Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAMARCO ANTONIO SMITH,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

MARK DIAMOND
Attorney for Petitioner
7400 Beaufont Springs Dr., Ste 300
Richmond, VA 23225
(917) 660-8758
markd53@hotmail.com

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IN THE

SUPREME COURT OF THE UNITED STATES

DAMARCO ANTONIO SMITH,
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-vs-

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Damarco Antonio Smith, who is incarcerated in a federal correctional facility, asks leave to file the attached Petition for a Writ of Certiorari to The Supreme Court of the United States of America without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 39 of this Court.

The Petitioner was previously granted leave to proceed in forma pauperis in the Court of Appeal for the Fourth Circuit. By order of the Court of Appeals dated December 2, 2022, the undersigned was appointed as counsel for the petitioner pursuant to the Criminal Justice Act, 18 USC § 3006A, which is why no affidavit from the petitioner is attached, pursuant to Supreme Court Rule 39(1).

Dated: July 19, 2023

/s/ Mark Diamond
Attorney for Petitioner

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAMARCO ANTONIO SMITH,

Petitioner,

-vs-

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

July 19, 2023

MARK DIAMOND
Attorney for Petitioner
7400 Beaufont Springs Dr., Ste 300
Richmond, VA 23225
(917) 660-8758
markd53@hotmail.com

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals incorrectly deprive Mr. Smith of his right of appeal?

Yes.

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OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit dismissed Mr. Smith's direct appeal in *United States v. Damarco Antonio Smith,* Slip Copy, No. 22-4682 (4th Cir. Va.). (Appendix -A-)

JURISDICTION

The final Order of the U.S. Court of Appeals, Fourth Circuit, was issued on June 22, 2023. This petition was filed within ninety days thereof. Jurisdiction in the district court was based on 18 USC § 3231, since the appellant was charged with offenses against the laws of the United States of America. The jurisdiction of this Court is invoked under 28 USC § 1254 and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment, which assures that no one "shall be deprived of life, liberty, or property, without due process of law." The case also involves 18 USC § 3742 which affords a defendant the right of direct appeal.

STATEMENT OF THE CASE

By affirming his conviction, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory

power. In addition, the Fourth Circuit's ruling contradicts rulings on the same issue rendered by the Supreme Court.

BACKGROUND OF THE CASE

This petition raises from a judgment entered in the United States District Court for the Eastern District of Virginia (Norfolk) dated March 4, 2022. Mr. Smith was charged by superseding indictment, which was replaced with an Information on October 13, 2021, that charged him with conspiracy to commit aggravated identity theft in 2018 [18 USC § 1028A(a)(1) and (c)(5), § 2]; conspiracy to commit credit union fraud of Langley Federal Credit Union and Bay Port Credit Union between July, 2018, and March, 2020 [18 USC § 1344, § 1349]; and possession of a firearm by an unlawful user of controlled substances of a pistol in March, 2020 [18 USC § 922(g)(3), § 924(a)(2)].

On October 25, 2021, he pleaded guilty to the three counts. On March 4, 2022, he was sentenced to 24 months in prison and one year of supervised release for conspiracy to commit bank fraud, 100 months in prison and five years of supervised release for credit union fraud, and 100 months in prison and three years of supervised release for aggravated identity theft, the sentences on Counts 2 and 3 to run concurrently but the sentence on Count 1 to run consecutively to the others for a total effective sentence of 124 months in prison and five years of supervised release. On June 22, 2023, Mr. Smith's appeal was dismissed as untimely.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has decided an important federal question concerning the statutory right of appeal and the circumstances under which an appellee forfeits his objection to an untimely appeal. It has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ARGUMENT: THE COURT OF APPEALS INCORRECTLY DEPRIVED MR. SMITH OF HIS RIGHT OF APPEAL.

The Court of Appeals dismissed Mr. Smith's appeal, stating it was required to because he filed his appeal late. But the Court was not required to. By refusing to consider the merits of the issues raised in his brief, the Fourth Circuit deprived Mr. Smith of his right of appeal under 18 USC § 3742.

The Court Retained Jurisdiction To Hear The Appeal.

