In The
Supreme Court of the United States

Appeal No.

Jeffrey E. AKARD,)
Petitioner,)
v.)
United States of America,)
Respondent.)

Petitioner's Appendix

Jeffrey E. AKARD
19917b NCCF
1000 Van Nuys Rd
New Castle IN 47362

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 15, 2023
Decided December 6, 2023
Amended December 7, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2086

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY AKARD,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 2:07-CR-074-PPS-APR

Philip P. Simon,
Judge.

ORDER

Defendant-Appellant Jeffrey Akard filed a petition for rehearing on November 15, 2023. All judges of the original panel have voted to deny panel rehearing.

Accordingly, the petition for rehearing is DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 15, 2023
Decided December 6, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

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JEFFREY AKARD,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 2:07-CR-074-PPS-APR

Philip P. Simon,
Judge.

ORDER

Defendant-Appellant Jeffrey Akard filed a petition for rehearing and rehearing en banc on November 15, 2023. No judge in active service has requested a vote on the petition for rehearing en banc, and all judges of the original panel have voted to deny panel rehearing.

Accordingly, the petition for rehearing and rehearing en banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

Submitted October 17, 2023
Decided October 20, 2023

Received 10/26/23

Before
ILANA DIAMOND ROVNER, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*
DORIS L. PRYOR, *Circuit Judge*

No. 23-2086	UNITED STATES OF AMERICA, Plaintiff - Appellee v. JEFFREY AKARD, Defendant - Appellant
Originating Case Information:	
District Court No: 2:07-cr-00074-PPS-APR-1 Northern District of Indiana, Hammond Division District Judge Philip P. Simon	

The following are before the court:

1. **MOTION TO DISMISS APPEAL**, filed on September 18, 2023, by counsel for the appellee.

2. **APPELLANT'S REPLY BRIEF**, filed on October 13, 2023, by the pro se appellant.

The government has moved to dismiss this appeal because Appellant Jeffrey Akard entered a plea agreement in which he waived his right to appeal his conviction, the sentence imposed, "or the manner in which my conviction or my sentence was determined or imposed, to any Court on any ground, including any claim of ineffective assistance of counsel unless the claimed ineffective assistance of counsel relates directly to this waiver or its negotiation." After multiple unsuccessful 28 U.S.C. § 2255 proceedings, Akard sought to challenge his sentence through a

-over-

B-1

petition for writ of coram nobis based on an alleged defect in the calculation of his sentence. The plea waiver prevents review of this argument. The petition also raised arguments excluded from the plea waiver: that counsel was ineffective in negotiating the plea and the plea waiver. But the district court already rejected the factual premise that counsel was ineffective in deciding Akard's first § 2255 motion. As a result, Akard cannot litigate these claims in his petition. *See United States v. Hassebrock*, 21 F.4th 494, 498 (7th Cir. 2021) ("Indeed, the primary argument he raises in his *coram nobis* petition—ineffective assistance of counsel—was raised and rejected in his § 2255 motion and may not be relitigated here.") (citing *United States v. Keane*, 852 F.2d 199, 206 (7th Cir. 1988)). Accordingly,

IT IS ORDERED that the motion is **GRANTED** and this appeal is **DISMISSED.**

form name: c7_Order_3J (form ID: 177)

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, IL

23-2086

Jeffrey E. AKARD,	)	Appeal From US Dist. Ct.
Defendant, Appellant,	)	No. 2:07-CR-74 and
v.	)	Appeal From US Ct. Appeals
United States of America,	)	No. 23-2086 Order on
Plaintiff-Appellee.	)	Oct. 20, 2023.

Motion For Reconsideration

Appellant pro se, Jeff AKARD, moves this court to reconsider the 'Primary Argument' was that U.S. Dist. Ct. Judge Philip P. Simon's mistake to USSG § 4A1.2(F) given 2 points ERROR causes a 70 month additional incarceration at the Ind. State level, has NEVER been acknowledged by Judge Simon, and use of a Feb. 2008 'Appeal waiver' to the sentencing error occurring April 2008 provides sound reason to not enforce the waiver.

The U.S. District Court For N. Dist. of Ind., Hammond Division and U.S. Ct. Appeals For 7th Cir. will not state on record USSG § 4A1.2(F) is counted under § 4A1.1(c) For (1) one criminal history point, Not (2) two under § 4A1.1(b) as

Judge Simon was lead to do by the goverment. Therefore, a judge saying he wants to give a guideline sentence and Akard deserves a guideline sentence, but make a clear guideline error is appealable to the "reasoning and result reached by a district court."

Allow a pro se litigant to express the (2) issues in another way. Let us say:

On Jan. 01, 20XX, I sign an 'Appeal Waiver' against a cause that I understand has a 'Guideline' awardment of $1,000,000 (6 zeroes) damages. However, on Feb. 01, 20XX, Judge makes a mistake with an $.00 error and awards me $10,000.00 (6 zeroes) damages. On appeal For $90,000.00 error the Judge won't admit a mistake, says I cannot appeal the error because of a Jan. 01 "waiver" even though I could never expect on Jan. 01 a judge would make a $90k error on Future date of Feb. 01.

WHEREFORE, Akard respectfully requests this Court address (2) two issues:

1) U.S. District Court's USSG error to §4A1.2(F), and

2) Enforcement of Court's Plea Agreement Appeal Waiver Violates Akard's rights to Court's reversible error.

10/24/23

Respectfully Submitted,

Jeffrey E. Akard
19976 NCCF NCW
1000 Van Nuys Rd.
New Castle IN 47362

APPENDIX D

Oct. 17, 2023
Sept. 25, 2023

United States Court of Appeals

For the Seventh Circuit

Chicago, IL

23-2086

Jeffrey E. AKARD,	Appeal From the U.S. District
Defendant, Appellant,	Court For Northern District of
v.	Indiana, Hammond Division
United States of America,	No. 2:07-CR-74
Plaintiff-Appellee.	Hon. Philip P. Simon, Judge

Appellant's Reply Brief

Appellant pro se, Jeff AKard, moves to File a Reply Brief due 21 days after appellee's brief, pursuant to Rule 31(a), but before this Court's Order of Nov. 01, 2023 (see 09/11/23). AKard believes his issue is exactly why a Court of Appeals exists, to correct or as oversight For a U.S. Dist. Ct. Judge's refusal to admit, correct, or even acknowledge the merits of: USSG § 4A1.2(F) was given (2) two criminal history points by § 4A1.1(b) in error, where plain reading For USSG § 4A1.2(F) - diversionary disposition, is counted under § 4A1.1(c) as (1) one criminal history point.

As the court noted in Jaworski v. Master Hand Contractors, 882 F. 3d 686, 690 (7th Cir. 2018), "[t]he purpose of an appeal

to evaluate the reasoning and result reached by district court."

This USSG § 4A1.2(F) criminal history points dispute For a 2000 Georgia First Offender Act, clearly stated on document as a "diversionary disposition" and without a prison sentence, was NEVER resolved - hence Akard's Writ of Error Coram Nobis post Federal incarceration. Appelle states, "he should receive two points" R.55 at 8-22, therefore my Coram Nobis is For: (see Attachments)

1) error "most Fundamenal", that all parties agree that the 2000 Ga. case is counted under USSG § 4A1.2(F), but AUSA and Judge Simon counted §4A1.2(F) For (2) two points under § 4A1.1(6).

2) "sound reason", that Akard's collateral challenge should never been ordered by Judge Simon to appoint the same inexperienced appointed attorney, James N. Thiros, to Fail at plea hearing then orders same attorney For direct appeal to Fail by not raising (against himself) "unless the claimed ineffective assistance of counsel relates directly to this waiver or its negotiation." Thiros refused to seek a plea offer void of an appeal waiver, said AUSA had threatened a trial For both counts with max sentence unless plea deal has an appeal waiver, and therefore, how could Akard "knowingly and voluntarily" enter into a plea agreement appeal waiver (in. Feb. 2008) under duress and advised 84-96 months when errors (in April 2008) at sentence hr. Violated Akard's rights by USSG errors, hadn't even happened in Feb.

3) "continues to suffer", the Judge's error caused a raise From Cat. I to Cat. II, or an additional 35 months of Federal incarceration. This would easily be corrected by an ordered Zoom hearing, and allows Akard by 2 for 1 credit of 70 months relief to his Ind. State sentence. To retort the appellee, this Coram Nobis is my attempt of 'last resort' against a U.S. Dist. Ct. Judge that, I reiterate, won't acknowledge or correct his plain english reading of USSG § 4A1.2(F). Full Stop.

Plea Agreement's Appeal Waiver

Appellee's Motion (DKt. #5) p.1, admits Akard has an argument to escape the waiver and suggests the appellant not be given a merit briefing, shows appellee knows an USSG error has occurred. Appelle should be awarded a cookie For Filing its' "brief within one week of this Court's Sept. 11, 2023, Order," but cracked on wrists with a ruler For ever seeking Court's denial "without requiring merits briefing" (DKt. #2 p.1), being Akard's Nov. 01, 2023, ordered Appellant's Reply Brief, especially Appellee knowing a pro se incarcerated Akard has multiple deadlines. Any slieght-of-hand by appellee doesn't change the Fact that Akard was give a 2 pt. error and denied all correction attempts.

20008 Appeal dismissed by appeal waiver, because Thiros didn't claim Ineffective assist. of counsel on himself, which equals another Ineff. assit. of counsel on the appeal.

2011 COA dismissed as untimely where Akard can show the clerk "cc" Akard the denial + never sent a docket sheet.

2016 Successive 2255 wasn't denied by its merits.

2017 Nunc Pro Tunc was court construed, without Akard's permission, as a Successive 2255 to deny by the Waiver.

2023 Petition For Extraordinary Relief/Writ of Coram Nobis denied by US Dist Ct., but didn't admit or acknowledge a USSG § 4A1.2(F) given 2 pts error.

Precedents

Plea agreement viewed under Contract Law, Akard is not in Federal incarceration, Federal custody, nor under any "waiver" to seek relief From his conviction - or - his sentence that has concluded. In the "special public-interest concerns", Akard's Indiana State sentence is substantially prejudiced by 70 months Further incarceration due to Federal Judge's § 4A1.2(F) 2 point assessment error. Maybe then Akard is precedent For a Federal appeal Waiver, that's in the interest of a Federal conviction or current Imposed Federal sentence, is now moot For a completed Federal incarceration, when this Fed. Waiver interFers with a Ind. State sentence's relief.

In opposition to the appellee, it is NOT a "waste of judicial resources" to allow Akard to seek 70 Months relief From a State sentence, by a correction to Judge Simon's Mistake.

Conclusion

Appellant seeks this Court to Remand, Correct, or any other just and proper relief to correct the USSG § 4A1.2(F) be counted under § 4A1.1(c) For (1) one criminal history point, which would lower AKard to 3 total criminal history points, lowers AKard to Category II, and correct sentencing range of 135-168 with AUSA's 'recommended Minimum of guideline' being 135 months -minus- current 170 months sentenced results in a 35 month relief. Without a correction to this error, the goverment still got their pound of Flesh, but AKard has extra 35 month error- plus- 70 month State sentence For 105 month disparity that cannot be corrected until § 4A1.2(F) gets corrected.

9/25/23

Respectfully Submitted,

Jeffrey E Akard

I hereby swear and affirm all statements made herein are true and corrected supported by true attachments, all sworn pursuant to 28 USC § 1746.

So Sworn on 09/25/2023

Jeffrey E Akard

Certificate of Service

I certify a true and complete Reply Brief was served upon AUSA 5400 Federal Plaza, Ste 1500, Hammond, IN 46320, by U.S Mail postage pre-paid First class on 09/28/2023.

