

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

**BRIAN KEITH PERSON, JR.,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

- I. Whether the Fourth Circuit Erred By Dismissing Mr. Person's Appeal Pursuant to An Appeal Waiver When He Argued that His Plea was Not Knowing and Voluntary.

## LIST OF PARTIES

BRIAN KEITH PERSON, JR, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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## **ORDER BELOW**

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Brian Person, Case No. 21-4450, Docket Entry No. 36, entered on June 8, 2023. A copy of the order and judgment of the Fourth Circuit issued that date are attached.

## **JURISDICTIONAL STATEMENT**

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on June 8, 2023 on direct appeal of a sentence imposed against Petitioner Brian Person in the United States District Court for the Eastern District of North Carolina on an Indictment for criminal violations of 21 U.S.C. §§ 841(a)(1) and 846 in E.D.N.C. No. 4:19-cr-00010-FL-1. Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

**"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.**

## STATEMENT OF THE CASE

### A. Procedural History.

On February 6, 2019, a federal grand jury convened in the Eastern District of North Carolina returned a two-count Indictment against Mr. Person. [J.A. at 10-13].<sup>1</sup> The Indictment charged in Count One that:

From a date unknown to the Grand Jury, but no later than in or about August 2018, and continuing until on or about October 16, 2018, in the Eastern District of North Carolina, the defendant, BRIAN KEITH PERSON JR., did knowingly and intentionally combine, conspire, confederate, agree and have a tacit understanding with others, known and unknown to the Grand Jury, to distribute and possess with the intent to distribute twenty-eight (28) grams or more of cocaine base (crack) and a quantity of cocaine, Schedule II controlled substances, in violation of Title 21 United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

[J.A. at 10.] Count Two charged that:

On or about October 16, 2018, in the Eastern District of North Carolina, the defendant, BRIAN KEITH PERSON JR., did knowingly and intentionally possess with the intent to distribute a quantity of cocaine base (crack) and cocaine, Schedule II controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).

[J.A. at 10-11.]

Also on February 6, 2019, the Government filed a Notice of Related Case which gave notice to the Court of a Petition for Revocation of Supervised Release in United States v. Person, E.D.N.C. No. 4:15-cr-35-F (hereinafter “the related case”). [J.A. at

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<sup>1</sup> Citations in this Petition for Certiorari are taken from the Joint Appendices filed in the Fourth Circuit Court of Appeals at 21-4450 and, at various places as indicated, the related appeal, 21-4462. The citations without additional appeal number references are taken from 21-4440.

14.] The revocation petition in the related case was based upon the criminal conduct involved in the instant offense.

On July 11, 2019, Mr. Person signed a written consent to proceed before a Magistrate Judge for felony arraignment. [J.A. at 48.] Mr. Person pled guilty pursuant to a written plea agreement. [J.A. at 150-57.]

On January 2, 2020, the Final Presentence Investigation Report was filed (hereinafter “PSR”). [J.A. at 112-32.] Also on January 2, 2020, Defendant’s trial counsel filed a sealed motion for downward departure and variance based upon his mental and physical disabilities. [J.A. at 133-44.]

After a number of continuances, the sentencing hearing was held on August 24, 2021. [J.A. at 49-78; 145-49.] The trial court denied Defendant’s motion for downward departure and variance. The trial court sentenced Mr. Person to 113 months imprisonment each on Counts 1 and 2 to be served concurrently. [J.A. at 66.] The written Judgment was filed on the same day. [J.A. at 77-84.] In the same hearing, the trial court also revoked Mr. Person’s supervised release in the related case and sentenced Mr. Person to serve 24 months consecutive to the sentence imposed in this case. [J.A. at 73-74.]

On August 26, 2021, Mr. Person’s trial counsel filed a timely notice of appeal on his behalf. [J.A. at 85-86.] On June 8, 2023, upon motion of the Government, the Court of Appeals dismissed the appeal on account of the appeal waiver contained in the Plea Agreement. See Ex. A.