Mr. Smith was late to file his pro se notice of appeal. (FRAP 4[b][A][i]) Judgment was entered on March 4, 2022, and he filed his appeal on November 23, 2022. However, Smith's late notice did not deprive the Court of Appeals of jurisdiction to hear his appeal. That is because FRAP 4(b) setting time limits for appeal is not statutorily derived.

The time to appeal a criminal judgment – as opposed to a civil judgment – is set forth in a court rule of appellate procedure only, not in a law. Rule 4(b) is not grounded in any federal statute. (*Bowles v. Russell*, 551 U.S. 205, 210 (2007)

Instead, Rule 4(b) is a "claim-processing rule" (*Manrique v. United States*, 137 S.Ct. 1266, 1271 (2017) that can be forfeited "if the party asserting the rule waits too long to raise the point." (*Eberhart v. United States*, 546 U.S. 12, 15 (2005)

The Fourth Circuit has instituted Local Rule 27(f)(2) which states, "Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or on other procedural grounds should be filed within the time allowed for the filing of the response brief." The Rule runs counter to the Supreme Court's holding in *Eberhart v. United States* (at 18) that failure to timely object to untimely submissions entails forfeiture of the objection.

When the government timely objects to the untimeliness of a defendant's criminal appeal, "Rule 4(b) is mandatory and inflexible.... And where, as here, the government forfeits an objection to the untimeliness of a defendant's appeal by failing to raise it, we act within our jurisdiction when we decide to consider the appeal as though it were timely filed." (*United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) citing *Eberhart*, 546 U.S. at 17-18)

Here, the government's motion to dismiss was untimely. It waited five months after Mr. Smith filed his appeal to move to dismiss. The motion to dismiss was filed on April 25, 2023, which was four months after appellate counsel had been appointed for Mr. Smith; after the Court had already issued its scheduling order for submission of briefs; and after Mr. Smith's appellate brief had already been served and filed. The prosecutor's tardiness was not harmless error since Mr. Smith's timely appellate brief raised five meritorious claims that would have led to dismissal of charges and a reduced sentence.

Mr. Smith's Appeal Merited Review

In Point 1 of our brief, Mr. Smith argued that the district court accepted his guilty plea on Count 3 improperly because he did not admit to a key element of the charge, rendering his plea on that charge involuntary and unknowing.

The Information alleges that Mr. Smith was an unlawful user of controlled substances when he bought the pistol. The Statement of Facts elaborates that Smith failed to report to the gun dealer that he was an unlawful user of marijuana in his application of March 13, 2020. But the Statement fails to allege that marijuana was unlawful on March 13, 2020. Additionally, neither the Statement of Facts, Information, nor any other accusatory document in this case alleges that he was an unlawful user of marijuana on or about March 13 – the date he purchased the gun – as opposed to having been one in the past.

Federal Rule of Criminal Procedure 11(b)(3) states, "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." A defendant's admissions during a plea colloquy must be knowing and voluntary. The district court must make clear to a defendant exactly what he is admitting to and the record must show that those admissions are factually sufficient to constitute the alleged crime. The admissions must show that the defendant has a clear understanding of the nature of the charge so that he does not admit to conduct that does not actually fall within the charge without realizing it. (*United States v. Holmes*, 407 F. App'x 722, 723 (4th Cir. 2011)

The district court conducted absolutely no factual allocution of Mr. Smith during the plea proceedings concerning the charges to which he pleaded guilty. Unlawful possession of a controlled substance is a critical element of Count 3 and Mr. Smith never allocuted that he was an unlawful possessor of a controlled substance on March 13, the day he bought the gun. For this reason, had the Court of Appeals considered this issue, Count 3 would have been reversed.

In Point 2 of our appellate brief, Mr. Smith argues that the court incorrectly enhanced his base offense level on Count 2, which alleged conspiracy to defraud a credit union. Two offense levels were improperly added under USSG § 2B1.1(b)(16)(B) for possession of firearms in furtherance of the crime. There is no basis for this claim in the record. Additionally, eight levels were improperly added because the amount of loss was $46,532, not $95,000. [USSG § 2B1.1(b)(1)(D)]

There is no fact or claim contained in the Information, Statement of Facts, or presentence report that a firearm was used in any way in the planning or commission of Count 2. During the plea proceeding, Mr. Smith never allocuted that he used a firearm at any time. The sole claim was that the gun was found in the trunk of his car when arrested. No connection to the charges was alleged.