Jeffrey E Akard

Jeffrey E. AKARD 199176 NCCF NCN 1000 Van Nuys Rd, New Castle IN 47362

Attachments

1 USSG § 4A1.2(F) and § 4A1.1(c)

2 Georgia First Offenders Act
June 29, 2000 "deferred" proceeding
Jan. 25, 2003 "discharged w/o adjudication of guilt"
Ga Code § 42-8-60
Dec. 15, 2015 Order "not sentenced to prison"

3 Gov. Sent. Memo "USSG 4A1.2(F) Allows 2 Points To Be Assessed"
U.S. v. Shazier, 179 F.3d 1317 (11th Cir. 1999) La. First Off. Act and this person went to prison + violated parole - irrelevant
US v. Jones, 448 F.3d 958, 9060-62 (2006) ILL. law and AKard does Not have a prior sentence of Imprisonment - irrelevant

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

§ 4A1.2 (f)

(f) Diversionary Dispositions

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense. See 25, Jan. 2003 Ga. FOA "A. W/o court adjudication of guilt."

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

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1-2

ATTACHMENT - A

770 822 7155 P.04

IN THE SUPERIOR COURT of GWINNETT COUNTY
STATE of GEORGIA

FIRST OFFENDER FINAL DISPOSITION ✓

CRIMINAL ACTION NO. Accs. 00-B-0276-4

VS

OFFENSE(S) Ct. 1. Carrying a Concealed Weapon
Ct. 2. Aggravated Assault
Ct. 3. Obst. of a LEO

Jeffrey Earl Akard

May/June TERM, 2000 ☐ AMENDED SENTENCE

OTN: 796404051

☑ FELONY SENTENCE Ct. 2 ☐ MISDEMEANOR SENTENCE Ct. 1 + 3

☑ PLEA: RACE: W SEX: M DOB: 8-15-74

☐ NEGOTIATED ☐ TRIAL: ☐ VERDICT: ☐ OTHER:

☑ GUILTY on Ct(s) 1, 2 + 3 ☐ JURY ☐ GUILTY on Ct(s) ☐ NOLLE PROS Ct(s)

☐ NOLO CONTENDERE ☐ BENCH ☐ NOT GUILTY on Ct(s)

☐ GUILTY to LESSER INCLUDED OFFENSES ☐ GUILTY of INCLUDED OFFENSES

☐ Defendant was advised that s/he has a right to have the sentence reviewed by the Superior Court Sentence Review Panel. (See separate order)

☑ FIRST OFFENDER TREATMENT

WHEREAS, said defendant has not previously been convicted of a felony nor taken advantage of the provision of the *First Offender Act* (Ga. Laws 1968, p.324),
NOW, THEREFORE, the defendant consenting hereto, it is the judgment of the Court that no judgment of guilt be imposed at this time, but that further proceedings are deferred and defendant is hereby sentenced to confinement for the period Ct. 2 - * 5 years serve 53 days at Pretrial Det. Center

and/or placed on probation for the period of 4 years + 282 days from this date provided that said defendant complies with the following and special conditions herein imposed by the Court as part of this sentence; PROVIDED, further, that upon violation of the terms of probation, the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms of probation, or upon release of the defendant by the Court prior to the termination of the period thereof, the defendant shall stand discharged of said offense charged and shall be completely exonerated of guilt of said offense charged. Let a copy of this Order be forwarded to the Probation System of Georgia and the Identification Division of the Federal Bureau of Investigation.

☑ GENERAL CONDITIONS of PROBATION

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

☑ 1) Do not violate the criminal laws of any governmental unit.
☑ 2) Avoid injurious and vicious habits, especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.
☑ 3) Avoid persons or places of disreputable or harmful character.
☑ 4) Report to the Probation or Parole Supervisor as directed and permit said supervisor to visit you at home or elsewhere.
☑ 5) Work faithfully at suitable employment insofar as may be possible.
☑ 6) Do not change your present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation or Parole Supervisor.
☑ 7) Support your legal dependents to the best of your ability.

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA
2000 JUN 30 AM 11:23
CLERK

☑ OTHER CONDITIONS of PROBATION

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of $ 1,000.00; Plus $50 or 10%, whichever is less, UP of OCGA §15-21-73; Plus 10% of the fine for the J.C.S. Fund UP of OCGA §15-21-90; Plus 5% of the fine for the Crime Victims' Assistance Program UP of OCGA §15-21-130; Plus $25 or 10% of fine, whichever is less, for DUI victims' compensation UP of OCGA §15-21-112, if applicable; Plus 50% of the fine for the Drug Abuse Treatment & Education Fund UP of OCGA§15-21-100, if applicable;Plus $50.00 on felony sentence fro Crime Lab surcharge;Plus $25.00 in each DUI or misdemeanor drug case for Crime Lab surcharge; Plus 10% of fine for Brain & Spinal Injury Trust Fund, if applicable (only DUI cases);And pay restitution of $; And pay a probation supervision fee in the amount of $ 23.00 per month; And shall perform hours of community service as directed by the Gwinnett County Probation Dept.: And, if checked, ☑, shall submit to mental health and/or drug and alcohol evaluation and/or treatment per the attached addendum; And, if checked, ☐, shall, as a Special Condition of Probation, be assigned to the Intensive Probation Supervision Program per attached addendum.

* Credit for time served since 4-8-2000. Sentence - Ct. 2 - 5 years Serv. 53 days
Cts. 1+3 - 12 months Probation
Concurrent to each + Ct. 2

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

Defendant was represented by Attorney Joe Randazzo Gwinnett County Court-Appointment [Appointment]

Court Reporter Lynn Rajani Judge

ORDERED this 29th day of June, 2000 SR. Judge (PRINT) H. M. Stark

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WHITE - Clerk YELLOW - D. A. PINK - P. O. BLUE - Defense Attorney

AOC NCR Frm 62[20] 11/9

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GEORGIA DEPARTMENT OF CORRECTIONS
COMMUNITY CORRECTIONS DIVISION

STATE OF GEORGIA

VS

Jeffrey Earl Akard

Docket No. 00B-0276-4

County of Gwinnett

In the Superior **Court**

PETITION FOR DISCHARGE OF DEFENDANT (FIRST OFFENDER ACT)

COMES NOW THE undersigned Ronald Barnett, Probation Officer II respectfully states to this Honorable Court that Jeffrey Earl Akard was on the 29th day of June, 2000 placed on probation with said defendant's consent under the provisions of the Act for Probation of First Offenders, (OCGA 42-8-60 et. seq) and with further proceedings being deferred in accordance with said Act for a period of 5 years

THE DEFENDANT being eligible for discharge as shown by having fulfilled the terms of said probation, and upon review of the Defendant's criminal record as on file with Georgia Crime Information Center (attached hereto);

WHEREFORE, it is respectfully requested that the above-named defendant be discharged under the provisions of said Act.

This 23d day of January, 2003.

Ronald Barnett

Ronald Barnett, Probation Officer II
Gwinnett Judicial Circuit

ORDER OF DISCHARGE

WHEREAS, the above named defendant, having been placed on probation on the 29th day of June, 2000, for a period of 5 years; $1,250 Fine; Alcohol/Drug Evaluation in accordance with the provisions of the Probation for First-Offenders Act (OCGA 42-8-60, seq.) without an adjudication of guilt, and .....

WHEREAS, this Court having been petitioned by the Defendant's Probation Officer and having reviewed the Defendant's criminal record showing eligibility for sentencing;

WHEREFORE IT IS ORDERED AND DIRECTED that in accordance with the provisions of the Probation for First-Offenders Act (OCGA 42-8-60, seq.):

A. The defendant be discharged without court adjudication of guilt;
B. That this discharge shall completely exonerate the defendant of any criminal purpose;
C. That this discharge shall not affect any of said defendant's civil rights or liberties; and
D. The defendant shall not be considered to have a criminal conviction.
E. This discharge may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.

CLERK SUPERIOR COURT GWINNETT COUNTY GEORGIA FILED IN OFFICE 2003 JAN 24 PM 2:43 TOM LAWLER, CLERK

IT IS FURTHER ORDERED AND DIRECTED that the Georgia Crime Information Center be notified of this discharge in accordance with the provisions of said Act as amended.

ORDERED THIS 23d day of January, 2003.

Michael C Clark

Judge Michael C. Clark
Gwinnett Superior Court

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Tel: (404) 651-5198(direct), (404) 657-9350 (general)
Fax: (404) 651-5282

B. Judicial sealing or expungement of adult felony convictions:

"First Offender Act": First offenders prosecuted under Georgia law may be placed on probation *or sentenced to confinement* without an adjudication of guilt. Ga. Code. Ann. § 42-8-60. Upon successful completion of probation or sentence, the offender is discharged without adjudication, which "completely exonerate[s] the defendant of any criminal purpose and shall not affect any of his civil rights or liberties." § 42-8-62(a). While those sentenced to confinement are considered "convicted" during the period of incarceration, § 42-8-65(c), after discharge the offender is "not considered to have a criminal conviction," § 42-8-62(a), and "is to suffer no adverse effect upon his civil rights or liberties." 1990 Ga. Op. Att'y Gen. 105 (1990). In addition, an offender sentenced to probation under this scheme is not disqualified from jury service during the probation period, *id.*, or from voting, 1974 Op. Att'y Gen. 48 (1974). A discharge restores firearms privileges, § 16-11-131(f), and the conviction not be used to disqualify the offender from employment. § 42-8-63. No provision for sealing or expungement, however. Also, a finding of guilt for a discharged offense "may be pleaded and proven as if an adjudication of guilt had been entered and relief had not been granted" to discharge the offender pursuant to this procedure. § 42-8-65(a).

Expungement of noncriminal records only if no charges filed. Ga. Code Ann., § 35-3-37.

C. Administrative certificate-

N/A

III. Nondiscrimination in Licensing and Employment:

Georgia's general law governing professional licensure provides that conviction of a felony or any crime involving moral turpitude may be grounds for revocation or refusal of a license, without regard to whether it is related to the practice of the licensed business or profession. *See* Ga. Code Ann. § 43- 1-19(a)(3), (6).

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,
Plaintiff,

v.

JEFFERY EARL AKARD,
Defendant.

CASE NO. 00-B-0276-4

ORDER CLARIFYING SENTENCE

The Court's SENTENCE dated June 29, 2000 is hereby clarified as follows:

The Defendant was not sentenced to a prison sentence. The Defendant was given credit for time served while he was held prior to trial at the Pretrial Diversion Center.

SO ORDERED this 16 day of Dec., 2015.

Randy Rich, Judge
Superior Court of Gwinnett County

Copies to: Defendant, ADA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	Cause No. 2: 07 CR74
	)	
JEFFREY E. AKARD	)	

GOVERNMENT'S SENTENCING MEMORANDUM

Comes now the United States of America, by David Capp, United States Attorney for the Northern District of Indiana, and provides the Court a sentencing memorandum in support of its objections listed at paragraphs 77 and 132 of the Pre-Sentence Report.

Background

The government has objected to the Pre-Sentence Report (PSR) regarding the defendant's criminal history. The government believes that the defendant should be assessed 2 points for the criminal conduct that occurred in Gwinnett County, Georgia in 2000 as described in the PSR at paragraphs 77-78, resulting in criminal history category III.

In April 2000, the defendant was charged with three offenses in Gwinnett County, Georgia. In late June 2000, the defendant entered a guilty plea to all three charges. He was sentenced, pursuant to Georgia's First Offender Act, "to confinement for the period 5 years serve 83 days at Pretrial Det. Center and or placed on probation for the period of 4 years + 282 days ..." on the aggravated assault charge and placed on 12 months probation for the carrying a concealed weapon and obstruction of a law enforcement charges. See, attached Exhibit A, Sentencing Order.

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The Defendant Received A "Prior Sentence" in Gwinnett County

The Gwinnett County Judgment establishes the defendant plead guilty to three offenses. U.S.S.G. § 4A1.2(f) requires counting diversionary dispositions "resulting from a finding or admission of guilt ... even if a conviction is not formally entered ..." As a result, the Gwinnett County guilty pleas are considered a prior sentence under U.S.S.G. § 4A1.2. See, also *United States v. Jones,* 448 F.3d 958, 960-962 (2006) ("And it is the fact of that prior wrongdoing, not how the judicial disposition is labeled, which matters in calculating criminal history.[citation omitted]; U.S.S.G. § 4A1.2(f). Counting diversionary dispositions that involve admission or judicial determination of guilt reflects 'a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency. U.S.S.G. § 4A1.2 App. Note 9.; 4A1.2(f).'").