**B. Statement of the Facts.**

After his indictment and guilty plea in the related case for making false claims against the United States in violation of 18 U.S.C. § 287, Mr. Person was sentenced to eight months of imprisonment and four years of supervised release. According to docket sheet in the related case, Mr. Person was sentenced on July 5, 2016 and was ordered to surrender to the U.S. Marshals Service at Greenville, NC on August 19, 2016. [21-4462 J.A. at 8.] Mr. Person's supervision started on April 17, 2017. [21-4462 J.A. at 26.]

According to the Presentence Reports filed in both this case and the related case, Mr. Person is intellectually disabled. The Presentence Report in this case notes that:

54. According to the 2016 PSR, in May 2012, Person was committed to the psychiatric unit at Vidant Roanoke Cowan Hospital in Ahoske, North Carolina, after having auditory hallucinations and stating that he wanted to kill himself and his mother. Person was diagnosed with major depressive disorder with psychotic features, mood disorder, psychotic disorder, and borderline intellectual functioning. Upon his discharge, Person met with Integrated Family Services in Greenville as part of recommended aftercare. Person was again evaluated and diagnosed with severe major depression, Post-Traumatic Stress Disorder, and borderline intellectual functioning. At that time, Person was prescribed Haldol, Cogentin, Zoloft, and Trazadone. Person was seen for medication management and individual therapy through at least October 2012. Records also reflect a history of schizophrenia.

55. As already stated, Person underwent a competency evaluation in October 2015. The evaluator, Kristine Herfkens, PhD, summarized that Person functions in the mild intellectual disability range, with a full-scale intelligence quotient of 71, in the borderline range of intellectual functioning, and adaptive deficits in academic, personal, and occupational abilities. The defendant's verbal abilities were described as weaker than his nonverbal abilities, he was deemed completely illiterate, and the defendant's ability to comprehend and glean

substantive information from orally presented material was considered equally impaired. Furthermore, Dr. Herfkens noted that Person was vulnerable to manipulation by trusted family and friends. Person's listening comprehension and memory retention was also deemed significantly impaired. With respect to his competency to proceed with court proceedings, Dr. Herfkens summarized that Person has a limited and largely incorrect understanding of the legal process; however, he was deemed able to understand the necessary information to stand trial and to assist in his own defense, noting that any new information must be given to Person in "small chunks with simply vocabulary," and then confirm that he has comprehended the information before moving forward with new information.

[J.A. at 125-26.] Also, "Person began receiving disability income due to his psychiatric condition and intellectual disability in 2012." [J.A. at 126.]

At the beginning of the plea hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the Magistrate Judge read out a number of statements to Mr. Person and several other defendants. [J.A. at 24.] The bulk of these addressed matters which Rule 11(b)(1) requires that "the court must inform the defendant of, and determine that the defendant understands." Fed. R. Crim. P. 11(b)(1). As part of this "explanation of your rights," [J.A. at 24], the Magistrate Judge said:

In one type of a plea agreement, you or the government may request or recommend to the Court that a particular sentence or sentencing range is appropriate or that a particular provision of the sentencing guidelines, a sentencing policy statement or a sentencing factor does or does not apply. However, even if the Court accepts this type of a plea agreement, the Court is not required to accept the recommendation. You do not have the right to withdraw your guilty plea if the Court does not follow the sentencing recommendation or request.

[J.A. at 21.]

When the Magistrate Judge came to Mr. Person's case, he asked him a whether or not Mr. Person heard or understood the rights that he had read out to the three defendants earlier. Mr. Person replied, "Yes sir." [J.A. at 28.]

The Magistrate Judge asked Mr. Person's trial counsel if all formal plea offers by the government had been conveyed to him. [J.A. at 30.] When the trial counsel said yes, the Magistrate Judge asked "So how did you do that if he's not able to read? Is there a plea agreement in this case? [J.A. at 30.]

Mr. Person's trial counsel replied: "Yes there is. I went through every page, every section and every word." [J.A. at 30.]

The Magistrate Judge then addressed Mr. Person, and asked him if he had signed the Plea Agreement and whether it was his intention to plead guilty to Counts 1 and 2 of the Indictment. [J.A. at 31.] Before Mr. Person responded on the transcript, Mr. Weede intervened and conferred with Mr. Person off the record. [J.A. at 31.] Mr. Person then confirmed he intended to plead guilty to Counts 1 and 2 pursuant to the written plea agreement. [J.A. at 31.]

