No. 23-

In the

Supreme Court of the United States

BROCK BRIAN BEEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Circumstances. Petitioner Brock Brian Beeman ("Beeman") entered a guilty plea to one count of making interstate threats with intent to injure, in violation of 18 U.S.C. § 875(c). His plea agreement with the government contained an appeal waiver. Eight days prior to the sentencing hearing, the probation officer submitted a revised presentence report that contained a new two-point enhancement for obstruction of justice. On the day before sentencing, the government, for the first time, submitted its restitution request. Mr. Beeman, who was incarcerated and proceeding *pro se*, first saw both items on the morning of sentencing and objected to them. Nonetheless, the court went forward with the sentencing hearing and imposed the statutory maximum of 60 months' incarceration. The Fourth Circuit Court of Appeals declined to consider whether the district court violated the sentencing notice provisions of Rule 32 of the Rules of Criminal Procedure, ruling that the issue was waived pursuant to the appeal waiver in Mr. Beeman's plea agreement. There is a split in the Circuit Courts as to whether an appeal waiver precludes appellate consideration of assignments of error asserting violations of the notice provisions of Rule 32.

Question for Review. Did the Fourth Circuit err in upholding the Petitioner's appeal waiver to preclude his claim that the trial court violated the notice provisions of Rule 32 of the Federal Rules of Criminal Procedure?

PARTIES TO THE PROCEEDINGS

All Parties are listed in the caption on the cover page.

RELATED CASES STATEMENT

United States v. Brock Brian Beeman, Case no. 2:20-cr-0056-RCY-DEM-1 (U.S. District Court for the Eastern District of Virginia, Judgment on February 2, 2022).

United States v. Brock Brian Beeman, Case No. 22-4081, Fourth Circuit Court of Appeals, Judgment entered on July 12, 2023, (unpublished opinion).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

RELATED CASES STATEMENT iii

TABLE OF APPENDICES v

TABLE OF AUTHORITIES vi

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE PETITION 5

ARGUMENT 7

I. The Fourth Circuit erred in upholding the appeal waiver against a claim that the trial court violated the notice provisions of Rule 32 of the Federal Rules of Criminal Procedure 7

CONCLUSION 10

INDEX TO APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 12, 2023.....1a

APPENDIX B — TRANSCRIPT EXCERPT OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, DATED FEBRUARY 21, 2022 ..... 7a

TABLE OF AUTHORITIES

Statutes and Other Authorities

18 U.S.C. § 2261A(2)(A) 2
18 U.S.C. § 3552 1
18 U.S.C. § 876(c) 2
47 U.S.C. § 223(a)(1)(C) 2
Rule 32 of the Federal Rules of Criminal Procedure ..... passim
6A1.2 of the United States Sentencing Guidelines 1

Cases

U.S. v. Petty, 80 F.3d 1384, 1387 (9th Cir. 1996) 5, 6
U.S. v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001) 5
United States v. Arevalo, 628 F.3d 93, 100 (2d Cir. 2010) 5
United States v. Beeman, No. 22-4081 (4th Cir. July 12, 2023) (unpublished opinion) 1, 4

OPINIONS BELOW

Filed with this Petition is the unpublished Opinion of the Fourth Circuit Court of Appeals denying Petitioner's appeal, *United States v. Beeman,* No. 22-4081 (4th Cir. July 12, 2023) (unpublished opinion), (Pet. App., 1a-6a); and the unpublished transcript of rulings of the United States District Court of the Eastern District of Virginia in the Petitioner's sentencing (Pet. App., 7a).

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on July 12, 2023. This Court has jurisdiction to consider Mr. Beeman's petition from the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Rule 32(e) of the Federal Rules of Criminal Procedure states:

> (2) *Minimum Required Notice.* The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

§ 6A1.2 of the United States Sentencing Guidelines states:

> (a) The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

18 U.S.C. § 3552 states:

(d) The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

STATEMENT OF THE CASE

On March 18, 2021, Mr. Beeman was charged in a Second Superseding Indictment with two counts of Cyberstalking, in violation of 18 U.S.C. § 2261A(2)(A) and (B); three counts of Interstate Communications with Intent to Injure, in violation of 18 U.S.C. § 875(c); five counts of Mailing Threatening Communications, in violation of 18 U.S.C. § 876(c); and one count of Anonymous Telecommunications Harassment, in violation of 47 U.S.C. § 223(a)(1)(C). Joint Appendix ("JA"), 3 - 4. On April 13, 2021, he entered a guilty plea to Count Three of the Second Superseding Indictment pursuant to a Plea Agreement with the Government. J.A. 37. Approximately six weeks later, on May 25, 2021, Mr. Beeman filed a *pro se* motion to withdraw his guilty plea, asserting that his plea was not voluntary because his counsel allegedly threatened and coerced him into entering the guilty plea. J.A. 76. The court ordered a competency evaluation, J.A. 91, which determined that Mr. Beeman was competent to stand trial and assist counsel. J.A. 533. The court allowed Mr. Beeman to proceed *pro se* and, following a hearing, denied his motion to withdraw his guilty plea. J.A. 335, 408.