U.S.S.G 4A1.2(f) Allows 2 Points To Be Assessed

Here, because the defendant plead guilty and received a sentence of more than sixty days, U.S.S.G. 4A1.1(b) requires 2 points be added to the defendant's criminal history. U.S.S.G. § 4A1.2(f) requires prior sentences be counted under U.S.S.G. § 4A1.1(c) which adds "1 point for each prior sentence not counted in (a) or (b) ..." The plain language of U.S.S.G. § 4A1.1(c) requires adding 2 points for the Gwinnett County conduct because the sentence imposed was more than sixty days. In a very similar case, *United States v. Shazier*, 179 F.3d 1317 (11th Cir. 1999), the defendant claimed he should only receive 1 point, pursuant to U.S.S.G. 4A1.2(c), because he was sentenced under

3-2
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Louisiana's first offender law, making it a diversionary sentence under 4A1.2(f). The district court and the Eleventh Circuit disagreed and assessed 2 points under 4A1.2(b) because he served six months incarceration.

> Section 4A1.1(c), by its terms, only applies to sentences not already counted in subsection (a) or (b). *See* U.S.S.G. § 4A1.1(c)"Add one point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.") It does not remove from those sections sentences that are required to be counted thereunder. Since the six-month sentence was already required to be counted under subsection (b), subsection © is inapplicable to it.

Shazier, 179 F.3d at 1318.

WHEREFORE, the government requests that this Court assess 2 criminal history points for the conduct described in paragraphs 77-78 of the PSR and increase the criminal history to category III in paragraph 87 of the PSR.

Respectfully submitted,
DAVID CAPP
UNITED STATES ATTORNEY

S/Gary T. Bell
Gary T. Bell
Assistant United States Attorney
Internet Address: gary.bell@usdoj.gov

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THE COURT: I agree with the Government. I think that this was a prior admission of guilt, even though not an adjudication of guilt.

And so, under 4 A 1.2 F, it should be included, and you then make -- have to make a determination of categorizing the prior offense. And if under 4 A 1.1 it's a prior sentence of imprisonment of at least 60 days, then two points are added. And this was a prior sentence of imprisonment of more than 60 days; it was 83 days.

And so, I think that it's a two point enhancement under 4 A 1.1 B for that reason. There is a larger point here that I think is kind of getting lost is what we are attempting to determine is is the Defendant a recidivist. And I find the case of United States versus Jones 448 F. Third, 958 at 960, it's a Seventh Circuit case from 2006 to really be the most persuasive.

And what that instructs District Courts to do is to focus on what the Defendant actually did in the prior episode, not how somebody attempted to characterize it.

And there -- to me there is no question that Mr. Akard in Georgia in 2000 went into some facility -- some bar or restaurant and displayed a weapon, and whether it was fired or not, I don't recall. So the conduct occurred.

How Georgia actually characterized it, is a little beside the point in the sense of what you are attempting to do is add additional penalty for people who are recidivists. And that's an

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22 months
14 months

Criminal complaint
Apr 20
May 17

Federal Sentencing Guide

OFFENSE LEVEL		CRIMINAL HISTORY POINTS					
		0 or 1	2 or 3	4,5,6	7,8,9	10,11,12	13+
		I	II	III	IV	V	VI
A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	21 24-30	27-33	33-41	41-51	46-57
	17	24-30	23 27-33	30-37	37-46	46-57	51-63
	18	27-33	26 30-37	33-41	41-51	51-63	57-71
	19	30-37	28 33-41	37-46	46-57	57-71	63-78
	20	33-41	31 37-46	41-51	51-63	63-78	70-87
	21	37-46	33 41-51	46-57	57-71	70-87	77-96
	22	41-51	39 46-57	51-63	63-78	77-96	84-105
	23	46-57	43 51-63	57-71	70-87	84-105	92-115
	24	51-63	48 57-71	63-78	77-96	92-115	100-125
	25	57-71	53 63-78	70-87	84-105	100-125	110-137
	26	63-78	60 70-87	78-97	92-115	110-137	120-150
	27	70-87	66 78-97	87-108	100-125	120-150	130-162
	28	78-97	74 87-108	97-121	110-137	130-162	140-175
	29	87-108	82 97-121	108-135	121-151	140-175	151-188
	30	97-121	92 108-135	121-151	135-168	151-188	168-210
	31	108-135	103 121-151	135-168	151-188	168-210	188-235
	32	121-151	116 135-168151	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-LIFE
	38	235-293	262-327	292-365	324-405	360-LIFE	360-LIFE
	39	262-327	292-365	324-405	360-LIFE	360-LIFE	360-LIFE
	40	292-365	324-405	360-LIFE	360-LIFE	360-LIFE	360-LIFE
	41	324-405	360-LIFE	360-LIFE	360-LIFE	360-LIFE	360-LIFE
	42	360-LIFE	360-LIFE	360-LIFE	360-LIFE	360-LIFE	360-LIFE
	43	LIFE	LIFE	LIFE	LIFE	LIFE	LIFE

4 = 48
5 = 60
6 = 72
7 = 84
8 = 96
9 = 108
10 = 120
11 = 132

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(Rev. 11/01/2007)

	Criminal History Points	
	II	III
Level 32	135-168	151-188

135 Plea agreement says low end

170 received

Difference of 35 months

Offense Level Computations

50. The 2007 edition of the Guidelines Manual has been used in this case

Count One: Receiving Child Pornography - 18:2252(a)(2)

51. **Base Offense Level:** The United States Sentencing Commission Guideline for a violation of 18 U.S.C. §2252(a)(2) is found in U.S.S.G. §2G2.2 and calls for a base offense level of 22. 22

What is that crime is (52.)

Specific Offense Characteristic: Pursuant to 2G2.2(b)(2), if the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels. In this case, there are depictions of prepubescent children. +2

53. **Specific Offense Characteristic:** Pursuant to 2G2.2(b)(4), if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels. +4

Never showed evidence from my computer - Saying in E-mail it showed he sent 3rd set

95% of cases (54.)

Specific Offense Characteristic: Pursuant to 2G2.2(b)(6), if the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, increase by 2 levels. +2

From Mainly person (55.) 1 months high speed internet makes it easy to mass

Specific Offense Characteristic: Pursuant to 2G2.2(b)(7)(D), if the offense involved 600 or more images, increase by 5 levels. +5

56.1 **Victim Related Adjustments:** None 0

57. **Adjustment For Role In The Offense:** None. 0

58. **Adjustment for Obstruction of Justice:** None 0

59. **Chapter Four Enhancements:** None. 0

"Does sex Robots" weird shit.

60. **Offense Level (Subtotal):** 35

61. **Adjustment For Acceptance of Responsibility:** Pursuant to U.S.S.G. §3E1.1(a), the defendant warrants a two (2) level reduction in the offense level for acceptance of responsibility. He has truthfully admitted to the conduct that comprised the offense of conviction and has not falsely denied any relevant conduct. He was also timely in the manifestation of his acceptance of responsibility. -2

62. The government intends to recommend that the defendant receive the additional one (1) level reduction in the offense level for acceptance of responsibility pursuant to U.S.S.G. §3E1.1(b). The adjusted offense level appears to be sixteen or greater. He has assisted authorities in the investigation and prosecution of his involvement in the offense. He also timely notified authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. -1

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63. Total offense level: 32

75. The items located and secured can be found in the offense conduct section of this report. The charges have been dismissed without prejudice.

PART B. DEFENDANT'S CRIMINAL HISTORY

Since 1981, Indiana State Law required that all defendants charged with felonies or misdemeanors be offered the right to representation by counsel in judicial proceedings.

Juvenile Adjudications

76. None.

Adult Adjudications

	Date of Arrest	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Pt
77.	04/08/00	Ct. One: Carrying a Concealed Weapon Ct. Two: Aggravated Assault Ct. Three: Obstruction of Officers Gwinette County, Georgia 00B-0276-4	06/29/00: First Offender Act, Cts. One and Three 12-Months probation, $1,000 Fine, Ct. Two: 5 years in jail, suspend all but 83 days at the pretrial (detention center. Diversion 01/23/03: Discharged from Probation (First Offender Act) Without a finding of guilt.	4A1.2(f)	2

78. According to records obtained, the details of Count One are as follows: on or about the 8th day of April, 2000, the defendant carried his personal firearm, a Colt 380 Pistol, in a manner not open and fully exposed to view outside of his home or place of business, contrary to the laws of the State of Georgia. The details of Count Two are as follows: on or about the 8th day of April, 2000, the defendant, did then and there unlawfully make an assault upon the person of Fran Brogdon, with a Colt 380 Pistol, a deadly weapon, by discharging the firearm inside the River Island Grill, thereby placing said person in reasonable appreshension of immediately receiving a violent injury, contrary to the laws of the State of Georgia. The details of Count Three are: on or about the 8th day of April, 2000, the defendant did then and there knowingly and wilfully hinder Officer C. M. Meved of the Gwinnett County, Georgia, Police Department, a law enforcement officer, in the lawful discharge of his official duties by refusing to obey said officer's commands to lay on the ground after discharging his pistol inside the establishment, contrary to the laws of the State of Georgia.

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79.	09/16/01	Ct. One: Reckless Driving Gainesville, Georgia	10/17/02: Guilty, ordered to serve community service and pay $600.	4A1.2(c)(1)	0

80. No narrative was available.

81.	11/06/02	Ct. One: Operating While Intoxication/Endangering a Person Ct. Two: Driving Left of Center Miami County, Indiana 52D01-0211-CM-00454	03/24/03: Guilty - 1-Year Miami, Indiana, County Jail, suspended for 1 year probation. 03/24/04: Probation Termination - Successfully.	4A1.1(c)	1

82. A companion charge of Driving Left of Center was dismissed pursuant to the plea. The defendant was represented by counsel in this matter.

83.	04/12/04	Ct. One: Operating While Intoxicated/Endangering a Person Ct. Two: Operating With a B.A.C. of .15% or Above. Miami County, Indiana 52D01-0404-FD-00046	07/26/04: Sentenced as a Class A Misdemeanor to 1 year Miami County, Indiana, Jail, suspended, for 1 year of Probation. 09/07/05: Petition to Revoke Probation Filed. 10/13/05: Petition to Revoke Probation Dismissed - Probation Terminated Successful.	4A1.1(c)	1

84. The defendant was represented by counsel in this matter. Companion charges of Operating With a Prior OWI within 5 years and Unsafe Lane Movement were dismissed. He was represented by counsel in this matter. Officials in the Miami County, Indiana, Probation Department advised the violation was filed, due to the defendant having outstanding monetary obligations. This obligations were paid prior to the deadline, therefore, he was released successfully.

85.	04/27/93	Minor in Possession Knox County, Indiana 42D02-9304-CM-515	04/15/93: Entered Deferral Program. 11/30/93: Violation of Deferral Program. 12/03/93: Dismissal of Violation. Case termed Successful. Dismissed.	4A1.2(f)	0

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APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago IL

Jeffrey E. AKARD,
Appellant,
V. No. 2:07-CR-074-PPS-APR
United States of America,
Appellee.

Appellant's Brief

COMES NOW, appellant pro-se, JEFF AKARD, moves this Court For an Order granting a Request For Leave For review of appellant's Petition For Extraordinary Relief In Nature of Writ of Error Coram Nobis Filed March 10, 2023 [DKt. 107] originating in U.S. Dist. Court, Northern Dist of Indiana, Hammond Div. as In re Akard v. United States of America, but not provided a seperate civil action cause number.