Additionally, the amount of loss is specified throughout the record as $46,372 while a loss of $95,000 – the number used by the district court to enhance Smith's sentence – is not. Nowhere in the record does the court explain how it came up with $95,000 as an apt amount for enhancement purposes.

For these reasons, a total of 10 points were improperly added to Mr. Smith's Base Offense Level on Count 2. His Adjusted Offense Level should be 11 and not 21, and his Guidelines range should properly have been 18 to 24 months instead of 57 to 71 months in prison. All other sentencing factors remaining the same, the error raised Mr. Smith's Total Offense Level from 17 to 27, and his final Guidelines range from 37 to 46 months in prison to 100 to 125 months in prison instead. He was sentenced to 100 months.

In Point 3 of our brief, Mr. Smith asserts that the district court incorrectly enhanced his offense level on Count 3, too. The district court began with a Base Offense Level of 20 under USSG § 2K2.1(a)(4)(B)(I) for an offense committed by a prohibited person using "a semiautomatic firearm that is capable of accepting a large capacity magazine."

USSG § 2K2.1 Application Note 2 clarifies the circumstances under which a base offense level of 20 is justified. The facts must show that "(A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition."

There is no claim in the record that the pistol imputed to Mr. Smith had the ability to fire multiple rounds without reloading, or that it had a magazine or

similar device that could accept more than 15 rounds of ammunition attached to it or in close proximity to it. He never allocuted to this during the plea proceedings. For this reason, the base offense level on Count 3 should be 12 instead of 20 under USSG § 2K2.1(a)(4)(B)(I).

In addition to miscalculating his Base Offense Level, the district court miscalculated Mr. Smith's enhancements on Count 3. That is because the firearm imputed to him was not stolen and it was a single firearm, not eight to 24 firearms. According to every allegation of fact in the record including the Information, Statement of Facts, and PSR, the firearm imputed to Smith was not stolen and he never allocuted that it was. Since the firearm was not stolen, the district court erred in imposing an enhancement of 2 points under USSG § 2K2.1(b)(1)(B).

The district court also improperly enhanced Mr. Smith's offense level by an additional 4 points for an offense involving eight to 24 firearms. USSG § 2K2.1 Application Note 5 clarifies: "For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer." Since only one firearm was imputed to Mr. Smith concerning Count 3, the district court erred in imposing an enhancement of 4 points.

For these reasons, Mr. Smith's Base Offense Level on Count 3 should be 12 and not 20; his offense level enhancements should be 4 and not 10 , and his

Adjusted Offense Level should be 16 and not 30. These changes should have led to a Guidelines range on Count 3 of 33 to 41 months in prison, based on an Adjusted Offense Level of 16, instead of the 135 to 168 month range used by the district court based on its Adjusted Offense Level of 30. All other sentencing factors remaining the same, the error raised Mr. Smith's Total Offense Level from 17 to 27, and his final Guidelines range from the proper 37 to 46 months in prison to 100 to 125 months in prison. He was sentenced to 100 months in prison on Count 3.

In Point 5 of our brief, Mr. Smith argues that the district court incorrectly denied his motion for downward departure under USSG § 4A1.3(b)(1). Smith argued that imposing criminal history category IV over-represented the seriousness of his criminal history since, according to the PSR, two of the four prior convictions that were attributed to him, which totaled three out of five of his criminal history points, occurred while he was a juvenile between the ages of 14 and 15 and consisted of possession of alcohol at age 14, for which he was sentenced to 30 hours of community service, and possession of $40 worth of cocaine at age 15, for which he was committed to the Department of Juvenile Justice for six months.

The possession of alcohol juvenile determination should not have been counted at all under USSG 4A1.2(c)(2) since "public intoxication" offenses are

"never counted" toward a defendant's criminal history category. Without this one point, Mr. Smith would have been a Category III and not a category IV offender.