On January 24, 2022, eight days before sentencing, the Probation Officer filed a revised presentence report. J.A. 571. The sentencing guidelines calculation

included a new two-point enhancement for obstruction of justice based on Mr. Beeman's alleged malingering during his competency evaluation. J.A. 581, ¶¶ 21, 29. At sentencing, Mr. Beeman, still proceeding *pro se*, informed the court that he first learned of the new obstruction enhancement on the morning of the sentencing hearing and that he objected to it. J.A. 447 – 48. Without noting the lateness of the amendment to the presentence report, the court first found that Mr. Beeman had failed to file a written objection to the enhancement. *Id*. The court, however, allowed argument on the obstruction enhancement and found that Mr. Beeman's malingering during his competency evaluation supported the imposition of the two-point enhancement. J.A. 457-58.

In regard to restitution, the Presentence Report filed eight days before sentencing simply stated that restitution was to be determined. J.A. 605. The government filed a timely position on sentencing, J.A. 16, 411, however, it did not file its position on restitution until the day before sentencing. J.A. 422. Mr. Beeman objected to the scope of the restitution. J.A. 491-92. The court overruled his objection and imposed the full restitution amount requested by the government. J.A. 493.

Mr. Beeman noted his appeal to the Fourth Circuit Court of Appeals, arguing, *inter alia*, that pursuant to Rule 32, he had inadequate notice of the new sentencing enhancement and of the restitution components and amount. The waiver provision in his plea agreement states:

> 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 63 - 64. The Fourth Circuit ruled, without discussion, that "Beeman's remaining appellate issues invoking Rule 32 fall within the appeal waiver's scope." *United States v. Beeman*, Case No. 22-4081 (July 12, 2023) (unpublished), p. 6.

REASONS FOR GRANTING THE PETITION

Rule 32 of the Federal Rules of Criminal Procedure requires the probation officer to calculate the defendant's offense level and criminal history category. F. R. Crim. P. 32(d)(1)(B) and (C). Under the heading "Minimum Required Notice," the Rule requires that "[t]he probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney specifies for the government at least 35 days before sentencing unless the defendant waives this minimum period." F. R. Crim. P. 32(e)(2).[1] Similarly, Rule 32(c)(1)(B) states that "If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution." Mr. Beeman, who was proceeding *pro se*, had almost no notice of the newly sought sentencing guideline enhancement or the restitution amount or basis – learning of each on the

[1] Likewise, § 6A1.2(a) of the Sentencing Guidelines require the same notice deadlines as Rule 32. These provisions mirror, but gives a greater notice obligation than 18 U.S.C. § 3552(d), which states that "[t]he court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant."

morning of sentencing.

There is a circuit split on the scope of appeal waivers and whether they preclude appellate consideration of alleged violations of the notice provisions under Rule 32. The Second Circuit in *United States v. Arevalo*, 628 F.3d 93, 100 (2d Cir. 2010), broadly holds that valid appeal waivers bar review of Rule 32 error (specifically, failure to make findings on disputed portions of the presentencing report under Rule 32(i)(3)).[2]

However, in *U.S. v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996), the Ninth Circuit reached a contrary result, ruling that "[i]n the absence of compelling evidence to the contrary, we do not interpret the language as a waiver of the right to appeal a substantial violation [of Rule 32] which arose only after the stipulation was signed and which could not have been anticipated." The First Circuit also takes a more nuanced view, holding that plea-agreement waivers are presumptively valid, but are subject to a general exception "where a miscarriage of justice occurs" weighing "the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." *U.S. v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) (severing appeal waiver from plea agreement where district court incorrectly

[2] The Fourth Circuit held in *United States v. Quinones*, No. 17-4253, at *3 (4th Cir. Dec. 27, 2017) (unpublished), that "the issue of whether the district court judge gave a timely opportunity for allocution under Fed. R. Crim. P. 32(i)(4)(A)(ii) falls within the scope of [the defendant's] waiver of appellate rights"), *citing United States v. Arevalo* to uphold an appeal waiver against a claim of a Rule 32 violation.

advised the defendant she had a right to appeal despite appellate waiver in plea agreement); *see also U.S. v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001) ("we endorse the First Circuit's approach in *Teeter*").

This Court should grant certiorari to resolve these varying standards, particularly as they relate to failure to provide adequate notice of sentencing enhancements and restitution as required under Rule 32.

ARGUMENT

I. The Fourth Circuit erred in upholding the appeal waiver against a claim that the trial court violated the notice provisions of Rule 32 of the Federal Rules of Criminal Procedure.