Respectfully Submitted,
Jeffrey E. AKARD
199176 NCCF
1000 Van Nuys Rd
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Jurisdictional Statement

On March 10, 2023, AKard Filed For relief by Petition for Extraordinary Relief In Nature of Error Coram Nobis under All Writs Act, 28 USC § 1651(a), which provided jurisdiction to district courts, see United States v. Morgan, 346 U.S. 502, 510-11, 74 S.Ct. 247 (1954); and by 28 USC § 3231, see U.S. v. Denedo, 556 U.S. 904, 129 S.Ct. 2213, 2220 (2009). The All Writs Act gives district courts to grant a Writ of Coram Nobis when appropriate, see United States v. Wilkozek, 822 F.3d 364 (7th Cir. Ct. App. 2006). The common-law writ of coram nobis is used in criminal cases where there is no other remedy available to obtain review, and also a correction or vacation, of a judgment by the court in which the judgment was rendered because error of Fact, which were not apparent on the record, that affect the validity and regularity of the proceedings. The district court's error/defect was such as to deprive AKard of his Constitutional rights.

On March 24, 2023, district court denied the Writ, [dkt. 107]. A motion For Reconsideration of 'Sound Reasons' Denial of Petition was sent April 13, 2023. Notice of Appeal was sent within 60 days of denial along with Docketing Statement as provided by court's rules.

This Court of Appeals has jurisdiction to review the district court's denial of coram nobis pursuant 28 USC § 1291.

Based on the standards articulated in United States v. Orocio, legal questions receive de novo review while clear error review applies to Factual Findings, 645 F.3d 630, 635 (3rd Cir. 2011), abrogated on other grounds by Chaidez v. United States, 568 US 342, 133 S. Ct. 1103 (2013).

Statement of the Issues

Appellant stands to have 70 months incarceration reduced From his 2009 Indiana State sentence by a district court's correction to 2008 Federal court's error to USSG § 4A1.2(F) being assessed (2) two criminal history points by § 4A1.1(b), instead of plain english USSG assess (1) point by § 4A1.1(c).

Statement of the Case

On May 17, 2007, Akard was indicted under 18 USC § 2252(a)(2) and issued a Warrant From his Indiana State custody holding in Tippecanoe Co. jail, where FBI agent Taylor took Akard into Federal custody without reading him his rights or charges. Akard was questioned three times by the government, that he denied, because Akard had never met with an attorney.

On Feb. 19, 2008, Akard signed a pre-sentence plea agreement based on appointed counsel's, James N. Thiros, advise he'd get an 84-96 month sentence, which started Const. rights viol.

On Feb. 22, 2008, AKard plead guilty to Count One that Forced an appeal Waiver or government would go to trial Without It.

On July 23, 2008, Court abused its discretion by an improper calculation of USSG sentence For 170 months incarceration.

On Nov. 14, 2008, attorney Thiros Filed a 'sure Fail' direct appeal that Failed to raise ineffective assistance of counsel, on himself, For advising AKard to sign away his appeal rights on Feb. 19, 2008, before errors occurred on July 23, 2008.

On Dec. 17, 2015, AKard received an Order Clarifing Sentence From Gwinnett Co. Superior Court's Judge Rice - stating that AKard never received a prison sentence and under the (GFOA) Georgia First Offenders Act, AKard was "discharged with NO Finding of guilt."

Summary of Argument

District court continues to deny a correction to USSG error by the plea agreement appeal waiver. Coram Nobis is a seperate civil action not barred by appeal Waivers, ID Wilkozek. Clearly USSG § 4A1.2(F) is assessed (1) one criminal history point by § 4A1.1(c), where Federal Judge Simon said, on record, he wanted to give a guideline sentence, but erred when he assessed (2) two points by § 4A1.1(b). A reasonable jurist would Find district Court's rulings on Const. 5, 6, + 8th Amend. claims are debatable or Wrong. see Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000);

see also Miller-El v. Cockrell, 537 U.S. 322, 366, 123 S.Ct. 1029 (2003) (a reasonable jurist could debate whether the petition [coram nobis] should have been resolved in a different manner or that issues presented were "adequate to deserve encouragement to proceed Further"), as Constitutional 5th, 6th, 8th or 14th Amend. rights violations,

Argument

The argument before this Court of Appeals is against the district court's abuse-of-discretion.

1. Incorrect point assessment of USSG § 4A1.2 (F). The district court abused its' discretion when Judge Simon stated, "I am going to give a guideline sentence in this case." (sent. hr. p. 70) and "I think that a guideline sentence is appropriate." (sent. hr. p. 72). However, USSG § 4A1.2 (F) - Diversionary Disposition (Appx. p. 11) states, "is counted as a sentence under § 4A1.1 (c)", as (1) one criminal history point. When Judge Simon erred by § 4A1.1 (b) as (2) two points, the court raised Akard From 3 total points to 4, which increased Category II to Category III. Thus, Akard's sentence range at 32 went From 135-168 to 151-188. (see Appx. p. 19).

A district court's review under abuse-of-discretion is used regardless of whether a sentence imposed is inside or outside USSG range. see Gall v. United States, 522 U.S. 38, 51, 128 S.Ct. 597 (2007). A significant procedural error occurs by improper calculating USSG range.

2. Enforcement of appeal waiver.

The district court abuses its' discretion for Judge Simon to enforce a plea agreement appeal waiver signed Feb. 19, 2008, against Judge Simon's error to USSG sentence on July 23, 2008. District court did not have to enforce the waiver on all Akard's prior filings to collateral attack court's error by §2255, §2241, Nunc Pro Tunc, and the present Writ of Error Coram Nobis - to construe the petition as a 'sure fail' §2255, then use his own discretionary enforcement of an appeal waiver. Judge Simon made the error to USSG 4A1.2(F), used Illinois and Louisianna caselaw for a Georgia issue, and could have exercised his authority to correct it, but refuses to.

A voluntary and knowing waiver of an appeal is not enforceable where court relies on a constitutionally impermissible factor like when counsel is 6th Amend. ineffective in negotiation of plea agreement, see Dowell v. United States, 694 F.3d at 902 (7th Cir. 2016). Akard entered into a plea based on counsel's advice of 84-96 month sentence (Appx. p. 40), and that the government threatened to go to trial with 2 counts if appeal waiver wasn't included.

3. Court misused U.S. v. Morgan.

The district court abused its' discretion with misapplication of United States v. Morgan, 346 U.S. 502, 511, 74 S. Ct. 247 (1954) is a controlling precedent for an All Writs Act Writ of Error Coram Nobis, but the district court used the Dissent quote, not controlling

Morgan, 346 U.S. at 505 n.4, "This motion is of the same general character as one under 28 USC § 2255." (Appx. p. 54 Opinion and Order doc 108 p. 3 of 6). The Dissent Focus was Rule 60 (b) argument that district court combined statements in error.

Akard provided extraordinary relief can be granted to his petition by showing: 1) Petitioner is no longer in Federal custody; 2) he suffers continuing collateral consequences from the error; 3) did provide sound reasons for failing to gain earlier relief; 4) no remedy at time of trial, because he didn't go to trial; and 5) error was Fundamental to court's assessment of 4A1.2(E).

District court found at Docket 108 p. 3-4 of 6, "Akard has made a showing [standing] that he suffers continuing consequences of the asserted sentencing errors because he cannot seek to reduce time remaining on his State court sentence." (Appx. p. 54). Which presents an 8th Amend. viol. and furthermore denied on, "multiple arguments based on ineffective assistance of counsel, and they were denied.", but never ruled on based on court's 'abuse of discretion' to Judge Simon's own USSG sent. error.

Conclusion

Granting this Writ of Error Coram Nobis would provide relief at a minimal cost/effort for parties to hold a video hearing to correct the USSG § 4A1.2(E) assessment for (1) one criminal history point; correcting total crim. history points to (3) three; reduces criminal history category to II; lower sentencing

range at offense level 32 to 135-168 where government had reccomended lowest in range being 135 months; and allows the record to be corrected of error 170 months to 135 month Federal sentence. Whereby, Akard could seek an Indiana State Modification to a Consecutive Federal sentence of 35 months, at 2 For 1 credit, being a 70 month reduction For his current State sentence, and restoring a substantial Const. right.

Respectfully Submitted,

Jeffrey E. Akard

I hereby declare by penalty of perjury pursuant 28 USC 1746, the Following Motion and Appendix are true and correct to the best of my knowledge.

So Sworn on 05/10/23

Jeffrey E. Akard

Certificate of Compliance

The Following Motion & Attachments comply with page + word limits.

Certificate of Service

I certify the Following was presented to the NCCF law library staff For copies and For US Mail postage First-class prepaid and addressed to: AUSA 5400 Federal Plz Hammond IN 46320. on 05/10/23

1000 Van Nuys Rd
New Castle IN 47362

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

23-2086

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEFFREY E. AKARD, Defendant-Appellant.	))))))))	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division No. 2:07-CR-74 Hon. Philip P. Simon, Judge

MOTION TO DISMISS APPEAL

Comes now the United States of America, by its counsel, Clifford D. Johnson, United States Attorney for the Northern District of Indiana, through David E. Hollar, Assistant United States Attorney, and hereby moves to dismiss Defendant Jeffrey E. Akard's appeal in light of his plea agreement (attached as Exhibit 1) waiving his right to appeal his sentence. His brief on appeal challenges his sentence. In a two paragraph argument he (at best) "offers only flimsy arguments for escaping" the waiver. *United States v. Watson*, 48 F.4th 536, 543 (7th Cir. 2022). Because binding authority from this Court establishes he cannot appeal, this Court, consistent with *Watson*[1] should dismiss the appeal without requiring merits

[1] Per the Court's direction in *Watson*, the United States has filed its brief within one week of this Court's September 11, 2023, order directing the government to file a brief and "well before its own brief deadline" of October 11, 2023. *Watson*, 48 F.4th at 542.

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briefing, just as it previously dismissed Akard's direct appeal. *United States v. Akard*, No. 08-2947 (7th Cir. Jan. 27, 2009).

PROCEDURAL HISTORY

In February 2008, Akard pled guilty pursuant to a plea agreement to receiving child pornography. R. 24, 28. In the plea agreement, Akard agreed to:

> expressly waive my right to appeal or to contest my conviction and my sentence imposed or the manner in which my conviction or my sentence was determined or imposed, to any Court on any ground, including any claim of ineffective assistance of counsel unless the claimed ineffective assistance of counsel relates directly to this waiver or its negotiation, including any appeal under Title 18, United States Code, Section 3742 or any post-conviction proceeding, including but not limited to, a proceeding under Title 28, United States Code, Section 2255.

R. 24, ¶ 7(i)

At sentencing the district court accepted the plea agreement. R. 55, at 23. It also resolved a dispute between the parties about whether Akard should receive criminal history points for a 2000 Georgia offense, concluding that he should receive two points. R. 55, at 8-22. This finding placed Akard in criminal history category III and produce a 151-188 month advisory guideline range. R. 55, at 22. The court ultimately imposed a 170 month sentence. R. 44; R. 55, at 73.

Akard appealed, attempting to challenge his criminal history point calculation. *United States v. Akard*, No. 08-2947 (7th Cir. Nov. 17, 2008). On

the government's motion this Court dismissed without requiring a responsive brief because "Akard's waiver in his plea agreement does not make any exception for legal issues and there is no indication that his plea waiver was not knowing and voluntary." *United States v. Akard*, No. 08-2947 (7th Cir. Jan. 27, 2009).

Akard next filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255. R. 62. The district court found "that Akard made his plea knowingly and voluntarily," so "the waiver in the plea agreement bars ... Akard's claim." R. 70, at 5. The district court denied a certificate of appealability. R. 79. This Court dismissed Akard's untimely appeal. *United States v. Akard*, No. 11-3023 (7th Cir. Oct. 11, 2011).

Akard next sought permission to file a successive Section 2255 motion, which this Court denied. *United States v. Akard*, No. 16-1265 (7th Cir. Feb. 19, 2016). He then filed a purported motion to correct his sentence "nunc pro tunc," which the district court construed as a successive Section 2255 motion and denied. R. 87. This Court rejected an appeal, agreeing that, however labeled, he could not relitigate his claims. *United States v. Akard*, No. 17-1515 (7th Cir. Aug. 22, 2017).

