

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jeffrey E. AKARD -PETITIONER
(Your Name)

United States of America -RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the Seventh Circuit
(NAME THE COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffrey E. AKARD
(Your name)

199176 NCCF NCN
P.O. Box "A"
New Castle, IN 47362-1041

None
(Phone Number)

QUESTION(S) PRESENTED

1. Should a U.S. District Court Judge enforce a plea agreement appeal waiver (signed in Feb.) when that same Judge later (in July) made an error to U.S. Sentencing Guidelines?

2. Is the use of an Extraordinary Writ (Coram Nobis) proper if a plea agreement appeal waiver expires once the sentence ends or is found invalid?

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

CASES

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STATUTES AND RULES

<u>U.S. Sentencing Guidelines § 4A1.1(b) two points</u>	<u>5, 6</u>
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from Federal Courts:

The opinion of the United States Courts of Appeals appears in Appendix A-B to the petition and is

☒ reported at 23-2086; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States District Court appears at Appendix F to the petition and is

☒ reported at 2:07-cr-74; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was Dec. 07, 2023 / Oct. 17, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Dec. 06, 2023, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

☐ For cases from the state courts:

The date on which the highest state court decided my case was _____ A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Appendix No. A.

The jurisdiction of the Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment Due Process

6th Amendment Effective Counsel

8th Amendment Punishment

14th Amendment Due Process

STATEMENT OF THE CASE

U.S. District Court Judge Phillip P. Simon refuses to admit, correct, or even acknowledge his mistake of:

US Sentencing Guidelines § 4A1.2(F) - diversionary disposition - was given (2) two criminal history points by use of § 4A1.1(b) in a fundamental error, where the plain English reading for § 4A1.2(F) is counted under § 4A1.1(c) as (1) one criminal history point. See (Appx. D p. 7).

On May 17, 2007, AKard was indicted under 18 USC § 2252(a)(2). On Feb. 19, 2008, AKard signed a pre-sentence plea agreement based on appointed counsel's, James N. Thiros, advice AKard would only get an 84-96 month sentence (Appx. F p. 3-4). On Feb. 22, 2008, AKard plead guilty to Count One that forced an 'Appeal Waiver' or government threatens to maximize the 2 count sentence without waiver.

On July 23, 2008, the government violated plea agreement 7.C. ii. by stating USSC § 4A1.2(F) could be given (2) two points by § 4A1.1(b), see (Appx. D p. 13-15), and US Dist. Judge Simon abused his discretion by an improper calculation of USSC (Appx. D p. 16) and continues to enforce a concluded or invalid appeal waiver.

On April 19, 2019, AKard's Federal sentence ended, by he suffers continuing collateral consequences from the incorrect assessment of USSC § 4A1.2(F)'s (2) two point error, by present penal consequences of an additional 70 month incarceration to AKard's 2009 Indiana State sentence. see (Appx. F).

REASONS FOR GRANTING THE PETITION

A reasonable FactFinder could determine the government and U.S. District Court Judge violate a plea agreement 'Contract', misapplied plain reading of U.S. Sentencing Guidelines, and violated Akard's Constitutional rights.

1. On July 28, 2008, U.S. District Court Judge Simon stated, "I am going to give a guideline sentence in this case," (Sent. Hr. p. 70). "I think that a guideline sentence is appropriate." (Sent. Hr. p. 72). However, Judge Simon counted USSC § 4A1.2(F) as (2) two criminal history points by § 4A1.1(b) in error, where § 4A1.2(F) clearly states, "counted as a sentence under § 4A1.1(c)". see (Appx. D p. 7). All parties agreed the 2000 Georgia First Offenders Act case is clearly stated as "diversionary disposition" (Appx. D p. 9-11), without adjudication of guilt, nor considered to have a criminal conviction, and was never given a prison sentence (Appx. D p. 12). Therefore, the Government's sleight-of-hand (Appx. D p. 13-15) and Judge's abuse-of-discretion at sentencing (Appx. D p. 16) that did violate the plea agreement and Akard's Const. rights when USSC § 4A1.2(F) was assessed (2) two criminal history points.

2. Akard's offense level was set at 32 (Appx. D p. 18). However, fundamental error reading of USSC § 4A1.2(F) as (2) two criminal history points caused an increase to Akard's total, 2 OWI's, for 4 points in Category III at sentencing range of 151-188 months. Correction to § 4A1.2(F)'s Ga. case as (1) one point under § 4A1.1(c) amounts to a total of (3) three criminal history points (Appx. D p. 19-20) in Category II for 135-168 months.

A district court's review under abuse-of-discretion is used for significant procedural errors by improper calculating USSC range, see *Gall v. United States*, 522 US 38, 51, 128 S.Ct. 597 (2007); and *Miller v. Cockrell*, 537 US 322, 366, 123 S.Ct. 1029 (2003) (a reasonable jurist could debate the petition) see (Appx. F p. 6).