The Magistrate Judge then asked Mr. Person: "Now, I know, Mr. Person, you've told me that you're not able to read, but have you had an opportunity to discuss this plea agreement and what's in this plea agreement with your attorney, and did you, in fact, do so before you signed it? [J.A. at 31.]

Mr. Person responded "Yes." [J.A. at 31.]

The Magistrate next asked Mr. Person whether there are any other agreements that he had with either the United States or the U.S. Attorney related to this case other than this plea agreement. Mr. Person responded "Yes, sir," just as he had responded in the affirmative to the Magistrate Judge's previous questions. [J.A. at 30-31.] This caused his trial counsel to intervene again and confer with Mr. Person

off the record. [J.A. at 31-32.] When they returned to the record, Mr. Person again said “Yes, sir.” [J.A. at 32.]

The Magistrate Judge then repeated the question whether there are other agreements other than the plea agreement, and this time Mr. Person answered “No sir.” [J.A. at 32.]

The Magistrate Judge then asked Mr. Person “do you understand my question?”, and Mr. Person replied “Yes, sir.” [J.A. at 32.]

The Magistrate Judge then asked: “Now, Mr. Person, do you feel like you have understood the terms, the language, the words, the sentences, even any of the legal phrases that are used in the plea agreement, after you discussed it with Mr. Weede?” [J.A. at 32.]

Mr. Person answered “Yes, sir.” [J.A. at 32.]

After asking Mr. Person if he understood that he had waived or given up his right to appeal or collaterally attack his sentence, the Magistrate Judge then asked: “Has anyone, Mr. Person, made any other or different promises to you to get you to plead guilty in this case other than what’s contained in the plea agreement? [J.A. at 32.]

Mr. Person again answered “Yes, sir,” causing the Magistrate Judge to repeat the question. [J.A. at 33.] Mr. Person’s trial counsel then intervened again to confer with Mr. Person off the record. [J.A. at 33.]

After this conference, Mr. Person then said “No, sir.” [J.A. at 33.] The Magistrate Judge then confirmed this answer with a follow up series of questions. [J.A. at 33.]

The Rule 11 colloquy proceeded for a while without incident until the Magistrate Judge asked Mr. Person if he needed any more time to either think about his plea or to discuss his case with Mr. Weede before entering the plea. At this question, Mr. Weede once again intervened and conferred with his client, and Mr. Person answered “Yes, sir.” [J.A. at 35.]

Despite this answer to his previous question, the Magistrate Judge asked Mr. Person “are you ready to enter your plea at this time?” [J.A. at 35.]

Mr. Person answered “Yes, sir.” [J.A. at 35.]

Mr. Person then pled guilty to Counts One and Two. [J.A. at 35-36.] After Mr. Person pled guilty, the Magistrate invited the Government to provide a factual basis for the plea. [J.A. at 36.] The Assistant United States Attorney then stated the following:

MR. RHOADES: Yes, your Honor. If this matter were to proceed to trial, the evidence would show that in early August of 2018 the Greenville Regional Drug Task Force received information from a confidential source that the defendant, Brian Person, a person on federal supervised release, was involved in drug trafficking located in Greenville, North Carolina.

Agents conducted surveillance for months on his residence and saw people and vehicles coming and going from the residence that's consistent with drug-trafficking. A law enforcement officer also saw hand-to-hand transactions by two individuals that were working for the defendant. Law enforcement also observed the defendant hiding suspected contraband in vehicles, and he would then park those vehicles in other locations. They saw Mr. Person place a small bag in his truck and drive that truck to his sister-in-law's house.

On October 16, 2018, law enforcement learned that he was moving the truck to his sister-in-law's home. They assisted the U.S. Probation Office with a probationary search. The defendant was home with his mother, and after the probation officers cleared the home, officers saw the

defendant's mother walking from the home to her car carrying a purse. The defendant's mother consented to a search of her vehicle before leaving. There law enforcement found 41 grams of crack cocaine that she was attempting to take from Person's home.