Mr. Smith also had two adult convictions that were counted toward his Criminal History Category. These consisted of possession of a single marijuana cigar at age 18, for which he was sentenced to a pay a fine, and failure to appear for an unspecified event for an unnamed offense that occurred on May 31, 2019, for which he received a 30-day suspended sentence on August 29, 2019, upon two years of "unsupervised probation."

In total, seven Criminal History Points were imposed by the district court, which grossly exaggerated the seriousness of his criminal history. His prior criminal record shows no indication of violence or serious transgressions that might pose a threat to the public. None of his prior convictions were felonies. Two were juvenile determinations. His drug possession cases consisted of small amounts for personal use with no sale, violence, or other factor that might preclude downward departure. In fact, all of his prior crimes were petty, victimless crimes. None of his prior convictions led to incarceration. Mr. Smith's was precisely the type of petty prior record that USSG § 4A1.3(b)(1) was intended to ameliorate. For these reasons, his motion for downward departure was improperly denied.

Finally, in its motion to dismiss the appeal, the prosecutor argued that Mr. Smith waived his right of appeal. As discussed in our opposition to the motion, as well as in Point 4 of our appellate brief, that is only partially true since some of the

issues we raised on appeal fall outside the waiver provision contained in the Plea Agreement, as well as Mr. Smith's waiver allocution before the district court.

To the extent it is true, however, that did not preclude appellate review of the merits of our brief since his waiver was unenforceable as entered involuntarily, unknowingly, and unintelligently. The Court of Appeals did not get to the merits of this claim.

The Plea Agreement, which was adopted by the district court, states the following in relevant part:

> 5. Waiver of Appeal, FOIA, and Privacy Act Rights
> The defendant also understands that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Nonetheless, the defendant knowingly waives the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatsoever other than an ineffective assistance of counsel claim that is cognizable on direct appeal, in exchange for the concessions made by the United States in this Plea Agreement. (JA 132)

The right to appeal a criminal conviction is a hallmark of American jurisprudence. (*Martinez v. Court of Appeal*, 528 US 152 (2000) For a waiver to be enforceable, the record must show that the issue being appealed is within the scope of the waiver. (*United States v. Thornsbury*, 670 F.3d 532, 537 (4th Cir. 2012) Mr. Smith's several claims in his appellate brief that he received ineffective assistance of counsel fell outside the scope of the waiver language contained in the

Plea Agreement and so were not precluded from appellate review. (*United States v. Lumsden*, 652 F. App'x 174, 174 (4th Cir. 2016)

In addition, Mr. Smith's waiver of his right to appeal is enforceable only if it was made voluntarily, knowingly, and intelligently. (*United States v. Manigan*, 592 F.3d 621, 627 (4th Cir. 2010) In this regard, the underlying case was Mr. Smith's first federal case and his first felony conviction. His prior state cases consisted of traffic infractions and other petty matters. He had never served jail time and was never on trial. There is no indication that he understood the meaning of waiver from past experience.

The district court's failure to substantially comply with the allocution requirements of Fed.R.Crim.Pro. 11 rendered Mr. Smith's waiver of appeal unenforceable. (*United States v. Faulkner*, 731 F. App'x 177, 179 (4th Cir. 2018) The following plea colloquy took place between the district court and Mr. Smith:

> Q. Do you understand that under some circumstances you or the government may have the right to appeal your sentence?
>
> A. Yes, sir.
>
> Q. Now, generally a defendant has the right to appeal their conviction and sentence and to proceed without prepayment of fees on the appeal if the Court were to find that they qualified for indigent status. But do you understand that your plea agreement includes a provision whereby you waive your right to appeal your conviction and any sentence imposed upon any ground whatsoever, so long as that sentence is within the statutory maximum?

A. Yes, sir.

Q. Do you understand, therefore, that you're giving up your right to appeal; that is by signing the Plea Agreement and pleading guilty you will not appeal your conviction or any lawful sentence imposed by the Court?