Akard has now completed his federal term of imprisonment and begun serving a 94 year state court rape sentence. See generally *Akard v. State*, 937 N.E.2d 811 (Ind. 2010); *Akard v. State*, 924 N.E.2d 202, 205-206 (Ind. Ct.

App. 2010). In March 2023, he filed a petition for extraordinary relief/writ of coram nobis. R. 107. The district court denied the motion. R. 108. Akard has appealed, raising as his sole issue that his criminal history points were wrongly assessed at his 2008 sentencing. Br. 5, 7.

ARGUMENT

This Court's binding precedents establish that Akard's plea agreement bars him from challenging his sentence. The Court interprets plea agreements using "ordinary principles of contract law, though with an eye to the special public-interest concerns that arise in this context." *United States v. Malone*, 815 F.3d 367, 370 (7th Cir. 2016) (internal quotation omitted). It will "not ignore the plain language of the contract where there is no ambiguity" and will "give unambiguous terms in the plea agreement their plain meaning." *Id.* (internal quotation omitted).

Akard waived the "right to appeal or to contest ... my sentence ... including any appeal ... or any post-conviction proceeding...." R. 24, ¶ 7(i). He now asks this court in a post-conviction proceeding to reduce his federal sentence from 170 months to 135 months. Br. 10. The appeal waiver's text plainly precludes this challenge.

Akard offers a brief argument (Br. 8) that his appeal waiver should not be enforced because the district court relied "on a constitutionally impermissible factor," namely that his counsel was "ineffective in negotiation

of plea agreement." But the district court in Akard's first Section 2255 motion already rejected the factual premise that his counsel was ineffective. R. 70. Regardless, there is no "general 'constitutional-argument exception' to waivers in plea agreements." *United States v. Behrman*, 235 F.3d 1049, 1051 (2000); see also *United States v. Smith*, 759 F.3d 702, 707 (7th Cir. 2014) ("We have repeatedly said that a defendant's freedom to waive his appellate rights includes the ability to waive his right to make constitutionally-based appellate arguments.").

Akard does not cite, let alone distinguish the above legal authorities. He cites no decision of this Court—or any other—to explain why he should be permitted to ignore his express waiver of his right to challenge his sentence in a post-conviction proceeding today, particularly when that same waiver precluded the same challenge on direct appeal in 2009. There is no need to further waste judicial resources and proceed with full merits briefing. Instead, consistent with the procedures outlined in *Watson*, this Court should dismiss the appeal.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal.

Respectfully submitted,

CLIFFORD D. JOHNSON
UNITED STATES ATTORNEY

/s/ David E. Hollar
David E. Hollar
Assistant United States Attorney
5400 Federal Plaza, Suite 1500
Hammond, IN 46320
(219) 937-5500

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I certify that all participants in the case who are registered CM/ECF users received service by the CM/ECF system.

I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

Jeffrey Akard
199176
New Castle Correctional Facility
1000 Van Nuys Road
P.O. Box E
New Castle, IN 47362

/s/ Samantha K. Lee
Samantha K. Lee
Supervisory Legal Assistant

OFFICE OF THE U.S. ATTORNEY
E. Ross Adair Federal Building and U.S. Courthouse
1300 South Harrison Street, Room 3128
Fort Wayne, IN 46802-3489
Telephone: (260) 422-2595
Facsimile: (260) 426-1616

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cause No. 2: 07 CR 74 PS
	)	
JEFFREY E. AKARD	)	

PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, come now the United States of America, by Assistant United States Attorney Gary T. Bell, the defendant, Jeffrey Akard, and James Thiros, as attorney for the defendant, and show the Court they have entered into a plea agreement as follows:

1. I, Jeffrey Akard, have the ability to read, write and speak the English language.

2. I have received a copy of the Indictment and have read and discussed it with my lawyer, and believe and feel that I understand every accusation made against me in this case.

3. I have told my lawyer the facts and surrounding circumstances as known to me concerning the matters mentioned in the Indictment and believe and feel that my lawyer is fully informed as to all such matters. My lawyer has counseled and advised with me as to the nature and elements of every accusation against me and as to any possible defenses I might have.

4. I understand that I am entitled to have all of my rights which may be involved in this matter explained to me, and that I have the right to have any questions I may have answered for me.

5. I understand by pleading guilty I waive certain rights. The rights described below have been explained to me, as well as the consequences of my waiver of these rights:

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EXHIBIT 1

a. If I persisted in a plea of not guilty to the charge against me, I would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. I have the right to a jury trial. However, I may waive a jury trial in writing with the approval of the Court and the consent of the government.

b. If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. Myself and my attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that a defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of my guilt beyond a reasonable doubt, and that it was to consider each count of the Indictment separately.

c. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count separately, whether or not the judge was persuaded of my guilt beyond a reasonable doubt.

d. At a trial whether by a jury or a judge, the prosecution would be required to present its witnesses and other evidence against me. I would be able to confront those government witnesses and my attorney would be able to cross-examine them. In turn, I could present witnesses and other evidence in my own behalf. If the witnesses for me would not appear voluntarily, I could require their attendance through the subpoena power of the Court.

e. At a trial, I would have a privilege against self-incrimination so that I could decline to testify, and no inference of guilt could be drawn from my refusal to testify. If I desired to do so, I could testify in my own behalf.

f. At trial and at every stage of the proceedings, I have a right to an attorney, and if I could not afford an attorney one would be appointed for me.

g. In the event that I should be found guilty of the charge(s) against me, I would have the right to appeal my conviction on such charge(s) to a higher court.

6. I understand that under the U.S. Sentencing Guidelines, the Court, in light of an investigation by the United States Probation Office, will determine the applicable sentencing guideline range, and that the Court will determine all matters, whether factual or legal, relevant to the application of the U.S. Sentencing Guidelines. I understand that the U.S. Sentencing

Guidelines are advisory only, and that the specific sentence to be imposed upon me will be determined by the judge after a consideration of a pre-sentence investigation report, input from counsel for myself and the government, federal sentencing statutes, and the U.S. Sentencing Guidelines.

7. Notwithstanding the above, I have, with the assistance of counsel, entered into an agreement with the United States Attorney's Office as follows:

a. I will plead guilty to Count One of the Indictment charging me with receiving child pornography in violation of Title 18, United States Code, Section 2252(a)(2). I am pleading guilty to Count One because I am, in fact, guilty of the offense as stated in the Indictment.

b. I understand that the possible penalty that may be imposed upon me for my conviction on Count One is a mandatory minimum term of incarceration of five (5) years, up to a maximum term of twenty (20) years incarceration, a fine not to exceed $250,000, or a combination of both imprisonment and a fine, plus a special assessment of $100.00. Furthermore, I understand that upon my release from prison, I will also be placed on supervised release for at least five (5) years up to the rest of my life.

c. The Government and I have also entered into the following agreements which are not binding upon the Court, and I understand that if the Court does not follow these agreements, I will not be allowed to withdraw my guilty plea:

i. In recognition of my acceptance of responsibility for my offense conduct, I am entitled to a two point and, if eligible, an additional two point reduction in offense level for acceptance of responsibility; however, the government is not obligated to recommend I receive the acceptance of responsibility adjustment if I deny my involvement in the offenses, give conflicting statements of my involvement, or engage in additional criminal conduct.

ii. The Government recommends that the Court should impose a sentence equal to the minimum of the applicable sentencing guideline.

iii. The Government and I agree to the following U.S. Sentencing Guidelines calculations (2007 edition) based on Guideline 2G2.2: The base offense level is 22; 2 levels are added because the materials depict prepubescent minors; 4 levels are added because the materials portray sadistic or

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masochistic conduct or other depictions of violence; 2 levels are added because a computer was used during the offense; and 5 levels are added because more than 600 images of child pornography were involved.

d. The United States Attorney's Office for the Northern District of Indiana agrees that it not seek any additional charges regarding the child pornography contained on my Gateway desktop computer, Dell laptop computer and the Polaroid photos seized from my residence in Lafayette, Indiana on September 10, 2007. I understand that the government currently possesses no evidence that I have ever physically (in person) engaged in any acts of molesting minors. I hereby affirmatively state under oath that I have **never** engaged in any acts of molesting minors. If the government discovers this statement to be false, I understand that this paragraph is null and void and I could be prosecuted for additional crimes in the Northern District of Indiana. I further understand that the Government would not be obligated to make any of the non-binding recommendations and could seek additional sentencing enhancements, and I will have no right to withdraw my plea of guilty.

e. The Government agrees that it will dismiss Count Two of the Indictment after the sentencing hearing.

f. The Government agrees that it will not request the Court to either depart or deviate upward from a U.S. Sentencing Guideline sentence.

g. I agree to forfeit all of my rights, title and interest in a Dell Inspiron 6000 laptop computer, serial number (01) 07898349890528, service tag 8SBTN71 which facilitated my criminal activity in committing Count One of the Indictment. I further agree to the entry of an order of forfeiture for the computer. I further state that I am the sole owner of the computer.

h. I understand that if I violate any of the provisions of this plea agreement, including my continuing obligation to demonstrate acceptance of responsibility, the Government may at its option either (1) ask the Court to make a determination that I have breached a term in this agreement in which event I will at sentencing lose the benefit of all the non-binding promises made by the government in this agreement and I would have no right to withdraw my guilty plea, or (2) The Government could seek to have the Court declare this entire plea agreement null and void, in which event I can then be prosecuted for all criminal offenses that I may have committed.

i. I understand that the law gives a convicted person the right to appeal the conviction and the sentence imposed; I also understand that no two can predict the precise sentence that will be imposed, and that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for my

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EXHIBIT 1

offense as set forth in this plea agreement; with this understanding and in consideration of the government's entry into this plea agreement, I expressly waive my right to appeal or to contest my conviction and my sentence imposed or the manner in which my conviction or my sentence was determined or imposed, to any Court on any ground, including any claim of ineffective assistance of counsel unless the claimed ineffective assistance of counsel relates directly to this waiver or its negotiation, including any appeal under Title 18, United States Code, Section 3742 or any post-conviction proceeding, including but not limited to, a proceeding under Title 28, United States Code, Section 2255.

j. I also agree to waive all rights, whether asserted directly or through a representative, to, after sentencing, request or receive from the United States any further records, reports, or documents pertaining to the investigation or prosecution of this matter; this waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.

8. I am prepared to state to the Court the facts in this matter that cause me to believe that I am guilty of Count One of the Indictment, including acknowledging the following facts: In March of 2006 I was living in West Lafayette, Indiana. In July of 2006 I moved to Lafayette, Indiana. During this time period, I used my Dell laptop computer to receive emails through the Internet. I knew certain emails contained child pornography. I viewed the emails and attachments containing digital photographs depicting real girls, less than 18 years old, engaged in various forms of sexually explicit conduct. I stored some of the child pornography photographs on my computer. Because I used America Online (AOL) to receive email, I now know that the emails containing child pornography traveled across state lines because AOL does not have a computer server in Indiana.

9. I believe and feel that my lawyer has done all that anyone could do to counsel and assist me, and that I now understand the proceedings in this case against me.

10. I declare that I offer my plea of guilty freely and voluntarily and of my own accord, and no promises have been made to me other than those contained in this agreement,

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nor have I been threatened in any way by anyone to cause me to plead guilty in accordance with this agreement.

11. I understand and acknowledge that this agreement, once filed with the court, is a public document and available for public viewing.

