NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

JUAN JABARI HOLLIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID AUTRY, OBA #11600
1021 N.W. 16th STREET
Oklahoma City, OK 73106
(405) 521-9600
(405) 521-9669 [fax]
dbautry77@gmail.com

Lawyer for Petitioner,
Juan Jabari Hollis

QUESTION PRESENTED

Despite waiving his right to appeal his sentence except under limited circumstances, did the calculation of his advisory guideline range, which influenced the sentence imposed, constitute a miscarriage of justice when the base offense level was fixed improperly based on previous state drug convictions which did not constitute "controlled substance offenses" under federal law under the categorical approach?

PARTIES TO THE PROCEEDINGS

The Petitioner is Juan Jabari Hollis, an individual. The Respondent is the United States of America.

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To: The Honorable Chief Justice and Associate Justices
of the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The order and judgment dismissing Mr. Hollis's appeal to the United States Court of Appeals for the Tenth Circuit appears in the Appendix to the petition and is unpublished. *United States v. Hollis,* No. 22-6208 (10th Cir. March 30, 2023). The order and judgment from which this petition for writ of certiorari is taken was preceded by the government's motion to enforce the plea agreement and dismiss Mr. Hollis's appeal because he had waived his appellate rights, except under limited circumstances, and Petitioner's response to that motion. The issue which forms the basis for this petition for writ of certiorari – whether a miscarriage of justice occurred when the district court increased Petitioner's base offense level improperly, and consequently denied him due process of law – was raised in the district court and in Mr. Hollis's response to the government's motion to enforce the plea agreement and dismiss his appeal.

JURISDICTION

The Tenth Circuit's order and judgment dismissing Mr. Hollis's direct appeal was issued on March 30, 2023. (Appendix) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and Rules 10, 12, and 13 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall ... be deprived of life, liberty, or property, without due process of law ... ."

STATEMENT OF THE CASE/PERTINENT FACTS

Mr. Hollis was charged in a four-count indictment with being a felon in possession of a firearm, possession of methamphetamine with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and witness tampering. (ROA Vol. I, pp. 9-12)[1]

After Mr. Hollis's pretrial motions, including motions to suppress, were denied (ROA Vol. I, pp. 3-5, Docs. 20-25, 27-28, 37-37), Petitioner entered into a plea agreement with the government, which required him to plead guilty to the felon in possession and witness tampering charges (counts 1 and 4). (ROA Vol. I, pp. 29-41) The two other charges were dismissed at sentencing. (ROA Vol. I, p. 78) Based on the plea agreement, Mr. Hollis waived the right to appeal his guilty plea and the resulting sentence, reserving the right to appeal its substantive reasonableness, only if the district court imposed a sentence above the advisory guideline range it determined to apply. (ROA Vol. I, pp. 37-38)

In accordance with the plea agreement, Mr. Hollis pleaded guilty to the felon in

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[1] References to the record refer to the documents filed in Mr. Hollis's Tenth Circuit action.

possession and witness tampering charges. During the plea colloquy, Defendant acknowledged the terms of the plea agreement, including the waivers of his right to appeal except under limited circumstances. He stated he voluntarily entered into the plea agreement knowing its terms, and that he was pleading guilty of his own volition. (Change of Plea Tr., pp. 13-16, ROA Vol. III, pp. 16-19)

A presentence report was ordered. In all three presentence reports submitted in the district court (the initial presentence report, the second, or final, presentence report, and the revised second presentence report), the probation office set the base offense level at 24, because Mr. Hollis illegally possessed the firearm which was the subject of count 1 after having been convicted of two controlled substance offenses in Payne County, Oklahoma. In case number CF-2001-256, Mr. Hollis was convicted of possession of cocaine and marijuana with intent to distribute. In case number CF-2003-43, Petitioner was convicted of possession of marijuana with intent to distribute. (ROA Vol. II, pp. 15-16, 72-74, 93-94)

In the first and second presentence reports, the probation office classified Mr. Hollis as an Armed Career Criminal who was automatically placed in criminal history category VI, with an advisory guideline sentencing range for imprisonment of 188-235 months. (ROA Vol. II, pp. 15-16, 72-74) In the revised second presentence report, it was determined that Petitioner was not an Armed Career Criminal in light of *United States v.*

Williams,___Fed.4th___, No. 21-6061 (10th Cir. Sept. 8, 2022)(published)(slip op.). (ROA Vol. I, pp. 66-69, ROA Vol. II, pp. 93-94, 109) The revised second presentence report fixed the advisory guideline range at 120-150 months, and placed Mr. Hollis in criminal history category V. (ROA Vol. II, p. 109)