A. Yes, sir.

Q. Are you entering this plea agreement freely and voluntarily?

A. Yes, sir. (Transcript of Plea Proceeding, USDC 66, p. 22)

The record does not show that Mr. Smith was fully informed of the rights he was being asked to waive or that he understood the consequences of their waiver. (*North Carolina v. Alford*, 400 U.S. 25 (1970) Both the district court and the Plea Agreement failed to inform Mr. Smith of his Fifth Amendment right to challenge a proposed sentence, including its excessiveness under the Eighth Amendment, and to submit a brief and/or argue before the Court of Appeals in support of such claims. The district court and the Plea Agreement failed to inform Mr. Smith of his Sixth Amendment right to prosecute an appeal as a poor person and have an attorney assigned to represent him for that purpose.

The district court failed to ascertain whether anyone else informed Mr. Smith of these rights or whether, understanding his rights, he still wished to waive them. All this sheds doubt that Mr. Smith's waiver of appeal was voluntary,

knowing, or intelligent. (*United States v. Thrasher*, 301 Fed.Appx. 241 (4th Cir. 2008)

Mr. Smith's waiver of appeal was additionally involuntary, unknowing, and unintelligent because the Plea Agreement did not include an agreed-upon sentence or sentence range; the presentence report had not been prepared when he took his plea; and his sentence had not been imposed at the time he waived his right of appeal. "Such a waiver is by definition uninformed and unintelligent and cannot be voluntary and knowing." (See, *McCarthy v. United States*, 394 U.S. 459, 466 (1969) Until the sentence is imposed, Mr. Smith would not have known what he was being asked to waive.

> Every other right that normally is relinquished is a known, well-defined right, and the quid pro quo is understandable. For example, when a defendant gives up the right to trial in favor of a plea, he or she knows that there will no longer be twelve jurors sitting in judgment, that there will no longer be live testimony and the right to confront witnesses, and that there will be no speedy and public trial. The defendant also understands that he or she is giving up the privilege against self-incrimination because the defendant must acknowledge guilt before the plea can be accepted….
>
> When a defendant waives the right to appeal a sentence, however, he or she is freed of none of the uncertainties that surround the sentencing process in exchange for giving up the right to later challenge a possibly erroneous application or interpretation of the Sentencing Guidelines or a sentencing statute. For example, when it comes time for sentencing in this case, this Court could make incorrect, unsupportable factual findings with respect to the amount of drugs involved, the nature of the relevant

> conduct to be considered or whether either of these defendants was involved in more than minimal planning with respect to the narcotics conspiracy to which they pled. Under the plea agreement proffered by the government, the defendants would have no right to ask the court of appeals to correct the illegal or unconstitutional ramifications of such sentencing errors.
>
> The condition sought to be imposed by the government is inherently unfair; it is a one-sided contract of adhesion; it will undermine the error correcting function of the courts of appeals in sentencing; it will create a sentencing regime where courts of appeals will never have the opportunity to review an illegal or unconstitutional sentence, or a sentence that has no basis in fact, unless those sentencing errors work to the disadvantage of the government. Such a result is inconsistent with what Congress intended when it created the Sentencing Commission and the Sentencing Guidelines. It is inconsistent with the express terms of 18 U.S.C. § 3742, and it is inconsistent with the scheme of Rule 11 of the Federal Rules of Criminal Procedure. A defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing. This Court therefore will accept no plea agreements containing waiver provisions of this kind. (*United States v. Raynor*, 989 F.Supp. 43, 49 (D.D.C. 1997); see also, *United States v. Melancon*, 972 F.2d 566, 570-80 (5th Cir.1992); *United States v. Perez*, 46 F.Supp.2d 59, 64-72 (D.Mass. 1999); *United States v. Johnson*, 992 F.Supp. 437, 438-40 (D.D.C. 1997)

It is true that a defendant may waive his constitutional rights as part of his decision to waive his right to trial. In that context, waiver or "relinquishment derives … from the admissions necessarily made upon entry of a voluntary plea of guilty." (*United States v. Broce*, 488 U.S. 563, 573 (1989)

By contrast, waivers of appeal are not based on a defendant's admission of guilt. "In the context of an appeal waiver, the defendant agrees not to appeal a sentencing court's factual, statutory, or constitutional rulings before they have even been made, presumably in exchange for a concession by the government. Thus, the defendant's agreement provides no assurance that the court's subsequent determinations will be correct or that the sentence or sentencing procedures will be constitutional. The waiver of the right to appeal errors in a proceeding that has yet to occur presents a substantial risk of unremedied constitutional violations that would impair the policies behind the rights involved. (see, *Town of Newton*, 480 U.S. at 392 n.2)." (Dissent in *United States v. Blick*, 408 F.3d 162, 165 (4th Cir. 2005) In short, you cannot voluntarily, knowingly and intelligently waive something until you know what it is you are waiving.