S/Jeffery E. Akard	S/James Thiros
Jeffrey E. Akard	James Thiros
Defendant	Attorney for Defendant

APPROVED:

DAVID CAPP,
Acting United States Attorney

By: S/Gary T. Bell
Gary T. Bell
Assistant U. S. Attorney

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EXHIBIT 1

APPENDIX F

United States District Court
Northern District of Indiana
Hammond Division

In re Jeffrey E. AKARD, Petitioner,	)	
V.	)	No. 2:07-CR-074-PPS-APR
United States of America, Defendant.	)	2:09-CV-0214-PPS

Petition For Extraordinary Relief
In Nature of Writ of Error Coram Nobis
Under All Writs Act, 28 USC § 1651(a)

COMES NOW, Petitioner pro-se JEFF AKARD, moves this Court For an Order Granting Writ For correcting an USSG sentencing calculation error within his July 22, 2008, Federal sentencing hearing, that has present penal consequences of 70 months incarceration to Akard's 2009 Indiana State sentence and denial of U.S. Const. Eighth Amend. rights, pursuant to Fed. R. App. Proced. 21,

The All Writs Act gives district courts the power to grant a Writ of Coram Nobis when appropriate, see United States v. Wilkozek, 822 F.3d 364 (7th Cir. 2016); Is available to persons not held in Federal custody to attack a [sentencing error in assessing criminal history points]

Judgment of conviction For Fundamental defects, see Chaidez v. United States, 568 US —, 113 S.Ct. 1103, 1107 (2013); and where petitioner can demonstrate he is suffering continuing civil disabilities that the challenged error is of sufficient magnitude to justify the extraordinary relief, see Fleming v. United States, 146 F.3d 88, 89-90 (2nd Cir. 1998) (explaining that a writ of error coram nobis is "essentially a remedy of last resort For petitioners who are no longer in custody").

Standing

Petitioner stands to have 70 months incarceration reduced From his 2009 Indiana State sentence by this Court's correction to his 2008 Federal Court's assessment of (2) two Criminal History Points, that was Irregular and invalid, to USSG § 4A1.2(E) which clearly states Is counted as (1) one Criminal History Point under § 4A1.1(c). see (Attachment 1).

All Writs Act's purpose is to promote respect For judicial process by enabling a court to correct technical errors In a Final judgment previously rendered, see United States v. Denedo, 556 U.S. 904, 129 S.Ct. 2213, 2220 (2009), where challenged judgment is erroneous in Fact and not In law to the legal decision. The Supreme Court has compelled its use "to achieve justice", quoting United States v. Morgan, 346 US 502, 74 S.Ct. 247 (1954). Jurisdiction Is provided to this Court by 28 USC § 1651(a), Id.

Morgan at 505 n.4 and by 18 USC § 3231, ID. Denedo at 914. In the interest of justice and judicial interest in Finality and efficiency, this extraordinary relief can be granted by:

1. Petitioner is no longer in Federal custody to his 2009 170 month sentence ending April 19, 2019, see United States v. Mills, 221 F.3d 1201, 1203 (11th Cir. 2000)(the All Writs Act, 28 USC § 1651(a), grants authority to Federal Courts to issue a writ of error coram nobis once a petitioner has served his sentence and is no longer in custody).

2. Petitioner suffers continuing collateral consequences from the incorrect assessment of USSG § 4A1.2(F) given (2) two Criminal History Points by § 4A1.1(b), instead of the correct (1) one point by § 4A1.1(c). see (Attachment 1-1). Present penal consequences of 70 months incarceration to Akard's 2009 Indiana State sentence can be relieved by the 35 month Federal sentencing correction shown in Section 5, infra. Indiana's 2009 law of 2 For 1 good-time credit allows (35 x 2) = 70 months in reduction to Akard's current (2019-present) Indiana sentence amounts to denial of U.S. Constitutional Eighth Amendment Rights.

3. Petitioner provides sound reasons For Failing to gain relief earlier. Appointed defense counsel, James N. Thiros,

advised AKard would get an 84-96 month sentencing range (Att. 6-14), that AKard had to sign a Feb. 22, 2008, plea agreement with an appeal waiver or government threatened to go to trial without an appeal waiver. Sixth Amend. Effective Counsel rights extends to plea bargin process. see Lafler v. Cooper, 132 S.Ct. 1376 (2010); Hill v. Lockhart, (1985). The Seventh Cir. Court of Appeals in United States v. Wilkozek, 822 F.3d 364 (7th Cir 2016) (Petition for Coram Nobis is not barred by his appeal waiver). "To bar collateral review, the plea agreement must clearly state that the defendants waives rights to collaterally attack... in addition to waiving his right to a direct appeal." see Keller v. United States, 657 F.3d 675 (7th Cir. Ct. App. 2011). Clearly AKard did not (Att. 4) and Judge Simon ordered Thiros to conduct AKard's direct appeal.

At the July 23, 2008, sentencing hearing, attorney Thiros abandoned his argument over 2000 Ga. conduct was not a 'prior sentence' as (0) zero points, Failed to Show the Judge written USSG § 4A1.2(F) reads the Ga. diversionary conduct counted under § 4A1.1(c) as (1) one point, and Thiros didn't raise an Ineffective assistance of counsel claim against himself In a direct appeals 'sure Fail' without that argument. see plea (Att. 4 p. 4+5 section 7(i)). Ineff. Asst. of Counsel (IAC) can be grounds For Coram Nobis relief. see United States v. Castro, 26 F.3d 557, 559 (5th Cir. 1994) (reversing denial of coram nobis and remanding For an Ineffective Assistance of Counsel determination).

Abuse of discretion by U.S. Dist. Court and sentencing Judge Simon is shown to appoint attorney Thiros as public defender for case, as sentencing hearing counsel, and then assign Thiros as appellate counsel for Akard. Thiros would have needed to claim IAC on himself for advising Akard to sign and to commit to a plea agreement appeal waiver, even before these sentencing errors ever occurred. Even if the waiver was knowing and voluntary, the court retains discretion not to enforce the waiver if its result is a miscarriage of justice, see United States v. Teeter, 257 F.3d 14, 25 n.9 (1st Cir. 2001).

No earlier relief could be gained in any appeal filed when: 2008 'Sure Fail' direct appeal, 2010 §2255 to successive 2255 had blocked meritorious claims by appeal waiver; 2016 Nunc Pro Tunc denied; jurisdictional denials; and where the Jan. 04, 2010's court Order said, "cc: Akard" (Exh. J-12), whereas Akard was pro-se Federally incarcerated without internet to "cc", resulted in a nefarious deadline denial when Akard was never mailed the order or provided docket sheet requests. Therefore, sentence imposed was in violation to Sixth Amend. Effective Counsel rights against Strickland Standard and United States v. Herrera, 412 F.3d 557 (5th Cir. 2005) (84-96 range advised minus 170 months sentenced is a 74 month miscalculation by counsel), and Petitioner's Fifth Amend. rights to due process of law and equal protection provided in Eighth Amend. have been violated throughout.

4. Petitioner provides there was no remedy at time of trial, because Akard did not go to trial. The Fundamental defect error did not arise until the July 23, 2008, sentencing hearing. Abuse of discretion by the Court is shown to First take away Akard's right to appeal on Feb. 22, 2008, then make the (2) two point error to §4A1.2(F) on July 23, 2008, that affected Akard's substantial rights results in a miscarriage of justice, see Davis v. United States, 417 U.S. 333, 464, 94 S.Ct. 2298 (1974). IF a district court "selects a sentence on a clearly erroneous Fact" it commits a "significant procedural error." citing Gall v. United States, 552 U.S. 38, 128 S.Ct. 886 (2007). Petitioner has demonstrated a reasonable probability of a different outcome to establish an effect on substaintial rights to obtain relief under this writ.

5. Finally, there must be an error, and the error must be Fundamental. The Government's Sentencing Memorandum [Dkt. 37] p.2 of 4 (Att. 5-2), clearly misleads the court by stating, "U.S.S.G 4A1.2(F) Allows 2 Points To Be Assessed." This erroneous advise to guidelines range, "set the Framework for sentencing proceedings." Molina-Martinez v. U.S., 136 SCt 1338 (2016).

However, plain English reading of USSG §4A1.2(F) states a 'Diversionary Disposition', "is counted as a sentence under §4A1.1(c)" see (Att. 1-1). Where §4A1.1 Criminal History Category (c) states, "Add 1 point..." (Att. 1-1). The government continued to mislead

the court by arguing 4A1.2(F) can get (2) two points by § 4A1.1(b), and using a Louisiana First Offenders Act For a parole Violation that sent offender back to La. prison case-argument, Whereas Akard was a Georgia First Offenders Act § 42-8-60 of Ga. Code (Att. 2-3) and Akard was never sent to prison (Att. 2-4).

During the July 23, 2008, sentencing hearing, a lengthy Sentencing argument occurred over § 4A1.2(a) Prior Sentence and "upon adjudication of guilt", see (Att. 1-2), where Akard conceeded the 2000 Georgia case was a Diversionary Disposition under § 4A1.2(E). The Ga. First Offender Treatment reads,

"that no judgment of guilt be imposed at this time..." (Att. 2-1); and the Order Of Discharge reads,

"Defendant be discharged Without court adjudication of guilt;... completely exonerate the defendant of any criminal purpose; discharge shall not affect any of said defendant's civil rights or liberties; and defendant shall not be considered to have a criminal conviction." see (Att. 2-2). Attorney Thiros beleived this meant zero points. On appeal Akard took the 'prior sentence' issue Further to seek Gwinnet Co. Superior Ct. Judge Rich 12/17/2015 Order states, defendant [AKARD] was not sentenced to a prison sentence (Att. 2-4).

The Federal judge said, "I am going to give a guideline sentence in this case." (sent. hr. p. 70) and, "I think that a guideline sentence is appropriate." (sent hr. p. 72). However, court's abuse of discretion is shown at sent. hr. p. 21 (Att. 3-4) where Judge Simon used

USSG § 4A1.2(F) but added (2) two point enhancement under § 4A1.1 (b) in a Fundamental error and against guidelines.

The Petitioner's offense level was set at 32 (Att. 3-3), however the Fundamental error reading of § 4A1.2(F) as (2) two points increased Akard's Criminal History Points to 4 which raised him to Category III, see (Att. 1 and 3), placing Akard into a sentencing range of 151-188. Correction to § 4A1.2(F) counted as (1) one point under § 4A1.1(c) amounts to 3 Criminal History Points total, in Category II, and a correct sentencing range of 135-168 months. (Att. 3-2).

The plea agreement (7.c.(ii)) states,

> "The Government recommends that the Court should impose a sentence equal to the minimum of the applicable sentencing guideline." (Att. 5-3).

Therefore, a corrected 135 months minus 170 months sentenced would equal a 35 month correction of error to Akard's 2008 Federal sentence, and provide him to appeal a 2 For 1 credit of 70 months reduction to his current Indiana State Sentence.

On what ground would anyone have us leave Mr. Akard in prison an additional 70 months where no one before this Court can suggest that the errors were harmless, no one can claim precedent commands affirmance, and stare decisis isn't supposed to be an act of methodically ignoring what everyone knows to be wrong only because we fear consequences of being right. see Ramos v. Louisiana, 140 S.Ct. 1390 (2020).

Wherefore, Plaintiff seeks this Court to Grant this Writ, conduct an evidentiary hearing, Order appointment of Counsel For a pro-se petitioner, and any other relief just and proper.

Respectfully Submitted,

03-01-23

Jeffrey E. AKARD

I hereby declare by penalty of perjury pursuant 28 USC § 1746, the Following Motion and attachments are true and correct to the best of my knowledge.

So Sworn 03/01/23

Jeffrey E. AKARD

Certificate of Service

I certify the following was presented to the NCCF law library staff For coping and For Mailing US Mail postage pre-paid First-class and addressed to:

on 03/02/2023

Jeffrey E AKARD

AUSA
5400 Federal Plaza
Ste 150
Hammond IN 46320

Jeffrey E AKARD
149176 NCCF
1000 Van Nuys Rd
New Castle IN 47362

Writ of Error Coram Nobis

Table of Attachments

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 2:07-CR-074-PPS-APR
	)	
JEFFREY AKARD,	)	
	)	
Defendant.	)	

OPINION AND ORDER

On July 23, 2008, Defendant Jeffrey Akard was sentenced to 170 months in prison, after he pled guilty to one count of receiving child pornography. [DE 44.] Akard later filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, in which he argued that his counsel was ineffective in miscalculating his criminal history level and sentence, did not object to the presentence investigation report, and improperly induced him into entering into the plea agreement. [DE 62.] I denied that motion with prejudice in January 2010. [DE 70; DE 71.] Akard appealed the judgment, and the Seventh Circuit dismissed the appeal for lack of jurisdiction due to Akard's failure to comply with Rule 4(a) of the Federal Rules of Appellate Procedure. *See United States v. Akard*, No. 11-3023 (7th Cir. Oct. 11, 2011).

