

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

CURTIS LAVON MAGEE  
Petitioner-Defendant

v.

UNITED STATES OF AMERICA  
Respondent

On Petition for Writ of Certiorari from the  
United States Court of Appeals for the Fifth Circuit.  
Fifth Circuit Case No. 23-60059

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether the Fifth Circuit erred by dismissing Mr. Magee's appeal based on the waiver of appeal provisions in his Plea Agreement.

## **PARTIES TO THE PROCEEDING**

All parties to this proceeding are named in the caption of the case.

## TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW .....	ii
PARTIES TO THE PROCEEDING .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES.....	v
I. OPINIONS BELOW .....	1
II. JURISDICTIONAL STATEMENT .....	2
III. CONSTITUTIONAL PROVISIONS INVOLVED .....	3
IV. STATEMENT OF THE CASE .....	4
A. Basis for federal jurisdiction in the court of first instance .....	4
B. Statement of material facts .....	4
V. ARGUMENT: Review on certiorari should be granted in this case.....	6
VI. CONCLUSION .....	11
CERTIFICATE OF SERVICE.....	12
(Appendices 1 and 2)	

## TABLE OF AUTHORITIES

### Page(s)

#### Cases:

<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956) .....	9
<i>Schweiker v. Wilson</i> , 450 U.S. 221, 101 S. Ct. 1074 (1981) .....	3
<i>United States v. Melancon</i> , 972 F.2d 566 (5th Cir. 1992) .....	6, 7, 8, 9
<i>United States v. Sierra</i> , No. 91-4342 (5th Cir. Dec. 6, 1991) .....	7

#### Statutes:

18 U.S.C. § 922 .....	1, 4
18 U.S.C. § 924 .....	1, 4
18 U.S.C. § 3231 .....	4
18 U.S.C. § 3742 .....	4
28 U.S.C. § 1254 .....	2
28 U.S.C. § 2255 .....	5

#### Rules:

Rule 10, Supreme Court Rules .....	6
Rule 13.1, Supreme Court Rules .....	2
Rule 29.5, Supreme Court Rules .....	12

United States Constitution:

U.S. Const. amend. V, Due Process Clause ..... 3, 9, 11

U.S. Const. amend. XIV, Equal Protection Clause ..... 3, 9, 11

Other:

Kathleen M. Sullivan, *Unconstitutional Conditions*,  
102 Harv.L.R. 1415 (1989) ..... 9

## **I. OPINIONS BELOW**

A Federal Grand Jury for the Southern District of Mississippi indicted Mr. Magee for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The Grand Jury returned the Indictment on June 7, 2022.

Mr. Magee accepted full responsibility for his actions by pleading guilty to the charge on October 20, 2022. Sentencing hearings followed on February 1, 2023. The court sentenced Mr. Magee 188 months in prison, followed by three years supervised release. The court also ordered a \$5,000 fine. The court entered a judgment reflecting this sentence on February 6, 2023. The district court's Judgment is attached hereto as Appendix 1.

Mr. Magee filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on February 7, 2023. Mr. Magee's contemplated issue on appeal was that the court ordered an unreasonably high sentence. However, before Mr. Magee briefed the sentencing issue, the prosecution filed a Motion to Dismiss Appeal based on the waiver of appeal provision in Mr. Magee's Plea Agreement. It filed the Motion to Dismiss Appeal on March 28, 2023. On May 9, 2023, the Fifth Circuit granted the Motion to Dismiss Appeal via a two-sentence Order. The Fifth Circuit's Order is attached hereto as Appendix 2.

## **II. JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Fifth Circuit filed its Order dismissing Mr. Magee's appeal on March 28, 2023. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).



### III. CONSTITUTIONAL PROVISIONS INVOLVED

“No person shall be ... deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V, Due Process Clause.

“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, Equal Protection Clause.<sup>1</sup>

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<sup>1</sup> “This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” *Schweiker v. Wilson*, 450 U.S. 221, 227 n.6, 101 S. Ct. 1074, 1079 n.6 (1981) (citations omitted).

#### **IV. STATEMENT OF THE CASE**

**A. Basis for federal jurisdiction in the court of first instance.**

This case arises out of a criminal conviction entered against Mr. Magee for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Magee arose from the laws of the United States of America.

**B. Statement of material facts.**

As stated above, Mr. Magee accepted full responsibility for his actions by pleading guilty to the felon in possession charge alleged against him. The plea hearing was on October 20, 2022, and the sentencing hearing followed on February 1, 2023. The court sentenced him to 188 months in prison.

Mr. Magee's guilty plea was pursuant to a Plea Agreement entered by the parties. The Plea Agreement contains a waiver of appeal provision that states in relevant part:

Defendant, knowing and understanding all of the matters aforesaid, including the maximum possible penalty that could be imposed, and being advised of Defendant's rights ... [including his right] to appeal the conviction and sentence ... hereby expressly waives ... the right to appeal the conviction and sentence imposed in this case, or the manner in which that sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever....