In addition to his ultimately successful objection to being classified an Armed Career Criminal, and a successful objection to an enhancement stemming from alleged "relevant conduct" for using the gun in connection with the felony crime of discharging a firearm from a moving vehicle (ROA Vol. III, pp. 30-31, 111-112)[2], Mr. Hollis made two other substantive objections to the probation office's advisory guideline calculations. Relevant to this petition for writ of certiorari, Petitioner challenged the base offense level of 24, founded on the two state controlled substance convictions.[3] (ROA Vol. I, pp. 43-45, 58-59, ROA Vol. II, pp. 15-16, 72-74, 93-94) Mr. Hollis argued that because these convictions did not meet the federal definition for a controlled substance offense, the base offense level should have been 14. The probation office disagreed. (ROA Vol. I, pp. 43-45, ROA Vol. II, pp. 67, 72, 115, 119-120)

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[2] Petitioner stipulated in the plea agreement to a 4-level enhancement for possessing the firearm in connection with another felony offense, and agreed this enhancement applied because of the possession of methamphetamine with intent to distribute allegation made in count 2. (E.g., ROA Vol. II, pp. 15, 72, 93)

[3] Mr. Hollis also objected to a 2-level upward adjustment for obstruction of justice, because this fact was already taken into account in his guilty plea to the charge of witness tampering in count 4. This issue is not raised in this petition for writ of certiorari.

At sentencing, in light of the remaining two substantive objections to the presentence report, Mr. Hollis argued that his total offense level was 15 (base offense level of 14 for being a "prohibited person," plus four levels for possessing the firearm in connection with another felony offense, minus 3 levels for acceptance of responsibility). It was agreed that Petitioner's criminal history category was V, after the Armed Career Criminal enhancement was withdrawn. This equated to an advisory guideline sentencing range of 37-46 months. After agreeing that Petitioner was not an Armed Career Criminal, the probation office determined the total offense level was 27 (base offense level 24 due to the two prior controlled substance convictions in Payne County, plus 4 levels for possessing the firearm in connection with another felony crime [possession of methamphetamine with intent to distribute, as charged in one of the dismissed counts], plus two levels for obstruction of justice, minus 3 levels for acceptance of responsibility). This amounted to an advisory guideline range of 120-150 months. (E.g., ROA Vol. III, pp. 30-31, 34, 37, 97-100, 102, 107)

The district court rebuffed Petitioner's objection to the base offense level of 24 based on the two prior Payne County drug convictions, relying on *United States v. Jones,* 15 F.4th 1288 (10th Cir. 2021), *rehearing en banc denied,* May 9, 2022. The district court sentenced Mr. Hollis to the top of the advisory guideline range, 150 months. This consisted of 120 months on the felon in possession conviction, and 150 months on the conviction for witness tampering. The sentences were ordered to run concurrently, with

credit for time already served in custody. (ROA Vol. III, 110-113, 127-131)

Petitioner filed a notice of appeal. The government filed a motion to enforce the plea agreement and dismiss the appeal because Mr. Hollis had been sentenced within the advisory guideline range found by the district court to apply. *See United States v. Hahn,* 359 F.3d 1315, 1328 (10th Cir. 2004)(en banc). In the Tenth Circuit, *Hahn* governs whether an appellate waiver contained in a plea agreement should be enforced to preclude an appeal, and sets forth a number of factors, one of which is whether enforcing an appellate waiver would constitute a miscarriage of justice. Petitioner filed a response. In his response, Mr. Hollis conceded two of the *Hahn* factors – whether the disputed appeal fell within the scope of the waiver of appellate rights, and whether he knowingly and voluntarily waived his right to appeal. However, Mr. Hollis argued that the third *Hahn* factor could not be met, because enforcing the appellate waiver in his case would amount to a miscarriage of justice. The base offense level 24 was ten levels above what it should have been, and this resulted in a guideline sentencing range far in excess of what was appropriate. Thus, the appellate waiver was "otherwise unlawful" according to the *Hahn* analysis for determining whether a miscarriage of justice has occurred, because "it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Hahn,* 359 F.3d at 1337.

The Tenth Circuit rejected Mr. Hollis's miscarriage of justice argument, and ordered the appeal dismissed:

> [Hollis] misunderstands the miscarriage of justice exception to enforcement of a waiver of appellate rights. The exception looks to whether the *waiver* is otherwise unlawful, not to whether another aspect of the proceeding may have involved legal error." *United States v. Smith*, 500 F.3d 1206, 1212-13 (10th Cir. 2007). ... Further, Hollis expressly waived his right to appeal "the manner in which the sentence is determined." Mot. To Enforce Appellate Waiver, Atach. 1 at 9, ¶ 15(b). "To allow alleged errors in computing a defendant's sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive." *Smith*, 500 F.3d at 1213.