In February 2016, Akard filed an application for an order authorizing the Court to consider a second or successive § 2255 motion, as required by 28 U.S.C. § 2244(b)(3)(B). The Seventh Circuit denied and dismissed Akard's application. *United States v. Akard* (7th Cir. Feb. 19, 2016). He then filed a motion to correct his sentence nunc pro tunc,

making the same arguments raised in his application for a successive habeas petition. [DE 86.] I denied that motion for lack of jurisdiction while declining to issue a certificate of appealability. [DE 87 at 3–4.]

Akard has now filed a Petition for Extraordinary Relief in Nature of Writ Coram Nobis pursuant to the All Writs Act, 28 U.S.C. § 1651(a). [DE 107.] He is no longer in federal custody and is currently incarcerated at New Castle Correctional Facility, in connection with an Indiana state court sentence imposed in 2009. The petition asserts that an error in the determination of Akard's federal sentence prevents him from seeking a "2 for 1 credit of 70 months reduction" of his state court sentence. *See id.* at 3–7. Akard thus requests a hearing on the matter and an order correcting the alleged defect in his sentence. *Id.* at 8–9.

A writ of coram nobis is an "extraordinary remedy," and courts should grant the writ "only under circumstances compelling such action to achieve justice," *United States v. Morgan*, 346 U.S. 502, 511 (1954), and to correct errors "of the most fundamental character." *Id.* at 512; *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007); *see also United States v. George*, 676 F.3d 249, 251 (1st Cir. 2012) (characterizing a writ of error coram nobis as the "criminal-law equivalent" of a "Hail Mary pass in American football"). The writ "is available only where Congress has provided no other remedy, such as habeas corpus." *United States v. Chaidez*, No. 03 CR 636-6, 2010 WL 2740282, at *1 (N.D. Ill. July 8, 2010) (citing *Carlisle v. United States*, 517 U.S. 416, 429 (1996)). In the criminal context, the Supreme Court has described coram nobis as "a step in the criminal

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case and not, like habeas corpus . . . , the beginning of a separate civil [p]roceeding. . . . This motion is of the same general character as one under 28 U.S.C. § 2255." *Morgan*, 346 U.S. at 505 n.4.

The Court in *Morgan*, while acknowledging that coram nobis relief is an "extraordinary remedy," indicated that the codification of federal habeas relief under § 2255 does not preclude granting a writ of error coram nobis to a person who was convicted of a federal crime but is no longer in federal custody. *Id.* at 510–11. The Seventh Circuit has explained that because one requirement of a writ of habeas corpus is that the petitioner be "in custody," *see* 28 U.S.C. § 2255, coram nobis relief would be appropriate where the petitioner was fined rather than given a custodial sentence, or where (as here) the petitioner has already completed a term of custody. *United States v. Keane*, 852 F.2d 199, 202 (7th Cir. 1988). In order to obtain coram nobis relief, the petitioner must show: (1) an error "of the most fundamental character" that renders the proceeding invalid; (2) that he had "sound reasons for the failure to seek earlier relief"; and (3) and that he "continues to suffer from his conviction even though he is out of custody." *See United States v. Delhorno*, 915 F.3d 449, 450 (7th Cir. 2019) (collecting cases).

Akard's petition raises arguments previously presented in his collateral challenges to his sentence pursuant to 28 U.S.C. § 2255. However, he asserts that he has standing to seek relief under the All Writs Act because he is suffering continuing civil disabilities due to the challenged sentencing errors and he had sound reasons to not seek relief earlier. [DE 107 at 3–6.] Akard has made a showing that he suffers continuing

consequences of the asserted sentencing errors because he cannot seek to reduce time remaining on his state court sentence. But the record in this case reflects that Akard has, in fact, already challenged the sentencing errors asserted in his petition through multiple collateral challenges to his sentence while he was still in federal custody. I previously considered these collateral challenges to Akard's sentence, including multiple arguments based on ineffective assistance of counsel, and they were denied.

In sum, rather than presenting any "sound reasons" justifying a delay in seeking coram nobis relief, the petition before me reiterates concerns that were previously raised in the multiple collateral challenges that Akard filed during his time in federal custody. On that basis, the motion must be denied. *See United States v. Hassebrock*, 21 F.4th 494, 498 (7th Cir. 2021) (finding petitioner no longer in federal custody could collaterally attack sentencing error by seeking writ of coram nobis, but nevertheless affirming denial of his petition because "the primary argument [petitioner] raises in his *coram nobis* petition—ineffective assistance of counsel—was raised and rejected in his § 2255 motion and may not be relitigated" (citing *Keane*, 852 F.2d at 206)).

I am further persuaded by the analysis of the Court of Appeals in *Baranski v. United States*, 880 F.3d 951 (8th Cir. 2018). It appears that no courts in this circuit have adopted or considered the Eighth Circuit's approach in *Baranski* (or a similar line of reasoning). My denial of Akard's petition will therefore be limited to the foregoing considerations. That said, *Baranski* is worth noting: the panel in that case squarely considered whether the restrictions on successive § 2255 motions codified in 28 U.S.C.

§§ 2244(b) and 2255(h) affect the availability of "*coram nobis* relief to a petitioner whose claim would be barred had he petitioned for relief while still in federal custody." *Id.* at 955. The court held that substantive limitations on the filing of second and successive motions under 28 U.S.C. § 2255 "limit the grant of *coram nobis* relief to a petitioner whose motion for § 2255 relief was denied while he was still in custody." *Id.* at 956. In other words, because a writ of coram nobis is an extraordinary remedy "available at the far end of a post-conviction continuum only for the 'most fundamental' errors, it would make no sense to rule that a petitioner no longer in custody may obtain *coram nobis* relief with a less rigorous substantive showing than that required by AEDPA's limitations for successive habeas corpus and § 2255 relief." *Id.* at 956 (quoting *Morgan*, 346 U.S. at 512).

This rule is in line with the Supreme Court's longstanding guidance that courts are "guided by the general principles underlying . . . habeas corpus jurisprudence," *Calderon v. Thompson*, 523 U.S. 538, 554 (1998), and when, in the civil context, a Rule 60(b) motion for relief from a final judgment "is in substance a successive habeas petition [it] should be treated accordingly," *see Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (internal citations omitted). I agree that "it would make no sense to rule that a petitioner," such as Akard here, "may obtain *coram nobis* relief with a less rigorous substantive showing than that required by AEDPA's limitations for successive habeas corpus and § 2255 relief," and therefore his petition is properly "subject to the restrictions on second or successive § 2255 motions set forth in § 2255(h)(1) and (2)." *Baranski*, 880 F.3d 956.

It follows that if Akard wishes to proceed with a successive petition for relief from his sentence, he must seek authorization to file another petition from "a three-judge panel of the court of appeals," rather than filing another collateral challenge to his sentence directly in district court. *See* 28 U.S.C. § 2244(b)(3)(B). Such authorization may only be granted if he presents "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h).

In conclusion, because Akard's petition fails to demonstrate that he had sound reasons for the failure to seek earlier relief, the petition [DE 107] is **DENIED**. The Clerk shall enter final judgment accordingly.

SO ORDERED.

ENTERED: March 24, 2023.

/s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT

F-16

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

UNITED STATES OF AMERICA
Plaintiff/Respondent

v. Civil Action No. 2:07-cr-74

JEFFREY AKARD
Defendant/Petitioner

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____
recover from the defendant *(name)* _____
the amount of _____ dollars ($____
), which includes prejudgment interest at the rate of _____%, plus post-judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

X Other: The Petition is DENIED.

This action was *(check one):*

☐ tried to a jury with _____

☐ tried by Judge _____
without a jury and the above decision was reached.

X decided by Judge Philip P. Simon on Petition for Extraordinary Relief in Nature of Writ of Error Coram Nobis under All Writs Act, 28 USC § 1651(a)

DATE: 3/24/2023 CHANDA J. BERTA, ACTING CLERK OF COURT

by /s/ S. Kowalsky
Signature of Clerk or Deputy Clerk

F-17

In The United States District Court
For The Northern District of Indiana
Hammond Division

United States of America,)
Plaintiff,)
v.) Cause No. 2:07-cr-0074-PPS-APR
Jeffrey E. AKARD,) 2:09-cv-0214-PPS
Defendant.)

Petitioner's Motion For Court to
Reconsider 'Sound Reasons' Denial of Petition

COMES NOW, Defendant/Petitioner pro-se, Jeff AKard, moves this Court to reconsider its" denial of petitioner's 03/01/2023 [DE 107] Petition For Extraordinary Relief In Nature of Writ of Error Coram Nobis under All Writs Act, 28 USC § 1651(a), that was based on Court's,

"In conclusion, because AKard's petition fails to demonstrate that he had sound reasons for failing to seek earlier relief, the petition is denied." see [DE 108 p.6] However, the petition did attempt to follow jurisprudence provided by this circuit For a coram nobis by United States v. Wilkozek, 822 F.3d 364 (7th Cir. 2016), where AKard's petition stated,

"3. Petitioner provides sound reasons for failing to gain relief earlier." [DE 107 Petition p.3].

Namely, the plea agreement appeal waiver blocked all the collateral challenges to Akard's sentence while he was in Federal custody, but a petition For Coram Nobis is not barred by his appeal waiver. ID Wilkozek.

A petitioner has no Fixed deadline by which he must seek coram nobis relief. Coram nobis is a "remedy of last resort" that requires us to balance the often-conFlicting interest of finality and equity. Ragbir v. United States, 950 F.3d 54, 63 (3rd Cir. 2020)(quoting Fleming v. United States, 146 F.3d 88, 89-90 (2nd Cir. 1998)(per curiam)). We do not require a petitioner to "challenge his conviction at the earliest opportunity", but do expect petitioner to have "sound reasons For not doing so." ID (quoting United States v. Kwan, 407 F.3d 1005, 1014 (9th Cir. 2005) abrogated on other grounds by Padilla v. Kentucky, 599 US 356, 130 S.Ct. 1473 (2010). Also citing Judiciary Act of 1789, 1 Stat. 84 §22, limited to Five years the bringing of Writ of error, ID Morgan, 346 US 505 n.4, as to Rule 60(b) inapplicable to this writ.

Petition For Coram Nobis presented a pro-se listing For 'sound reasons', but these are better Found in 09/01/17 Memo, Case 4:17-cv-00271-DLB-LAB, C. Appeals § 2255 Petitions (see Attachment). Petitioner provides all collateral attacks were denied by appeal waiver and other motions were court construe as § 2255(s) to only be denied by appeal waiver, making them inadequate or ineffective to correct this error.

– Sound Reasons –

1. On Feb. 22, 2008, [DE 28] appointed attorney, J. Thiros, advised Akard he had to sign a plea agreement with an appeal waiver or the government threatened to go to trial unless an appeal waiver was included. Akard had to sign away his rights to appeal a Fundamental error that had not yet occurred until the July 23, 2008, sentencing hearing, where this writ's issue of Court's abuse-of-discretion shown to assess incorrect USSG § 4A1.2(f) Criminal History points that still affects his State case.

2. On Jan. 27, 2009, same court appointed attorney for Akard's pre-trial, plea hearing, and sentencing hr. was ordered to File a direct appeal. Thiros Failed to assert ineffective assistance of counsel, on himself, as plea agreement directed (see Petition Att. 4 p. 4) For advising Akard to sign an appeal waiver. Without that direct appeal argument, the direct appeal was a 'sure Fail' and blocked all of Akard's Future appeals to correct a USSG sentencing error.

3. On Feb. 13, 2009, [DE 56], petitioner's Motion To Reconsider was court construed, on same day, as a petition For habeas corpus 28 USC § 2255, and dismissed as an appeal [waiver].

4. On July 29, 2009, [DE 62] petitioner's pro-se § 2255 was dismissed on Jan. 04, 2010, by appeal waiver. Docket info shows dismissal was "cc" to Akard, but Akard was a pro-se incarcerated litigant w/o internet For court to "cc" (Pet. Att. 7 p. 8-9). Akard never received notice of § 2255 denial, no ecf system used at USP Marion in 2010, nor were 2 request For docket sheets (that

Was checking on the §2255 status) was never provided to Akard. No merit review For USS6 sentencing claims were done on his criminal history points miscalculation, courts just denied Motions by the appeal Waiver.

5. On Aug. 15, 2011, [DE 77] Akard tried a COA Fo-NOA that was denied as untimely on Oct. 11, 2011, due to "CC" error.

6. On Feb. 09, 2016, a Filed Petition For Successive §2255 was denied on Feb. 19, 2016 (Att. p. 2).

7. On Dec. 22, 2016, [DE 86] Akard tried a Nunc Pro Tunc Motion For relief, but court construed it as §2255 and denied attempt by plea agreement appeal waiver, again.

8. On Mar. 06, 2017, [DE 90] after a transfer to USP Tucson, Ariz. 9th Cir., a Notice of Appeal attempt at 28 USC § 2241 was nonetheless court construed as a §2255 and otherwise denied as procedurally blocked/jurisdictional issue/collateral attack/ and appeal waiver blocked.

Therefore, plea agreement appeal waiver (Petition Att. 4 p. 4-5) blocked any and all attempts to correct court's July 23, 2008, incorrect assessment of USS6 § 4A1.2(F) given (2) two criminal history points by § 4A1.1(b), instead of correct (1) one point given by § 4A1.1(c). This Coram Nobis issue of court's abuse-of-discretion to say, "I am going to give a guideline sentence in this case." (Sent. Hr. p. 70), and, "I think that a guideline sentence is appropriate." (Sent. Hr. p. 72). A contributor is ineffective counsel by Thiros to induce client into an appeal waiver, but

Its Court's guidelines error that resulted in a 35 month disparity to Federal sentence and continues a 70 month disparity to Akard's current Indiana State sentence.

This Court said, "Akard has made a showing that he suffers continuing collateral consequences of the asserted sentencing errors." [DE 108 at 3-4], But Akard cannot get relief.

The writ by Coram nobis "is available only where Congress has provided no other remedy such as habeas corpus." see Carlisle v. United States, 517 US 416, 116 S.ct 1460 (1996). Akard's Coram Nobis is considered simply another "Step in the criminal case and not, like habeas corpus...", United States v Morgan, 346 US 502, 511, 74 S.Ct. 247 (1954), where 28 USC § 2255 did not supersede "all other remedies which could be invoked in the nature of the common law writ of error coram nobis." ID Morgan, 202 F.2d 67, also by Morgan, 346 US 505 n.4, Whereas Akard's Petition For Writ of Error Coram Nobis Is not subject to be construed or considered a habeas corpus 'sure Fail" by appeal waiver, nor successive habeas, § 2255 relief, Rule 60 (b), nor subject to their restrictions like use of 8th Cir. Baranski.

Thereby, Court's direction [DE 108 p.6] For Akard to File a 28 USC § 2244 (b)(3)(a) For a successive petition would not "achieve justice" ID Morgan, Sloan, where appeal waiver will again deny any relief For continuing collateral consequences.

- Sound Reasons For Delay -

Petitioner was in Federal custody From 2008-2019, and didn't transfer to Indiana DOC custody until April 2019. In May 2019 at WVCF, Akard received only (2) two hours per week in law library, For his First ever use of Ind. LexisNexis to contest his 2009 Ind. State conviction. Akard had an Ind. Post-Conviction PCI(12) petition, USSct. open case, VA apportionment case with Federal Cir. Ct. of Appeals, and a global pandemic gave him COVID-19 (3) three times, caused delay.

Petitioner believed his 170 month incarceration, AND 5 years supervised release was included in timeframe governing a coram nobis by WVCF law library Staff's directions. Therefore, Akard pursued the above cases and a March 2020 IDOC WexFord Health's denial of chronic care meds leads to current case with 2 cause no. and 3 amended complaints For case 1:21-CV-02133-JMS-TAB. Additionally, a July 04, 2020, IDOC staff neglect resulted in personal injury case on WVCF currently under 42 USC § 1983 case 2:22-CV-00338-JMS-MJD. Akard was transfered to NCCF NCN 22-hour lockdown PC units, without law library visits, and NCCF's different LexisNexis Format caused newly Found caselaw on this Coram Nobis to have Akard File now in 2023 From IDOC custody and not in Federal custody.

In conclusion, Petitioner seeks this Court's Reconsideration to Akard's 'Sound reasons' that had denied earlier relief, plea agreement appeal waiver blocked previous collateral challenges, remedy can only be invoked by Writ of Error Coram Nobis not blocked by appeal waiver, Akard is no longer under Federal sentence, Constitutional Fifth, Sixth and Eight Amendment rights have been violated, and Petitioner requests Granting of Writ, to hold an evidentiary hearing, and any other relief petitioner may be entitled to.

Respectfully submitted,

April 06, 2023

Jeffrey E. Akard

I hereby swear and affirm the foregoing is true and correct to the best of my knowledge and subject to penalties for perjury pursuant to 28 USC § 1743.

So Sworn on April 06, 2023

Jeffrey E. AKARD

Certificate of Service

I certify the above Motion was served upon AUSA For N. Dist of Ind. US Dist Ct. 5400 Federal Plaza Hammond Ind by postage First-class pre-paid.

April 06, 2023

Jeff Akard

199176 NCCF
1000 Van Nuys Rd
New Castle IN 47362

Attachment 1

imposed the sentence in the middle of the guideline range "due to the very serious nature of this offense, the large number of child pornography images possessed by the defendant, the defendant's criminal history," *inter alia.* (*Id.* at 10.) Judge Simon sentenced Petitioner to 170 months imprisonment and five years supervised release. (Ex. A, Att. 2 at 2-3.)

C. Appeals and § 2255 Petitions

On August 1, 2008, Petitioner filed a Notice of Appeal. (Ex. B, Notice of Appeal.) On January 27, 2009, the United States Court of Appeals for the Seventh Circuit dismissed Petitioner's appeal because Petitioner had waived his right to appeal in his plea agreement. (Ex. C, *United States v. Akard*, No.: 08-2947 (7th Cir. January 27, 2009), Order.)

On February 13, 2009, Petitioner filed a Motion to Reconsider the judgment and sentence based on a claimed ineffective assistance of counsel and his claim that the criminal history points were incorrectly calculated based on the Georgia case. (Ex. D, Motion to Reconsider.) The same day, Judge Simon construed the motion as a petition for habeas corpus under 28 U.S.C. § 2255 and dismissed it because of the appeal. (Ex. E, Order, February 13, 2009.) Judge Simon recognized that the issue regarding his determination of the appropriate Criminal History Category is a challenge to the sentence properly addressed under § 2255. (*Id.*)

On July 27, 2009, Petitioner filed a Motion to Vacate under 28 U.S.C. § 2255. (Ex. F, Motion to Vacate.) Petitioner argued ineffective assistance of counsel in that he believed counsel miscalculated the Petitioner's "levels and/or criminal history category," *inter alia.* (*Id.* at 4.) Petitioner filed a supplemental motion in which he argued that he was induced into the plea agreement by his attorney's misinterpretation of the impact the Georgia case would have on his criminal history calculation. (Ex. G, Supplemental Motion, at 13-14.) On January 4, 2010, Judge Simon denied Petitioner's motion and dismissed it with prejudice, finding that Petitioner entered into a plea agreement knowingly and voluntarily and that the agreement contained a waiver of Petitioner's right to appeal or otherwise challenge the sentence. (Ex. H, Order, January 4, 2010.) Judge Simon specifically noted that Petitioner's claims regarding his Criminal History Category

relate to sentencing and were "barred by the clear, unambiguous language of the plea agreement." (*Id.* at 6.)

On August 15, 2011, Petitioner filed a Request for a Certificate of Appealability with the district court. (Ex. I, Request for Certificate of Appealability.) Judge Simon denied the certificate of appealability and subsequently construed the request as a notice of appeal. (Ex. J, Order, September 6, 2011.) On October 11, 2011, the Seventh Circuit Court of Appeals dismissed Petitioner's appeal as untimely. (Ex. K, *Jeffrey Akard v. United States*, No. 11-3023 (7th Cir. Oct. 11, 2011), Order.)

On February 9, 2016, Petitioner filed a Petition Requesting Leave to File a Second or Successive 28 U.S.C § 2255 Motion with the Seventh Circuit Court of Appeals, making the same arguments he advances before this Court. (Ex. L, Petition for Successive § 2255.) Petitioner attached the same Georgia Order Clarifying Sentence that he attached to the instant Petition. (*Id.* at 18.) On February 19, 2017, the Seventh Circuit denied authorization because Petitioner's claim remained the same as in his first § 2255 motion. (Ex. M, *Jeffrey Akard v. United States*, No. 16-1265 (7th Cir. February 19, 2016), Order.)

On December 22, 2016, Petitioner filed a Motion, Pursuant to Nunc Pro Tunc to Correct Petitioner's Sentence. (Ex. N, Nunc Pro Tunc Motion.) In his motion, Petitioner again alleged his Criminal History Category was incorrect. (*Id.* at 2-3.) As in the Seventh Circuit and before this Court, he attached the Georgia Order Clarifying Sentence. (*Id.* at 10.) Judge Simon dismissed and denied the motion as a successive petition under § 2255 for which Petitioner had failed to obtain leave to file. (Ex. O, Opinion and Order, January 4, 2017.) Judge Simon recognized the Petitioner's "redundant filing, containing an argument already rejected by both this Court and the Seventh Circuit" did not present him with an opportunity to alter the sentence he had imposed. (*Id.*)

Petitioner filed a Notice of Appeal on March 6, 2017. (Ex. P, Notice of Appeal 2017.) On August 22, 2017, the Seventh Circuit denied Petitioner's request for a certificate of appealabiltiy and motion to proceed in forma pauperis. (Ex. Q, *Jeffrey Akard v. United States*, 17-1515 (7th Cir. August 22, 2017), Order.) The Seventh Circuit found

no substantial showing of a denial of a constitutional right and refused to construe the appeal as a request for authorization for a successive petition because it had already denied his request. (*Id.*) Further, the Seventh Circuit recognized "Section 2244(b)(1) prohibits absolutely the relitigation of claims." (*Id.*)

D. Petition

Petitioner filed the Petition on June 12, 2017. (Doc. 1.) In it, Petitioner makes the same arguments he previously presented unsuccessfully to the Indiana District Court and the Seventh Circuit Court of Appeals: that Judge Simon incorrectly sentenced him to 170 months based on what he perceives is an incorrect Criminal History Category. (*Id.*) Petitioner attaches the same Georgia Order Clarifying Sentence that he argued unsuccessfully was "newly discovered evidence" to the Indiana District Court and the Seventh Circuit. (Doc. 1-1 at 7.) Petitioner seeks an order requiring the Bureau of Prisons to contact the United States Attorney's Office in the Northern District of Indiana to tell Judge Simon that he used an incorrect Criminal History Category. (*Id.*)

Petitioner alleges that he exhausted his administrative remedies. (Doc. 1 at 4.) Respondent agrees.

On July 25, 2017, this Court directed Respondent to answer the Petition. (Doc. 5.) On August 21, 2017, Respondent filed a motion to extend time for a response. (Doc. 10.) The same day, this Court granted Respondent's motion to extend time and ordered the response due September 5, 2017. (Doc. 11.)

II. Legal Discussion

A. Petitioner cannot challenge his sentence through 28 U.S.C. § 2241.

A federal prisoner may file a petition pursuant to 28 U.S.C. § 2241 to challenge the "manner, location, or conditions of a sentence's execution." *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). When filing such a petition, "the prisoner must name the warden of the penitentiary where he is confined as a respondent." *Johnson v. Reilly*, 349 F.3d 1149, 1153 (9th Cir. 2003) (citations omitted). This requirement follows naturally because the warden has custody over the petitioner and is primarily responsible for the

Exhibit List