Person said that the drugs that his mom was trying to hide were his drugs, and, after that, Person provided consent for officers to search his truck that he had moved to his sister-in-law's home.

During the search, officers located a green book-bag containing cocaine, marijuana, drug paraphernalia and U.S. currency. The drugs were packaged in individual baggies, which is indicative of drug-trafficking.

The Pitt County Sheriff's Office sent these items to the North Carolina drug lab. The lab determined that there were 24 grams of marijuana. The lab analyzed several bags, which contained over 175 grams of powder cocaine and just over 9 20 grams of crack cocaine.

Person also described buying crack and powder for over the past two years. Officers also spoke to a cooperating witness, who described the defendant cooking crack three ounces at a time, and described how the crack was cooked by the defendant.

That would be some of the evidence that the government would show at trial.

[J.A. at 36-38.]

The Magistrate Judge then followed up with a question to the Government about the statutory amount of crack cocaine, i.e. 28 grams. The AUSA replied: "Based on the interviews with cooperating witnesses, they were able to describe him selling crack cocaine to other individuals over a specific time period that would accumulate to over 28 grams of crack cocaine." [J.A. at 39.]

When asked for the Defendant's position, Mr. Person's attorney indicates that Mr. Person did not agree with every aspect of what was said, but didn't think that the parts that he would disagree with would affect the amount of evidence and would not rise to a level that would prevent the Court from accepting the plea. [J.A. at 39.]

The Magistrate Judge followed this statement with a question to Mr. Person asking what he would dispute in the factual basis. Mr. Person then challenged the allegation that he had cooked any crack cocaine in his house because he never had any drugs in his house. [J.A. at 39-40.] Mr. Person also disputed saying that the drugs found on his mother were his and specifically denied that the drugs found on his mother were his. [J.A. at 40.]

The Magistrate Judge then asked the Government to restate the entire factual basis again, and the Assistant United States Attorney did so. [J.A. at 41-42.] After that, the Magistrate Judge asked the Assistant United States Attorney “Tell me how you get there [to the 28 grams of crack cocaine] with that – with his dispute that the crack cocaine that his mom had was hers and not his? [J.A. at 42.]

The Assistant United States Attorney answered saying “The defendant’s conduct through other sources about his distributing crack cocaine and cooking crack cocaine would put him over 28 grams.” [J.A. at 42.]

The Magistrate Judge then asked Mr. Person “other than what you’ve already told me as to what you dispute, do you dispute anything else? [J.A. at 43.]

Mr. Person responded: “Yeah, I got out of prison in 2017. I weren’t messing with no cocaine.” J.A. at 43.]

This response caused the Magistrate Judge to follow up further as to whether or not Mr. Person was disputing that was involved in powder cocaine at all. [J.A. at 44.] Mr. Person’s trial attorney conferred with Mr. Person off the record again and then stated: “Your Honor, at this point, after conferring with him, I do not think that

he is, disputing his involvement with the powder cocaine. [J.A. at 45.] The following exchange then occurred:

THE COURT: Is that right, Mr. Person?

MR. WEEDE: Yes, sir.

THE COURT: All right. Now, Mr. Person, do you have anything else to say about what the prosecutor has told me that the government feels it could show to the Court at a trial, if the case went forward to a trial?

THE DEFENDANT: Yes, sir.

THE COURT: What else do you have to tell me?

THE DEFENDANT: Nothing, sir.

THE COURT: Is that it?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Weede, anything further?

MR. WEEDE: No, your Honor.

[J.A. at 45.]

Although the Plea Agreement contained several stipulations pursuant to Fed. R. Crim. P. 11(c)(1)(B), at no time in the Rule 11 colloquy did the Magistrate Judge talk with Mr. Person about them specifically. [J.A. at 25-46, 156-57.] These stipulations included an agreement that Mr. Person's relevant and readily provable attributable converted drug weight would be at least 1,000 kilograms but less than 3,000 kilograms, which equals a base offense level of 30. [J.A. at 156.] Also, an upward adjustment of 3 levels was warranted under U.S.S.G. § 3B1.1(b) for a leadership role. [J.A. at 157.]