The Fourth Circuit in this case employed a bright line test to conclude that the appeal waiver in Mr. Beeman's plea agreement precluded consideration of his claimed Rule 32 notice errors. Indeed, the appellate decision included no discussion whatsoever in finding that the issue fell within the ambit of the waiver. *See United States v. Beeman*, Case No. 22-4081 (July 12, 2023) (unpublished), p. 6. This starkly differs from the approach taken in the First, Third and Ninth Circuits, which balance the fundamental fairness created by the error against the presumption in favor of appeal waivers in determining whether to uphold an appeal waiver.

In *U.S. v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996), "immediately before the commencement of the [sentencing] hearing, the probation officer gave Petty's counsel a second resentencing memorandum [that] explained the probation officer's prior decision not to recommend a downward departure." *Id.* at 1386. Defense counsel sought a continuance to address the issue, but the motion was denied. *Id*. On appeal,

the government sought to enforce an appeal waiver that stated "in view of this stipulation both [parties] agree to waive any right to further appeal." The Ninth Circuit ruled that "[i]n the absence of compelling evidence to the contrary, we do not interpret the language as a waiver of the right to appeal a substantial violation [of Rule 32] which arose only after the stipulation was signed and which could not have been anticipated" and that "[we] therefore find that violation to be outside the scope of Petty's waiver." In this case, the probation officer revised his sentencing guidelines calculation just eight days before the sentencing hearing to add a two-point enhancement for obstruction of justice based on Mr. Beeman's alleged malingering during his competency evaluation.[3] J.A. 581, ¶¶ 21, 29. Mr. Beeman informed the court that he first learned of the new obstruction enhancement on the morning of the sentencing hearing and that he objected to it. J.A. 447 – 48. He clearly did not have any time to research the factual or legal basis for the enhancement or to intelligently respond. Like in *Petty*, he could not have anticipated that such a substantial violation of Rule 32 would occur after he entered his plea waiver and therefore could not have knowingly and voluntarily waived it.

In *U.S. v. Teeter*, 257 F.3d 14, 21 (1st Cir. 2001), the First Circuit conducted a comprehensive overview of the validity of appeal waivers, noting that the primary concern with them is that they are anticipatory and thus the defendant does not know what error he may be waiving. However, the court notes that, first, "waivers are not

[3] Importantly, this enhancement was not added at the request of the government and no prior filings by the government would have put Mr. Beeman on notice earlier that the enhancement was being imposed by the probation officer.

inherently suspect in criminal cases," and "[c]riminal defendants typically may waive their rights, as long as they do so voluntarily and with knowledge of the general nature and consequences of the waiver." *Id*. Second, the court notes that public policy considerations animate the vitality of generally supporting appeal waivers because they provide a criminal defendant with an important "bargaining chip" in negotiating a more favorable plea agreement. *Id*. at 22. Finally, the court notes that the "the sheer weight of authority" supports the validity of appeal waivers, noting that every circuit to consider the issue has upheld them, with certain exceptions. *Id*. at 23. Thus, the *Teeter* court held that plea-agreement waivers are presumptively valid, but are subject to a general exception "where a miscarriage of justice occurs" weighing "the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." *U.S. v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001). *See also U.S. v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001) (adopting the First Circuit's standard).

It is the scope of exceptions to appeal waivers that differ most materially between the circuits. Thus, in the Second Circuit, in contrast to the First and Third Circuits, "waivers [are] unenforceable only in very limited situations, such as when the waiver was not made knowingly, voluntarily, and competently, when the sentence was imposed based on constitutionally impermissible factors, such as ethnic, racial or other prohibited biases, when the government breached the plea agreement, or when

the sentencing court failed to enunciate any rationale for the defendant's sentence." *U.S. v. Arevalo*, 628 F.3d 93, 98 (2d Cir. 2010) (internal citations and quotations omitted). This standard has been adopted by the Fourth Circuit. *See United States v. Quinones*, No. 17-4253, at *3 (4th Cir. Dec. 27, 2017) (unpublished).

In this case, the Fourth Circuit appears not to have looked to the more expansive standard for evaluating appeal waivers articulated in *Teeter* and *Khattak*. Fundamental fairness and the prevention of a miscarriage of justice dictates that a more flexible standard be used to assess whether to impose an appellate waiver against assertions of Rule 32 notice violations. If the Fourth Circuit had weighed the clarity and gravity caused by the error by giving Mr. Beeman essentially no prior notice of the possible imposition of a sentencing enhancement based on a ground he was informed of on the morning of sentencing, and no prior information of the basis or amount of restitution until the morning of sentencing, a different conclusion on the validity of the appeal waiver might have been reached. This Court should grant certiorari to reconcile the differing standards and to create a uniform standard in conformance with the First and Third Circuits' test.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted,

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Dated: October 11, 2023