United States v. Hollis, No. 22-6208 (10th Cir. March 30, 2023)(unpublished order and judgment, pp. 2-3)(Appendix)(emphasis in original).

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED BECAUSE AN APPELLATE WAIVER IN A PLEA AGREEMENT CANNOT VOLUNTARILY RELINQUISH THE RIGHT TO APPEAL A CLEARLY ERRONEOUS SENTENCING GUIDELINE DETERMINATION THAT SIGNIFICANTLY INCREASES THE ADVISORY GUIDELINE SENTENCING RANGE. A DEFENDANT CANNOT BE COMPELLED TO AGREE, AHEAD OF TIME, TO AN IMPROPER SENTENCE.

Notwithstanding the Tenth Circuit's "miscarriage of justice" analysis, an appellate waiver should not be enforced where it gives carte blanche to the district court to commit all manner of mistakes in calculating the advisory guideline range where, as here, a guidelines sentence is imposed. In this light, an appellate waiver becomes both a sword and a shield. It shields errors committed by the district court from appellate review, and can then be used as a sword by the government to leave an improper sentence in place. No defendant can knowingly and voluntarily agree to accept a flawed sentence based on a

guideline calculation that significantly, and erroneously, ratchets up the sentencing range.

It is acknowledged that a defendant can elect to waiver many important constitutional and statutory rights during the plea bargaining process. *E.g., United States v. Mezzanato,* 513 U.S. 196 (2015); *Tollett v. Henderson,* 411 U.S. 258, 267 (1973). And, it is widely recognized that a defendant may knowingly and voluntarily waive, in general, the right to appeal a sentence, or retain only a limited right to appeal pursuant to a plea agreement. *Hahn, supra. See also, e.g., United States v. Rivera,* 971 F.2d 876, 896 (2nd Cir. 1992); *United States v. Allison,* 59 F.3d 43, 46 (6th Cir. 1995). But, it stands to reason that an improper sentence by definition constitutes a "miscarriage of justice," which calls into serious question "the fairness, integrity or public reputation of judicial proceedings." *Hahn,* 359 F.3d at 1335, 1337. A waiver of appellate rights amounts to a miscarriage of justice where it asks a defendant, in advance, to agree to an improperly calculated guideline sentencing range.

The meritorious nature of Petitioner's substantive arguments demonstrating that the base offense level was improperly inflated by ten levels underscores this point.

Mr. Hollis's state convictions for possession with intent to distribute a relatively small quantity of marijuana and, in the other case, possessing small amounts of marijuana and cocaine with intent to distribute, do not qualify as "controlled substance" offenses under federal law for the purpose of setting the base offense level. Application Note 1 to USSG § 2K2.1 states the term "controlled substance offense" has "the meaning given that

term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1)."

USSG § 4B1.2(b) defines "controlled substance offense" as follows: The term "controlled substance offense" means an offense under federal law or state law, punishable by a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled dangerous substance (or a counterfeit substance) with intent to manufacture, export, distribute or dispense.

In *United States v. McKibbon*, 878 F.3d 967, 970-71 (10th Cir. 2017), the defendant, like Mr. Hollis, was convicted of being a felon in possession of a firearm. Just as the probation office and the district court did in Petitioner's case, McKibbon's base offense level was enhanced due to a prior state felony drug conviction. The Tenth Circuit held this was *plain error*. In Mr. Hollis's case, the enhanced base offense level was objected to. McKibbon's prior state drug conviction did not constitute a controlled substance offense as defined by USSG § 4B1.2(b). The Colorado statute under which McKibbon was convicted was broader than the definition of a controlled substance offense stated in § 4B1.2(b) because it criminalized "offers" to sell. To the same effect, the Tenth Circuit ruled in *United States v. Madkins*, 866 F.3d 1136, 1143-44 (10th Cir. 2017) that the defendant's base offense level was improperly increased due to a Kansas drug conviction under a statute broader than the guideline definition for a controlled substance offense.

Mr. Hollis's two Oklahoma drug convictions did not meet the definition of a "controlled substance offense" under USSG § 4B1.2(b) for the purpose of setting the base offense level. Consistent with the "categorical approach," *e.g., Johnson v. United States,* 559 U.S. 133 (2010); *Taylor v. United States,* 495 U.S. 575 (1990), the Oklahoma drug distribution/possession with intent to distribute statute under which Mr. Hollis was twice convicted (63 O.S. § 2-401) is broader, in several respects, than the federal definition of a controlled substance offense set forth in § 4B1.2(b).