Both of these agreements were incorporated into Mr. Person's Presentence Investigation Report. Specifically, the Base Offense Level was calculated at 30, and Mr. Person received a three level enhancement pursuant to U.S.S.G. § 3B1.1(b). [J.A. at 129.] In addition, Mr. Person received a two level enhancement for maintaining a

premise for the purpose of manufacturing or distributing a controlled substance under U.S.S.G. § 2D1.1(b)(12). [J.A. at 129.]

According to the PSR filed in this case, on October 16, 2018, Mr. Person's residence was searched by law enforcement. [J.A. at 115.] No narcotics were found in the residence, but Mr. Person's mother, Shirley Warren, was observed walking away from the residence and attempting to leave. She was searched and had 26.74 grams of cocaine and .12 grams of crack cocaine on her person. [J.A. at 115.]

The PSR also states that Mr. Person consented to a search of a pickup truck at his sister-in-law's residence on Ethel Lane in Greenville. A K-9 unit alerted to the odor of drugs in the truck. Officers found 24.16 grams of marijuana, 203.7 grams of cocaine, and 20.57 grams of crack cocaine in a book bag in the truck. [J.A. at 115.]

Following his arrest, the PSR states that Mr. Person provided an unprotected statement that the drugs in the truck were supplied by "Nephew" and that he purchased 6 to 8 ounces at a time about once a month for a total of 144 ounces. [J.A. at 115.]

The PSR calculates the drug weight for Mr. Person at 24.16 grams of marijuana, 84.0064 grams of cocaine base, and 23.973 grams of cocaine, which combined equals 5,0994.81 kilograms of converted drug weight from August, 2016 to October 16, 2018. [J.A. at 116.] The PSR arrives at this amount by historical drug weight statements from a cooperating witness and two confidential sources. [J.A. at 115-16.] More specifically, the drug weight calculation appears to be taken from the statements of the cooperating witness. [J.A. at 115-16.]

The cooperating witness claimed that when he was released from prison in 2016, he began dealing with a brother of Mr. Person, Maurice, who was in turn getting kilograms of cocaine from another brother of Mr. Person named Jeremiah. Jeremiah would deliver 10 kilograms of cocaine and trash bags of marijuana monthly to Mr. Person's trailer in Greenville. [J.A. at 116.]

The PSR does not explain how Mr. Person could have been involved in selling drugs to the CW or anyone else during the time from August, 2016 through April 17, 2017, but instead holds him accountable for "at least two months or 20 kilograms of cocaine." [J.A. at 116 n.2]

Despite this calculation, the PSR notes that pursuant to the stipulated Plea Agreement in this case, Person is accountable for at least 1,000 kilograms but less than 3,000 kilograms of converted drug weight. [J.A. at 116.] Thus, the PSR used the Base Offense Level of 30 in its calculations. [J.A. at 116, 129.] With the combined five levels of enhancement, the Adjusted Offense Level was calculated at 35. [J.A. at 129.] After a deduction of three levels for acceptance of responsibility, the PSR calculated Mr. Person's Total Offense Level at 32. [J.A. at 32.] Based on a total offense level of 32 and a criminal history category of III, Mr. Persons' guideline imprisonment range was calculated to be 151 to 188 months. [J.A. at 129.]

According to the PSR, with respect to Paragraphs 7, 12, 13, 14, and 15, Defendant

"does not have any objections to the calculation of the total offense level (32) or the advisory guideline range (151-188 months). However, the defendant disagrees that Bernard Tyson and Kevin Shephard worked for him and that he "supplied his mother with drugs." The defendant also disagrees with the information from the cooperating witness and

confidential sources.” However, the parties stipulated to the drug weight in the Plea Agreement and the factual objections have no bearing on the drug weight stipulation. Therefore, the defendant does not wish to be heard on the aforementioned factual objections during the sentencing hearing (and no witness testimony is necessary).

[J.A. at 132.] Defendant also had a second objection in which he denied the allegations with respect to the unrelated pending charges reported in Paragraph 41 of the PSR. [J.A. at 132.]