The plea agreement for the government 7.c.ii. states, "impose sentence equal to the minimum of the applicable sentencing guideline", (Appx. E p. 20), being the Court has 135 month actual sentence from the 170 month assessment error - results in a 35 month corrected sentence. This would allow Akard to apply the Federal sentence correction to his 2009 (consecutive to Federal time) Indiana State sentence, at 2 for 1 credit, for a 70 month reduction of incarceration.

3. The plea agreement 'appeal waiver' should not be enforced where the government violated plea agreement 7.F. Stating, "the Government agrees that it will not request the Court to either depart or deviate upward from a U.S. Sentencing Guideline sentence." (Appx. E p. 21).

The government's entire repeated argument is summarized by, "barred by the clear, unambiguous language of the plea agreement". Great!, because the 'clear unambiguous language of USSC § 4A1.2(F) says Akard should have received (1) one criminal history point under § 4A1.1(c), but Gov. Sent. Memorandum (Appx. D p. 13-15), government's sentencing arguments, and gov's persuasion placed upon US Dist. Ct. Judge for (2) two points - was an upward request.

4. The plea agreement 'appeal waiver' should not be enforced by Judge Simon as 'Knowingly or Voluntary' on Feb. 19, 2008, where Akard couldn't know that later on July 28, 2008, a US Dist. Ct. Judge would make such an egregious plain English reading error of USSG § 4A1.2(F) at sentencing to add 70 month punishment. 5th, 6th, 8th + 14th Amendment Viol. raised. see (Appx. F).

This is the non garden-variety type of situation for which Court's discretion is reserved to NOT enforce a plea agreement appeal waiver. Thus, Question 1. poses question noting that appellate court could have severed the waiver of appeal rights from the remainder of the plea agreement, see United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001) (where an appeal waiver is invalid where enforcement would result in a miscarriage of justice and cannot be 'knowing' to an unknown impact of error on defendant).

5. Viewed under the lense of Contract Law, this plea agreement 'contract' has concluded once Akard's Federal sentence ended in April 19, 2019. The Federal courts got their pound-of-flesh plus extra incarceration. Today, Akard is in in Federal incarceration, custody, control, nor under any 'waiver' to seek a Fundamental error correction to Federal sentencing documents that would provide means for Akard to seek Indiana State sentence relief, see (Appx. F p. 3).

Further Contract Law View

Akard requests the Justices consider comparison by:

Let us say that on Jan. 01, 20XX, Akard signs an 'Appeal Waiver' against some Settlement that Akard (and any common law) has a Standard (or Guideline) awardment of \$1,000,000 (6 zeroes) For damages. However, on Feb. 01, 20XX, a Judge makes a mistake at hearing with an \$.00 error and awards Akard with \$10,000.00 (6 zeroes) For damages. On appeal For \$990,000.00 error, the Judge won't admit a 0 mistake, denied all appeals by the Jan. 01 'Waiver' even though no reasonable person would expect a Judge to make a \$990 K error at a Future Feb. 01 date. see (Appx. C).

Therefore, Akard's Feb. 19, 2008, plea agreement appeal waiver couldn't 'knowingly' waive all rights to appeal a US Dist. Ct. Judge's July 28, 2008's sentencing hearing error. Right?

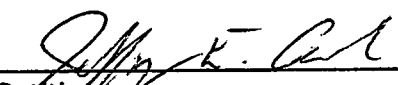
6. Akard's attempts to resolve this present matter has resulted in same 'appeal waiver' denial. Therefore, Question 2 poses the 28 USC § 1651 (a) Petition For Extraordinary Relief In Nature of Writ of Error Coram Nobis gave US District Courts the power to grant an All Writs Act case For matters just like this one where Federal error harms Akard's State sentence and Const. rights. see (Appx. F and 4 Factors of United States v. Morgan, 346 U.S. 502, 506, 74 S. Ct. 247 (1954).

Akard committed a wrong, paid the price to the Federal government, and deserves the Court's wrong be corrected.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

 (SIGNATURE)

Petitioner, pro se

Jeffrey E. AKARD (PRINTED NAME)

Date: 01/31/24

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jeffrey E. AKARD -PETITIONER
(Your Name)

United States of America -RESPONDENT(S)

PROOF OF SERVICE

I, Jeffrey E. AKARD, do hereby swear or declare that on this date, 31
January, 2024, as required by Supreme Court Rule 29, I have served the
enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF
CERTIORARI on each party to the above proceeding or that party's counsel, and on every other
person required to be served, by personally handing the same to the appropriate staff at the
New Castle Correctional Facility to be placed in the facility's prison legal mail system and deposit
in the United States mail, First-Class postage prepaid

The names and addresses of those served are as follows:

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