No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

BRIAN K. ALLEN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

JEREMY B. LOWREY
Arkansas Bar No. 2002153
Oklahoma Bar No. 15031
6834 Cantrell Road, PMB 3027
Little Rock, AR 72207
(870) 329-4957

ATTORNEY FOR PETITIONER
BRIAN K. ALLEN

QUESTIONS PRESENTED FOR REVIEW

1. Whether the near consensus Federal Circuit Courts of Appeals' application of plea agreement appeal waivers as to subsequent sentencing proceedings, where neither PSR nor evidentiary hearing has been compiled or conducted at the time of waiver, violates fundamental due process rights of defendants entering such waivers and whether such waivers inherently are neither knowing or intelligent.

LIST OF PARTIES TO PROCEEDING

All parties appear in the caption of the case on the cover page.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. Court: United States District Court, Eastern Dist. Arkansas
   Case Number(s): 4:20-cr-00292-JM-01
   Case Caption: *United States of America v. Brian K. Allen, a/k/a Jake the Snake*
   Date of Judgment: April 27, 2023

2. Court: United States Court of Appeals, 8th Circuit
   Case Number(s): 23-2153
   Case Caption: *United States of America v. Brian K. Allen, also known as Jake the Snake*
   Date of Judgment: August 18, 2023
   Rehearing Denied: September 28, 2023

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Federal Courts of Appeals Cases

Other Federal Cases

Constitution and Statutes:

Rules

CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS IN THIS MATTER

[No Applicable Citations Available]

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

BRIAN K. ALLEN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIAN K. ALLEN respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This case involves the direct appeal of Petitioner's criminal conviction in the United States District Court for the Eastern District of Arkansas in case number 4:20-cr-002920-JM-01. App. 3. The United States Court of Appeals for the Eight Circuit dismissed this case in response to the government's motion, based on Petitioner's appeal waiver in his plea agreement. Judgment of Dismissal dated August 18, 2023 (App. 3). Mr.

Allen's Petition for Rehearing and Rehearing En Banc was denied by order entered September 28, 2023. App. 1.

JURISDICTION

Jurisdiction in the District Court was conferred pursuant to 18 U.S.C. § 3231 and Fed. R. Crim. Proc. 18. Judgment was entered and became final on April 27, 2023. App. 3. The final judgment of the United States Court of Appeals for the Eighth Circuit on petitioner's appeal from his conviction and sentence was entered (by Order denying Petitioner's Petition for Rehearing and Rehearing En Banc) on September 28, 2023. App. 1. Pursuant to United States Supreme Court Rule 13(1) this petition is timely filed on December 27, 2023 within 90 days after entry of the judgment denying petitioner's appeal. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Sentencing Guidelines § 4B1.1(a) (2021)

§4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

* * *

United States Sentencing Guidelines § 4B1.2 (2021)

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony

convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

STATEMENT OF THE CASE

A. Mr. Allen's Plea Agreement, Reservation of Issues and Conviction History

Brian K. Allen was convicted after entry of a plea of guilty of 1 count of Conspiracy to Distribute Cocaine under 18 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B). App. 3; Plea (TR 1)- (TR 19). Judgment was entered April 27, 2023 in case number 4:20-cr-00292-JM-01 in the United States District Court for the Eastern District of Arkansas by the Honorable James M. Moody, Jr. *Id*. Notice of Appeal was timely filed on May 8, 2023 pursuant to FRAP 4(b). (R. Doc. 208), (R. Doc. 208-1).

The Government moved in the Eighth Circuit to dismiss Petitioner's appeal based on the appeal waiver contained in his plea agreement. The plea agreement provided, *inter alia*, in Paragraph 4, that Petitioner,

> . . . waives the right to appeal all non-jurisdictional issues including, but not limited to, . . . the factual basis for the pleas, including the sentence imposed or any issues that relate to the establishment of the Government range, except that the defendant reserves the right to appeal claims of prosecutorial misconduct and the defendant reserves the right to appeal the sentence if the defendant makes a contemporaneous objection because the sentence imposed is above the Guideline range that is established at sentencing.

R. Doc. 164.

The Court of Appeals dismissed Mr. Allen's claims based on the government's motion, without opinion, on August 18, 2023. App. 2. Petitioner filed a timely Petition for Rehearing and Rehearing En Banc on

September 1, 2023. This Petition was denied by Order entered September 28, 2023. App. 3.

B. Mr. Allen's Underlying Merits Claim

Because the case was dismissed on the government's motion, the 8th Circuit did not reach Mr. Allen's claims on the merits. Mr. Allen asserted that he was incorrectly sentenced under a sentencing range based on the career offender provisions of USSG § 4B1.1(a) because no clear evidence was presented as to which of two offenses (one qualifying and one not) Mr. Allen had served relating to within the fifteen year time frame established by that section. Mr. Allen argued that there is simply no fact in the record that would show whether Mr. Allen's parole was revoked on the theft by receiving conviction, or on the conviction (PSR 43) or the conviction for delivery of cocaine. (PSR 40). ("Theft by receiving" is not a "crime of violence or controlled substance offense" as defined by USSG § 4B1.2).