On January 2, 2020, Mr. Person’s trial counsel filed a motion for downward variance based on Mr. Person’s mental disabilities. [J.A. at 133-44.] In addition, On January 9, 2020, Mr. Person’s supervised release counsel filed a Sentencing memorandum in the related case adopted and incorporated by reference the matters contained in the motion for downward variance and asked the Court to run the supervised release violation and the felony sentence in this case concurrently, based upon Mr. Person’s guilty plea, his efforts to cooperate, and his limited mental functioning. [21-4462 J.A. at 80.]

The sentencing hearing and the supervised release revocation hearing were conducted in the same session on August 24, 2021. [J.A. at 49-76, 145-49.]

After this, the trial court then noted that Mr. Person’s trial counsel had objections and a motion for downward departure, and asked him if he wished to be heard on the objections. [J.A. at 57.] The following discussion occurred:

MR. WEEDE: We do not need to be heard on any objections, Your Honor.  
THE COURT: Are you withdrawing them?

MR. WEEDE: They are issues that Mr. Person -- I don't know that he technically would want them to be withdrawn. They were concerns he had as we went over the PSR about some of the facts. They do not bear in any way upon the stipulations that we reached, the calculation of the

drug weight, the calculation of his sentencing guidelines, so we don't need to be heard any further on the objections.

THE COURT: I rely on the probation officer's response and do overrule them.

[J.A. at 57.]

The trial judge then sentenced Mr. Person to 113 months in the case under appeal. [J.A. at 66.]

On appeal, Mr. Person raised two issues. The first issue was whether his plea agreement was knowing and voluntary. The second issue was whether his sentence was substantively reasonable. Upon motion by the Government, the Fourth Circuit dismissed the appeal with the following language.

Upon review of the record, we conclude that Person knowingly and voluntarily pleaded guilty and waived his right to appeal. We further conclude that the sentencing issue Person seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss.

See Ex. A. This petition follows.

## **REASONS CERTIORARI SHOULD BE GRANTED**

### **I. Mr. Person's Plea Agreement Was Not Knowing and Voluntary.**

“Before a defendant enters a plea of guilty, he is entitled to understand the nature of the offense to which he is admitting guilt and the consequences of his plea.” United States v. Lockhart, 947 F.3d 187, 197 (4th Cir. 2020) (en banc) (holding that “[t]he errors that occurred in this case prevented Lockhart from engaging in the calculus necessary to enter a plea on which this Court can rely in confidence.”). “Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is

voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(c)(2). "To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request." Fed. R. Crim. P. 11(c)(3)(B).

In this case, Mr. Person is a defendant with mental impairments who is not able to read or write English. [J.A. at 26-27.] Thus, he was totally dependent on his conversations with his trial counsel for understanding the terms and conditions of the Indictment, any plea agreement, the Presentence Investigation Report, and any other document filed in his case. In addition, Mr. Person's ability to understand, remember, and interact with an attorney about abstract legal concepts was deemed by a medical evaluator to be significantly impaired.

The defendant's verbal abilities were described as weaker than his nonverbal abilities, he was deemed completely illiterate, and the defendant's listening comprehension and memory retention was also deemed significantly impaired. With respect to his competency to proceed with court proceedings, Dr. Herfkens summarized that Person has a limited and largely incorrect understanding of the legal process; however, he was deemed able to understand the necessary information to stand trial and to assist in his own defense, noting that any new information must be given to Person in "small chunks with simple vocabulary," and then confirm that he has comprehended the information before moving forward with new information.

[J.A. at 126-27.]

It appears from the record and Mr. Person's difficulties during the hearing and thereafter that Mr. Person was unable to understand the legal boilerplate being read uninterrupted for seven pages in the transcript. [J.A. at 17-24.]

Further, there is no indication in the record that Mr. Person was specifically advised that he actually had a plea agreement with recommendations pursuant to Fed. R. Crim. P. 11(c)(1)(B) or what those terms actually were. One of his later objections was that he did not in fact employ two of the three individuals who were the basis of the leadership enhancement he signed onto in the Plea Agreement. [J.A. at 116, 132, 156-57.]