At the time of Mr. Hollis's 2001 and 2003 Oklahoma drug convictions, the Oklahoma schedule for controlled substances was broader than its federal counterpart at the time he was sentenced in his federal case. *United States v. Williams,* ___Fed.4th___, No. 21-6061 (10th Cir. Sept. 8, 2022)(published)(slip op.)(striking down Armed Career Criminal enhancement because the applicable Oklahoma drug statute was broader than its federal counterpart with respect to the "hemp exemption"). Although *Williams* dealt with a defendant who had erroneously been sentenced as an Armed Career Criminal, the discussion in that case as to what constitutes a controlled substance offense for purposes of federal vs. state law applies equally here. *Williams's* hemp exemption holding would disqualify both of Mr. Hollis's state drug convictions as "controlled substance" convictions under federal law.

The Oklahoma drug distribution/possession with intent to distribute statute is broader than its federal counterpart in other ways as well. Unlike the federal statute, the

Oklahoma statute criminalizes "transportation" of drugs; makes criminal the solicitation of a minor to possess with intent to distribute, to distribute, or to "cultivate" drugs for such purposes; and proscribes possession with intent to distribute and distribution not only of "counterfeit" drugs, but "imitation" controlled substances as well, which are defined differently and more broadly than the federal definition of "counterfeit" substances. *Compare,* 63 O.S. 2-401(A)(1)(2)(3)(distribution and possession with intent to distribute) with 21 U.S.C. § 841(a)(1)(2), and 21 U.S.C. § 802(7)(defining a "counterfeit substance") with 63 O.S. § 2-101(19)(defining an "imitation" controlled substance).

Based on the Tenth Circuit's own authority in *McKibbon, Madkins* and *Williams*, it was error amounting to a miscarriage of justice to increase Mr. Hollis's base offense level to 24 from 14 due to his two previous Oklahoma possession with intent to distribute convictions. Under the categorical approach, these convictions were imposed under a state drug statute broader in not just one, but several ways than its federal counterpart.

Nor would Mr. Hollis's arguments have been defeated by the Tenth Circuit's opinion in *United States v. Jones,* 15 F.4th 1288 (10th Cir. 2021), *rehearing en banc denied,* May 9, 2022. *Jones* held that for purposes of determining what a controlled substance offense is, the definition in the Armed Career Criminal Act is stricter, or more narrow, than its definition in the Career Offender guideline. The definition used in the Career Offender guideline is drawn from USSG § 4B1.2(b). However, as demonstrated

above, the Oklahoma drug distribution/possession with intent to distribute statute, even under this guideline provision, is broader in several respects than the definition of a controlled dangerous substance under federal law. *Jones* discusses neither *McKibbon* nor *Madkins*. *Jones* is in conflict with these two holdings. The court in *Jones* was not confronted with all the arguments made here and in the courts below. And, *Jones* predates the Tenth Circuit's opinion in *Williams*, which lends additional support to Mr. Hollis's claim.

In dismissing Mr. Hollis's appeal, the Tenth Circuit emphasized the question was not whether the proceedings "may have involved legal error," but wether "the *waiver* is otherwise unlawful." *United States v. Hollis, supra* at p. 3, citing *United States v. Smith,* 500 F.3d 1206, 1212-13 (10th Cir. 22007)(emphasis in original). This places too restrictive a limitation on an appellate court's duty to identify and, where warranted, correct an error. If legal error leads to an improper framework for arriving at an appropriate sentence, a miscarriage of justice obviously occurs. And, the fact Petitioner "expressly waived the right to appeal 'the manner in which the sentence is determined'" cannot be read as a carte blanche relinquishment to challenge an improper sentence. Such a waiver predetermines that the manner in which the sentence is determined is legally appropriate. A defendant cannot be asked to waive errors which have yet to occur, and then stand helpless without any vehicle to challenge them. The Tenth Circuit's focus is much too narrow and misses the point about what a miscarriage of justice actually is. In

this case, the manner in which the sentence was determined constitutes not just an error of law, but of due process. U.S. Const. Amend. V. Petitioner was unfairly deprived of the process which was due to him, and any other similarly situated litigant: the right to challenge an improper sentence.

CONCLUSION

For the reasons and authorities stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

David Autry, OBA #11600
1021 N.W. 16th Street
Oklahoma City, OK 73106
(405) 521-9600
(405) 521-9669 [fax]
dbautry77@gmail.com

Lawyer for Petitioner,
Juan Jabari Hollis