Mr. Allen argued that on the record presented, it could not be found that it was "more likely than not" under the proof presented that he was incarcerated for one of these convictions or the other. *See Coulston v. Apfel*, 224 F.3d 897 (8th Cir. 2000)("Generally, if the evidence is in equipoise, the party with the burden of proof loses."). Mr. Allen argued that as of the dates shown in the pen pack presented by the government at sentencing to be within fifteen years of the current conviction, the actual proof at sentencing

only showed that Mr. Allen was at most serving a sentence for a single offense meeting the definitions of USSG § 4B1.2(b) – a "controlled substance offense." No evidence was presented that Mr. Allen was incarcerated for any other qualifying offense within the relevant fifteen-year period.

REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue in this case because the general consensus determinations of the Courts of Appeals that appeal waivers are permissible in regard to subsequent sentencing proceedings are inherently violative of fundamental principles of due process. Further, almost all, if not all, Circuits can be considered to have weighed in on this issue at some level. Petitioner submits that the current prevailing position is in conflict with fundamental concepts of due process long established by this Court.

As Judge Friedman of the D.C. Circuit set out in *U.S. v. Raynor*, 989 F. Supp. 43 (D.C.C. 1997), a rule that permits a defendant to waive an appeal challenge of subsequent sentencing error "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..." Further, "[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." *Id.* It is a core

reality of the Federal sentencing system, for instance, that the Pre-Sentence Report, as well as objections to that report, are neither compiled nor addressed until subsequent to entry of the waivers on which the Courts of Appeal rely to avoid appellate review of sentencing issues on the merits, including review of those subsequently asserted objections. *See* Fed. R. Crim. P. 32. This is exactly the circumstance facing Mr. Allen in this case. His assertion is that neither the pre-sentence report, nor the subsequent proof by the government established three qualifying offenses to support habitual offender status under USSG § 4B1.1. This proof on this issue was not known to Mr. Allen prior to entry of his plea, and could not have been, as the presentence report had not been compiled, and the government had not responded to Mr. Allen's arguments, at the time he entered his waiver.

While most circuits recognize limitations on appeal waiver rights, there is no clear consensus as to scope or standard, evidencing at least an uneasiness with unfettered waiver, and yet an unwillingness to confront the issue directly. *See United States v. Yemitan*, 70 F.3d 746, 748 (2nd Cir.1995) ("We do not hold that the waiver of appellate rights forecloses appeal in every circumstance."); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir.1995) ("[W]aivers of rights to appeal may not apply to ineffective assistance of counsel claims."); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir.1994) (same); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994) (same, in

dicta); *United States v. Craig*, 985 F.2d 175, 178 (4th Cir.1993) (same). Prior to Petitioner's case, there was no clear ruling in the 8th Circuit on the scope of sentencing waivers, and even in this case the Court simply dismissed without comment or addressing a clear standard. App. 2.

The 8th Circuit's prior "clear" waiver case - *United States v. Rutan*, 956 F.2d 827, 829-30 (8th Cir.1992) – concluded merely that "[i]f defendants can waive fundamental constitutional rights [like the right to a jury trial], surely they are not precluded from waiving procedural rights granted by statute." In *United States v. Guzman*, 707 F.3d 938, 941-42 (8th Cir. 2013) the Court elaborated somewhat that it would not enforce a waiver where the waiver "would result in a miscarriage of justice," but has not to Petitioner's knowledge dealt previously directly with the core due process challenge raised here. Further, the case of *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003), relied on by the Court in *Guzman*, did not address any due process concerns relating to the uncertainty of subsequent proceedings, relying on considerations of "speed, economy, and finality." The *Andis* Court applied no constitutional analysis as argued for here finding in conclusory fashion that, ""the right to appeal is not a constitutional right but rather 'purely a creature of statute.'..." *U.S. v. Andis*, 333 F.3d 886 (8th Cir. 2003). The *Andis* Court then evaluated the viability of waivers under a mere "rational basis" standard, and then cryptically stated that, "a defendant may knowingly and

voluntarily enter into a plea agreement waiving the right to a jury trial, but nonetheless fail to have knowingly and voluntarily waived other rights-including appellate rights." *U.S. v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003)

Similar general and unclear statements are found in decisions of other circuits. *See United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir.1993); *United States v. DeSantiago-Martinez*, 980 F.2d 582, 583 (9th Cir.1992); *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir.1990); *See also King v. United States*, 41 F.4th 1363 (11th Cir. 2022)(" "defendant who wishes to plead guilty can waive the right to challenge his conviction and sentence in exchange for a better plea deal; *but see United States v. Icker*, 13 F.4th 321 (3rd Cir. 2021)(applying "plain error" standard in finding that, "because Icker was not convicted of any sex offenses, and because the record shows he was not given notice of any potential SORNA registration requirements, we will not enforce his appellate waiver as he did not enter into it knowingly and voluntarily.") The 8th Circuit in *Andis* compiled a comprehensive list of circuit waiver jurisprudence as follows:

> As a general rule, a defendant is allowed to waive appellate rights. Every circuit that has considered this issue has reached the conclusion that at least some forms of appeal waivers are permissible. See generally *United States v. Teeter*, 257 F.3d 14, 21-27 (1st Cir.2001); *United States v. Hernandez*, 242 F.3d 110, 113-14 (2d Cir.2001); *United States v. Khattak*, 273 F.3d 557, 559-63 (3d Cir.2001); *United States v. Brown*, 232 F.3d 399, 402-06 (4th Cir. 2000); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir.1992); *United States v. Fleming*, 239 F.3d 761, 764 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 916-18

> (7th Cir.2001); *United States v. Nguyen*, 235 F.3d 1179, 1182-84 (9th Cir.2000); *United States v. Rubio*, 231 F.3d 709, 711-13 (10th Cir.2000); *United States v. Howle*, 166 F.3d 1166, 1168-69 (11th Cir.1999). On numerous occasions, we have also acknowledged the general permissibility of including these waivers in plea agreements. See, e.g., *DeRoo v. United States*, 223 F.3d 919, 923-24 (8th Cir. 2000); *United States v. Morrison*, 171 F.3d 567, 568 (8th Cir.1999); *United States v. Michelsen*, 141 F.3d 867, 868-73 (8th Cir.1998).

U.S. v. Andis, 333 F.3d 886 (8th Cir. 2003).

There is little consistency in application of sentencing waivers among these decisions. Petitioner recognizes that this court has not recognized a "constitutional right" to appeal, but this does not mean that due process is not implicated by denial of a statutory right to appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985) this Court expressly found that the due process clause was applicable on appeal nonetheless. Justice Brennan wrote that, "if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, *[citation omitted]* the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Citing *Griffin v. Illinois,* 351 U. S. 12, 351 U. S. 20 (1956). Further, there is no question that the Federal appeal process is "an integral part" of the Federal system for finally adjudicating guilt or innocence. 28 U.S.C. § 1291; 18 U.S.C. § 3742(a).

"Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173 (1991). Waiver of appeal of sentencing proceedings is unlike many other constitutional waivers. In the context of waiver of trial by jury (for instance a guilty plea), a defendant is clearly apprised of what he is assenting to. Appeal waivers of the type at issue here differ from usual waivers of trial rights, in that they permit a waiver of a right to challenge the content and conduct of a ***subsequent***, and completely unpredictable, adversary proceeding. As a matter of practice, the preparation of a PSR has generally not even begun at the time the plea is entered.

Indeed, the problems and potential for unfairness inherent with such waivers are acknowledged even where they are permitted, as the waivers are generally extended only to circumstances where "no injustice would result." *United States v. Andis*, 333 F.3d 886, 889-90 (8th Cir. 2003). Implicit in this limitation is an understanding that,

> [p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural **due process rules are shaped by the risk of error inherent in the truth-finding process** . . . ."

Carey v. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) *[emphasis added]*; citing *Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976)[emphasis added].

Despite this fact, appeal waivers of error in subsequent sentencing proceedings have been upheld in virtually every circuit, generally subject only to a narrow "miscarriage of justice standard." Notably, the concept of miscarriage of justice is severely limited in this Court's jurisprudence and in certain contexts has been held to be commensurate with the standard of proof necessary to meet a claim of "actual innocence" only. *See e.g. Davis v. United States*, 417 U.S. 333 (1974)(where there is "conviction and punishment are for an act that the law does not make criminal", "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice'").

Respectfully, this patchwork of unpredictable standards and waiver application creates no valid due-process framework. Further, both the simple, and fundamentally fair outcome is a system in which, at the very least, appeal of pre-sentence reports, objections, and hearings cannot be waived prior to their actual occurrence, as there is simply no way to know either the scope of potential sentencing liability, or the actual error that may occur in such proceedings at the point of waiver.

CONCLUSION AND REQUEST FOR RELIEF

Petitioner requests that the Court issue a writ of certiorari in this matter to review the judgment of the United States Court of Appeals for the Eighth Circuit, and on the issuance of such writ, find and determine that plea waivers of appeal rights as to subsequently conducted sentencing proceedings, including compilation of and objection to pre-sentence reports, and sentencing hearing and imposition, violate the Due Process Clause of the Fifth Amendment.

Dated this 27th day of December, 2023

_____

Jeremy B. Lowrey
Attorney at Law
Arkansas Bar No. 2002153
6834 Cantrell Road, PMB 3027
Little Rock, AR 72207
(870) 329-4957
Facsimile No: (479) 222-1459

ATTORNEY FOR PETITIONER
BRIAN K. ALLEN