The Plea Agreement contains a further waiver of “the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255[.]” Mr. Magee reserved the right to assert ineffective assistance of counsel.

**V. ARGUMENT:**  
**Review on certiorari should be granted in this case.**

As described above, the Fifth Circuit never reached the merits of Mr. Magee's appeal because it ruled that the argument is barred from consideration by the waiver of appeal provision in the Plea Agreement. Because the Fifth Circuit never addressed the merits of Mr. Magee's argument, the only issue presented in this Petition is whether the Fifth Circuit erred in its analyses and conclusions regarding the waiver of appeal issue. We ask this Court to grant certiorari and reverse the Fifth Circuit's ruling. If this Court grants certiorari and rules that the waiver of appeal provision is unenforceable, then the case must be remanded to the Fifth Circuit for consideration of Mr. Magee's argument on the merits.

Certiorari is warranted under Rule 10 of the Supreme Court Rules, which states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." The Court should exercise its "judicial discretion" and grant certiorari because the subject issue involves important constitutional issues under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The concurrence opinion in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992) articulates these constitutional concerns in the waiver of appeal context.

*Melancon* involves the same issue before the Court in Mr. Magee's case – whether a waiver of appeal provision in a plea agreement is enforceable. 972 F.2d

at 567. Regarding the prosecution's motion to dismiss the appeal, the *Melancon* Court held, "a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *Id.* at 568. Accordingly, the Court granted the prosecution's motion to dismiss Melancon's appeal. *Id.*

Judge Robert M. Parker authored a lengthy and well-reasoned concurring opinion in *Melancon*. 972 F.2d at 570-80. He began by stating, "I concur specially because I cannot dissent. This panel is bound by the unpublished, *per curiam* opinion, *United States v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)]." *Id.* at 570. He went on to state, "I write separately to express why I think the rule embraced by this Circuit in *Sierra* is illogical and mischievous – and to urge the full Court to examine the '*Sierra* rule,' and to reject it." *Id.*

Judge Parker reasoned that "[t]he rule articulated in *Sierra* is clearly unacceptable, even unconstitutional policy: the '*Sierra* rule' manipulates the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law." *Melancon*, 972 F.2d at 571. "I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent." *Id.*

Judge Parker acknowledged that waivers can be valid in some scenarios.

However,

[i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

*Melancon*, 972 F.2d at 571 (citations omitted). But “[t]he situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence.” *Id.* at 572. **“This right cannot come into existence until after the judge pronounces sentence;** it is only then that the defendant knows what errors the district court has made – i.e., what errors exist to be appealed, or waived.” *Id.* (emphasis added; citation omitted).

For the reasons thoughtfully articulated by Judge Parker, this Court should grant certiorari and find that Mr. Magee's waiver of the right to appeal was made unknowingly. But the analysis does not end here. Judge Parker's attack on the majority's opinion also extends to constitutional concerns.

He opines that the rule adopted by the majority “reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty.” *Melancon*, 972 F.2d at 577.

Unconstitutional conditions occur “when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from governmental interference. The ‘exchange’ thus has two components: the conditioned government **benefit** on the one hand and the affected constitutional **right** on the other.”

*Id.* (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.R. 1415, 1421-1422 (1989) (emphasis in original)). “With a ‘*Sierra Waiver*,’ the government grants to the criminal defendant the **benefit** of a plea agreement only on the **condition** that the defendant accept the boot-strapped abdication of his or her right to appeal.” *Melancon*, 972 F.2d at 578 (emphasis in original). This is at least unacceptable, even if the government may withhold the benefit (i.e., the plea agreement) altogether.” *Id.* (citation omitted).

Judge Parker recognized that to create the constitutional issue described in the previous paragraph of this Brief, there must be a constitutional right. “The right to appeal is a statutory right, not a constitutional right.” *Melancon*, 972 F.2d at 577 (citation omitted). However,

[e]ven if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.

*Id.* (citing *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is

established, due process and equal protection bar the government from infringing on the right in an improper manner. This Court should grant certiorari to clarify this issue for the lower courts.



## VI. CONCLUSION

For the reasons stated in *Melancon*'s concurring opinion, this Court should grant certiorari. Specifically, we ask the Court grant certiorari and ultimately rule: either (1), the waiver of appeal provision was agreed upon unknowingly; or (2), under the Due Process and Equal Protection Clauses of the United States Constitution, the subject waiver of appeal provision unconstitutionally infringes on Mr. Magee's statutory right to appeal his sentence.

Submitted August 7, 2023, by:



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**CERTIFICATE OF SERVICE**

I, Thomas C. Turner, appointed under the Criminal Justice Act, certify that today, August 7, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 77290723602844, addressed to:

The Honorable Elizabeth B. Prelogar  
Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.

Respectfully submitted, August 7, 2023, by:

A handwritten signature in blue ink that reads "Thomas Creager Turner, Jr." with a stylized flourish at the end.

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