Although Mr. Person's trial counsel did not object or ask the district court to further explain provisions of the plea agreement in the Rule 11 hearing, under plain error review, the Court may notice an error that was not preserved by timely objection only if the defendant can demonstrate (1) that an error occurred, (2) that it was plain error, and (3) that the error was material or affected the defendant's substantial rights. Id. (citing United States v. Olano, 507 U.S. 725, 732 (1992)). Even when these three conditions are satisfied, the Court retains discretion whether to correct the error, which should be exercised only if the "error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. (citing United States v. Olano, 507 U.S. 725, 732 (1992)).

Given Mr. Person's inability to read English and limited ability to remember and understand legal concepts, the Plea Colloquy and the format used by the Magistrate Judge was clearly inadequate to ensure that Mr. Person actually had a knowing and voluntary Plea in this case. The Magistrate Judge also plainly erred in not advising Mr. Person that his plea agreement contained recommendations pursuant to Fed. R. Crim. P. 11(c)(1)(B) and what those terms actually were.

This plain error also affected Mr. Person's substantial rights, in that it appears on the record that he unknowingly signed on to an enhancement which was unsupported by the facts as he thought he knew them. This would have made a difference in the calculation of Mr. Person's Sentencing Guidelines, and as such it affected his substantial rights.

Finally, the error seriously affects the fairness, integrity or public reputation of judicial proceedings. The error in this case constitutes an inadvertent but serious failure of the trial court to ensure that Mr. Person's plea was knowing and voluntary. This is a core function of the federal criminal process. Unknowing pleas by illiterate individuals with serious mental impairments more than seriously affect the fairness, integrity, or public reputations of judicial proceedings. They are completely antithetical to and destroy fairness, integrity, and the public reputation of our judicial proceedings.

For these reasons the Court should overturn Mr. Person's plea agreement and remand to the trial court for further proceedings.

Below, the Government contended that the issues of whether Defendant's guilty plea was knowing and voluntary when made and whether the sentence was substantively reasonable fall "within the scope of Defendant's appellate waiver." Govt. Motion to Dismiss at 5. However, under Fourth Circuit caselaw, whether or not the guilty plea itself was knowing and voluntary is not an issue precluded by an appeal waiver. "Clark's waiver of appellate rights does not prevent him from challenging the validity of the plea itself." United States v. Clark, No. 21-4174, at \*1

(4th Cir. Jan. 24, 2022) (unpublished per curiam) (citing United States v. McCoy, 895 F.3d 358, 364 (4th Cir. 2018)). This position is discussed approvingly in Garza v. Idaho, a recent decision discussing defense counsel's duty to file a notice of appeal when an appeal waiver existed. “Separately, all jurisdictions appear to treat at least some claims as unwaivable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary.” Garza v. Idaho, 139 S. Ct. 738, 745 (2019).

In this case, because he cannot read, Mr. Person was completely dependent on the oral statements of his trial counsel for his understanding of the terms and conditions of his plea agreement. Although Mr. Person answered in the affirmative to the Magistrate Judge at the time, he had no way of actually knowing or determining for himself whether or not his trial counsel had in fact covered all of these, other than trial counsel's statements. Mr. Person's affirmative answer could not extend further than his actual knowledge at the time. Mr. Person's later statements and conduct appear to indicate that he was not aware of the agreement about a leadership enhancement that was in the plea agreement which was material to his sentence and disagreed with it.

Because this argument goes to the validity of the plea itself, it is not covered by the appeal waiver and must be adjudicated on its merits. Nevertheless, the Fourth Circuit Court of Appeals summarily stated that the plea was knowing and voluntary in the context of an order of dismissal. See Ex. A. The Fourth Circuit thus never

formally adjudicated the merits of Mr. Person's first argument and only addressed it in the context of dismissing his appeal under the appeal waiver.

The Court should grant a writ of Certiorari in this case to clarify the requirements of demonstrating that a guilty plea is knowing and voluntary in the case of illiterate and mentally challenged defendants. In addition, the Court should grant a writ of Certiorari in order to address the propriety of Fourth Circuit's not formally reaching the question in this case when it has been raised in the Opening Brief as an argument on appeal.

## **CONCLUSION**

For the above stated reasons, Petitioner Brian Person hereby requests that the Court grant a writ of Certiorari in this case, reverse the courts below, vacate his guilty plea and conviction, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 6th day of November, 2023.

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