For all these reasons, Mr. Smith did not waive his right of appeal and the Court of Appeals was wrong to summarily dismiss his appeal as untimely. It should have considered the merits of the arguments raised in his appellate brief.

CONCLUSION

Mr. Smith respectfully asks the Court to issue a *writ of certiorari* to review the Court of Appeals' dismissal of his appeal.

Respectfully submitted,
/s/ Mark Diamond
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

DAMARCO ANTONIO SMITH,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PROOF OF SERVICE

Mark Diamond swears that on July 19, 2023, pursuant to Supreme Court Rules 29.3 and 29.4, I served the attached Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on every person or his counsel who is required to be served by first-class mail through the U.S. Postal Service. The following people were served:

(1) Damaraco Smith, 41837-509, FCI Beckley, Box 350 General & Legal Mail, Beaver, WV 25813, appellant.

(2) Aidan Taft Grano-Michelson, U.S. Attorney, 919 East Main Street, Suite 1900, Richmond, VA 22319, attorney for the appellee.

(3) Elizabeth Prelogar, Solicitor General, Department of Justice, 950 Pennsylvania Ave. N.W., Washington, DC 20530

/s/ Mark Diamond
Attorney for Petitioner

FILED: June 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4682
(2:21-cr-00083-AWA-DEM-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAMARCO ANTONIO SMITH,

Defendant - Appellant.

O R D E R

Damarco Antonio Smith seeks to appeal his convictions and the 124-month sentence imposed following his guilty plea, pursuant to a written plea agreement, to aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1), (c)(5); conspiracy to commit credit union fraud, in violation of 18 U.S.C. §§ 1344, 1349; and possession of a firearm by an unlawful user of controlled substances, in violation of 18 U.S.C. §§ 922(g)(3), 924(a)(2) (2018). The Government has moved to dismiss Smith's appeal as untimely or, alternatively, as barred by the appellate waiver contained in his plea agreement.[1]

[1] Because we conclude that the appeal is untimely, we need not consider whether it is also barred by the appellate waiver.

In criminal cases, the defendant must file the notice of appeal within 14 days after the entry of judgment. Fed. R. App. P. 4(b)(1)(A)(i). With or without a motion, upon a showing of excusable neglect or good cause, the district court may grant an extension of up to 30 days to file a notice of appeal. Fed. R. App. P. 4(b)(4). Although the appeal period in a criminal case is a nonjurisdictional claims-processing rule, *United States v. Hyman*, 884 F.3d 496, 498 (4th Cir. 2018), "[w]hen the Government promptly invokes the rule in response to a late-filed criminal appeal, we must dismiss," *United States v. Oliver*, 878 F.3d 120, 123 (4th Cir. 2017).

The district court entered the criminal judgment on March 4, 2022. Smith filed his notice of appeal on November 23, 2022.[2] Because Smith failed to file a timely notice of appeal or to obtain an extension of the appeal period and the Government has promptly moved to dismiss the appeal as untimely, *see* 4th Cir. R. 27(f)(2), we grant the Government's motion to dismiss.[3]

Entered at the direction of the panel: Judge Harris, Judge Heytens, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

[2] For the purpose of this appeal, we assume that the date on Smith's notice of appeal is the earliest date he could have delivered the notice to prison officials for mailing to the court. *See* Fed. R. App. P. 4(c)(1)(A); *Houston v. Lack*, 487 U.S. 266, 276 (1988).

[3] Pursuant to 4th Cir. R. 27(f)(2), "[m]otions to dismiss based . . . on . . . procedural grounds should be filed within the time allowed for the filing of the response brief." Smith's contention that the Government forfeited the timeliness issue by failing to raise it prior to Smith's filing of his opening brief is therefore unavailing.

FILED: June 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4682
(2:21-cr-00083-AWA-DEM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DAMARCO ANTONIO SMITH

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK