No. _____

In The

Supreme Court of the United States

DAQUAN DORAL CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Government invoke an appeal waiver to preclude merits review of an appeal when the district court failed to specifically question the defendant about the appeal waiver at arraignment?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Daquan Doral Carter.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by order issued January 12, 2024, in which it dismissed Mr. Carter's appeal on the ground that it was precluded by the appeal waiver in Mr. Carter's plea agreement. A copy of the Fourth Circuit's order is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an order dismissing Mr. Carter's appeal of his sentence following a guilty pleas to conspiracy to distribute and possess with intent to distribute fifty grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count 1); distribution of a quantity of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count 2); and possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (Count 3). JA8, JA11; *see* JA58-66. The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's order pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Investigation and arrest of Daquan Carter

On November 18, 2020, officers with the New Bern Police Department stopped Daquan Doral Carter in New Bern, North Carolina, for a traffic violation. JA70. Officers saw marijuana in Mr. Carter's car; they confiscated 13.2 grams of marijuana and $15,000 in cash. JA70.

Officers stopped Mr. Carter twice more in 2021. JA71. On April 2, they searched his car and found 6.5 grams of marijuana and $2,000 in cash. JA71. On May 22, officers found 4.6 grams of marijuana and $8,000 in cash in Mr. Carter's car. JA71.

Using a tip from a confidential informant, officers set up controlled purchases from Mr. Carter. JA71. On June 23, 2021, officers used a confidential informant to buy 32.98 grams of crystal methamphetamine from Mr. Carter. JA71.

On the night of July 1, 2021, New Bern Police Department officers stopped a car driven by Jamerah Dillahunt. JA71. Mr. Carter was a passenger in the back of the car. JA71. Ms. Dillahunt and her front seat passenger, Jamaya Saunders, became aggressive toward the officers, and officers ordered all occupants to exit the vehicle. JA71. Mr. Carter complied with this command and admitted that he had marijuana on his person. JA71. Ms. Dillahunt, the driver, admitted that she had a firearm in the center console; officers searched the vehicle and found a .40 caliber handgun in the console. JA71. Officers also located a stolen 9 mm firearm with an extended magazine underneath the driver's seat. JA71. Ms. Dillahunt and Ms. Saunders denied possessing the stolen firearm. JA71. Mr. Carter was arrested in the early morning hours of July 2. JA71.

Mr. Carter was released from custody. *See* JA71. On July 7, 2021, the informant bought another 18.22 grams of crystal methamphetamine from Mr. Carter. JA71.

In an interview with investigating officers after the July 7 buy, the informant claimed that he purchased four ounces of methamphetamine from Mr. Carter each month from 2019 to 2021. JA71. Mr. Carter, however, was incarcerated for the entire calendar year 2019, and returned to custody on July 20, 2021. JA71 (footnote 1 of presentence investigation report). The informant claimed that Mr. Carter "took over" distributing methamphetamine when another distributor was incarcerated. JA71. The informant said that he acted as a middleman for Mr. Carter and that Mr. Carter "paid" the informant four ounces of methamphetamine per month from 2019 to 2021, although Mr. Carter was incarcerated during part of that time. JA71. The informant also said that Mr. Carter always carried a handgun. JA71.

New Bern Police Department officers responded to a reported shooting on July 16, 2021. JA71. Investigating officers reported that three victims of the reported shooting identified Mr. Carter as the suspect. JA71. Officers obtained warrants for Mr. Carter's arrest on charges arising from the shooting. JA72.

On July 20, 2021, law enforcement officers attempted to serve the arrest warrants on Mr. Carter by initiating a traffic stop. JA71. Mr. Carter fled from the attempted stop in his car, "at one point traveling over 100 miles per hour into the city limits of New Bern"; he then crashed his car and was arrested. JA71. Officers searched Mr. Carter's home on the same day and uncovered 1.6 grams of crystal methamphetamine, 2.1 grams of cocaine, and a manual showing how to convert a semi-automatic handgun into a rifle. JA71.

After his arrest, Mr. Carter admitted that he had been selling crystal methamphetamine from January 9, 2020, when he was released from jail, until his arrest in July 2021. JA71. He provided the officers with prices and quantities. JA71-72. Mr. Carter also admitted to carrying firearms despite having a felony conviction, and specifically admitted that he sometimes carried a firearm while selling methamphetamine. JA72.

Indictment

Mr. Carter was federally indicted on September 8, 2021, on charges of conspiracy to distribute and possess with intent to distribute fifty grams or more of a mixture and substance containing methamphetamine, from January 2020 and continuing up until July 7, 2021 (Count 1); two counts of distribution of a quantity of a mixture and substance containing methamphetamine on or about June 23 and July 7, 2021 (Count 2 and Count 5); possession of a firearm on or about July 2, 2021, after having been convicted of a felony (Count 3); and possession of a stolen firearm on or about July 2, 2021 (Count 4). JA13-15.

Plea agreement and arraignment

Mr. Carter agreed to plead guilty to Counts 1, 2, and 3 of the indictment pursuant to a plea agreement. JA58-66. According to the plea agreement, the Government agreed to dismiss Counts 4 and 5 at sentencing. JA65. Mr. Carter and the Government stipulated that the offense conduct involved no less than 1,000 kilograms but no more than 3,000 kilograms of converted drug weight; that an upward adjustment for possessing a stolen firearm was not warranted; and that

Mr. Carter should receive the maximum downward adjustment for acceptance of responsibility. JA66. In the plea agreement, Mr. Carter also agreed:

> To waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction proceeding, including any proceeding under 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea.

JA58.

Mr. Carter was arraigned and pleaded guilty pursuant to the plea agreement before United States District Judge Terrence W. Boyle of the United States District Court for the Eastern District of North Carolina. *See* JA8. The court first confirmed that Mr. Carter swore to tell the truth and that he was competent. JA19-20. The court confirmed that Mr. Carter was satisfied with the performance of his appointed counsel. JA20.

Next, the district court advised Mr. Carter of some the rights he would have if he chose to plead not guilty. JA20. The court informed Mr. Carter that he had the right to a jury trial and that he would be presumed innocent. JA20. The court explained that the burden of proof is on the Government, and that the Government would have to prove Mr. Carter guilty beyond a reasonable doubt by bringing witnesses into court to testify in Mr. Carter's presence and before a jury. JA20. The court advised Mr. Carter that, if he went to trial, his lawyer "could object to improper evidence, cross-examine the witnesses against [Mr. Carter], present witnesses and evidence on your behalf." JA20-21. The court told Mr. Carter that he

could "either testify or not testify," and that if he did not testify, his failure to testify would not be used against him. JA21. The court concluded, "When you plead guilty. You give those rights up. There won't be a trial. The case will be decided on your admission of guilt." JA21. Mr. Carter confirmed that he was willing to waive the rights the court described by pleading guilty. JA21.

The court informed Mr. Carter of the charges in Counts 1 through 4 of the indictment. JA21-22. The court recited the maximum possible sentence of imprisonment for each charge and, where relevant, the mandatory minimum sentence. JA21-22. Regarding Count 1, conspiracy to distribute and possess with intent to distribute fifty grams or more of a mixture and substance containing methamphetamine, the court informed Mr. Carter, "If you have a prior conviction, it would be ten years to life, a fine and supervised release and special assessment." JA21. As to each charge in Counts 1 through 4, the court informed Mr. Carter that the punishment included "a fine" and "supervised release." JA21-22. Regarding Counts 1, 3, and 4, the court also informed Mr. Carter that the punishment included a "special assessment." JA21-22.

Turning to the plea agreement presented to the court, the court further advised Mr. Carter:

> And you're entering into a written plea agreement in which you've agreed to plead guilty to Counts One, Two and Three of the indictment.
>
> And to waive your right to appeal and to waive your right to contest the conviction in any post-conviction proceeding.
>
> You forfeit any illegal assets.
>
> You waive your right to have a jury decide the facts.
>
> The elements of Count One are set out in paragraph 3 on page 4. The elements of Count Two are set out in paragraph 3 on page 5. And the elements of Count Three are set out in paragraph 3 on page 6.

> Any active sentence would be without parole.
>
> Pleading guilty has immigration consequences if that affects you. If it doesn't, it won't.
>
> The Government agrees to dismiss Counts Four and Five. I didn't see a Count Five.

JA22-23. The court then paused to confer with the deputy clerk off the record. JA23. The court continued:

> Okay. That's my mistake. Count Two and Count Five are both the same. So advising you of the punishment in Count Two is the same as advising it in Count Five. I didn't know they were together.
>
> The Government agrees, as I said, to dismiss Counts Four and Five.
>
> It'll make known the extent of your cooperation. It won't further prosecute you. This is limited to this U.S. Attorney.
>
> The offense conduct involved less than a thousand kilograms nor more than three thousand of converted drug weight.
>
> No upward adjustment for a stolen firearm. And a downward adjustment for acceptance of responsibility.
>
> Those are the important parts of the agreement.

JA23. Finally, the court asked, "Is that what you've agreed to?" and Mr. Carter responded, "Yes, sir." JA23.

Mr. Carter confirmed that no one had forced him to plead guilty and he was making his own decision. JA23-24. He then pleaded guilty to Counts 1, 2, and 3. JA24.

The Government's counsel made a proffer of the evidence the Government would have presented if the case had gone to trial. JA24-27. The court found that the plea was supported by an independent basis in fact and that it was voluntary. JA27. The court directed the clerk to enter a judgment of guilty on Counts 1, 2, and 3, ordered the preparation of the presentence report, and set the case for sentencing. JA27.

Sentencing and judgment

The Probation Office prepared a presentence investigation report. JA67-86. Based on Mr. Carter's prior sentences and the fact that the committed the instant offenses while under a criminal justice sentence, the Probation Office determined that Mr. Carter had a total of eleven criminal history points, resulting in a criminal history category of V. JA73-76. Consistent with the drug quantity stipulation in the plea agreement, the Probation Office determined that the base offense level was 30. JA80. The Probation Office recommended a two-point enhancement because a firearm was possessed, a two-point enhancement because Mr. Carter allegedly acted as an organizer, leader, manager, or supervisor, and a two-point enhancement because Mr. Carter recklessly created a risk of serious bodily injury in fleeing from law enforcement officers. JA80. After applying a three-point reduction for acceptance of responsibility, the Probation Office calculated a total offense level of 33 and a Guidelines range of 210 to 262 months' imprisonment. JA80.

Mr. Carter objected to the proposed enhancement for his role in the offense, arguing that he was not an organizer, leader, manager, or supervisor of the criminal activity. JA84. Mr. Carter challenged the credibility of the informant who had told police that Mr. Carter "took over" from another methamphetamine dealer. JA84. Mr. Carter also objected to the enhancement for reckless endangerment during flight on the ground that the conduct was "outside the bounds of relevant conduct and should not be considered." JA85.

The Probation Office rejected both objections and made no changes to its calculation of the Guidelines range. JA84-85.

At the sentencing hearing, Mr. Carter told the court that he accepted "full responsibility" for his actions and that he knew he had to "pay for [his] mistakes and [his] bad decisions." JA30.

Mr. Carter's counsel continued to object to the enhancements for Mr. Carter's role in the offense and for reckless endangerment during flight. JA30-33. The Government conceded that no enhancement for Mr. Carter's role in the offense should apply, and the court sustained Mr. Carter's objection to that enhancement. JA31.

Mr. Carter's counsel argued that no enhancement for reckless endangerment during flight should apply because Mr. Carter fled from the police in connection with a separate incident, when the police tried to arrest him on a warrant for a shooting. JA31-32. The Government's counsel argued that the incident was relevant conduct because, on the same day that Mr. Carter fled from the police, officers also found drugs in Mr. Carter's home, and because Mr. Carter allegedly "exceeded speeds of a hundred miles an hour." JA32. The court overruled Mr. Carter's objection, saying, "I think the circumstances of his fleeing and the chase and the difficulty in arresting him after he was being identified support obstruction of justice charge, so I'll deny that." JA33.

Accounting for its rulings on the objections, the district court calculated a total offense level of 31 and a Guidelines range of 168 to 210 months' imprisonment.

JA33, JA106. Mr. Carter's counsel argued that Mr. Carter should receive a sentence of 160 months. JA33. Mr. Carter's counsel noted that the case was "essentially built on two hard transactions and the statements that followed after that." JA34. The district court interjected:

> Well, that's the way you look at it. I—I—this is one of the worst presentence reports I've read recently. He's a threat to society and a dangerous and prolific criminal. Every time they stop him, he's got thousands of dollars in cash, drugs, and guns.

JA34. The court continued:

> He shot people. He got probation after he shot a guy and almost killed him. He needs to be removed from society for as long as the law will permit. . . . And, you know, that's not what I commonly say or how I commonly approach it. But having read his report, it's atrocious. I don't know how you can say anything good about him. Can you come up with anything good?

JA34. Mr. Carter's counsel responded that "no matter what the history, there is always opportunity for hope," and continued to press for a sentence of 160 months. JA34-35. The court replied that Mr. Carter had "avoided punishment historically at every turn in the road." JA35.

Mr. Carter's counsel further argued that Mr. Carter had accepted responsibility. JA36. The court said that Mr. Carter "didn't have any choice but to accept responsibility," and that it was "no great credit that he accepted responsibility" because "the choice was to have a guideline range of 360." JA36. Commenting on Mr. Carter's prior state sentences and arrests, the court told Mr. Carter, "[T]hat's why you've earned about a 15- to 30-year sentence because you have that experience." JA38.

Mr. Carter addressed the court again, emphasizing that he knew that his prior criminal conduct was serious and that he was ashamed of his behavior. JA38-39. He explained that he had never shot anyone and disputed the statement in the presentence investigation report that he had shot someone. JA41-43.

The Government's counsel asked the court to impose a sentence of 210 months' imprisonment, at the top of the Guidelines range. JA47. The Government cited Mr. Carter's offense conduct, his history of involvement with firearms, and the negative impact of methamphetamine on the community. JA44-47.

The court then pronounced the sentence:

> All right. Based on this hearing and on the arguments made, I believe that the guideline range accurately represents his punishment level under 3553(a), and I've taken into account all of his lawyer's arguments and his own comments, the Defendant's comments and requests, and I find that a sentence at the high end of that guideline is an appropriate sentence under the sentencing requirements and under the case law.
>
> I'll impose a sentence of 210 months on Counts One, Two, and Three—well, One and Two, and a sentence of 120 months on Count Three, concurrent.

JA47.

The district court entered judgment accordingly on December 14, 2022. JA11. In its statement of reasons accompanying the judgment, the court stated that it was adopting the presentence investigation report "with the following changes." JA106. The court identified one change: "The court ruled a 2-level enhancement pursuant to USSG 3C1.2 did not apply." JA106.[1] The court memorialized its

[1] On Mr. Carter's post-judgment motion, the district court corrected the statement of reasons to reflect instead that it had ruled that an enhancement for Mr. Carter's role in the offense did not apply. Order Granting Unopposed Mot. to Correct

calculation of the Guidelines range: total offense level 31 and criminal history category V, producing a Guidelines range of 168 to 210 months' imprisonment. JA106.

Mr. Carter timely filed a notice of appeal on December 15, 2022. JA11, JA56.

Mr. Carter's appeal

In his brief to the United States Court of Appeals for the Fourth Circuit, Mr. Carter argued that the district court committed procedural error at sentencing by applying a two-point Guidelines enhancement for reckless endangerment during flight, and by failing to explain on the record the basis for the sentence. *See* Opening Br. 12-33, *United States v. Carter*, No. 23-4720 (4th Cir. May 17, 2023).

The Government moved to dismiss Mr. Carter's appeal, citing the appeal waiver in his plea agreement. Mot. to Dismiss Appeal *passim*, *United States v. Carter*, No. 23-4720 (4th Cir. June 5, 2023). Mr. Carter opposed the motion, arguing that he did not knowingly and intelligently waive the right to appeal his sentence, where the district court failed to question Mr. Carter about the appeal waiver at arraignment, and the record did not otherwise show that Mr. Carter understood his appeal waiver. Resp. to Mot. to Dismiss Appeal *passim*, *United States v. Carter*, No. 23-4720 (4th Cir. June 13, 2023).

On January 12, 2024, the United States Court of Appeals for the Fourth Circuit entered an order dismissing Mr. Carter's appeal. App. 1-2. The Fourth

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Clerical Error in Statement of Reasons, *United States v. Carter*, No. 4:21-cr-00054-BO (E.D.N.C. June 12, 2023).

Circuit concluded that Mr. Carter "knowingly and voluntarily waived his right to appeal and that the issues [Mr.] Carter seeks to raise on appeal fall squarely within the scope of the waiver." *Id.* 1. Therefore, the Fourth Circuit granted the Government's motion to dismiss the appeal. *Id.*

STATUTE AND RULE INVOLVED

1. 18 U.S.C. § 3742(a) provides:

> (a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [1] than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

2. Federal Rule of Criminal Procedure 11(b)(1), (b)(1)(N) provides:

> (1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence . . . .

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below when Mr. Carter opposed the Government's motion to dismiss his appeal and argued that he had not knowingly and intelligently waived his right to appeal because, among other things, the district court did not question him about his appeal waiver at arraignment. *See* Resp. to Mot. to Dismiss Appeal *passim*, *United States v. Carter*, No. 23-4720 (4th Cir. June 13, 2023). The question was decided when the Fourth Circuit rejected Mr. Carter's argument and granted the Government's motion to dismiss the appeal. *See* App. 1-2.

REASON FOR GRANTING THE WRIT

Mr. Carter respectfully contends that there is a "compelling reason[]" for granting his petition for writ of certiorari. *See* S. Ct. R. 10. This Court has never addressed the enforceability of appeal waivers, but federal appellate courts, including the Fourth Circuit in this case, regularly dismiss criminal defendants' appeals based on boilerplate appeal waivers that appear in plea agreements across the United States. *See* Susan R. Klein, Aleza S. Remis, Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis,* 52 Am. Crim. L. Rev. 73, 85-87 (2015); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212, 221-225 (2005). Defendants like Mr. Carter are induced to sign plea agreements waiving their appellate rights in exchange for uncertain benefits, because they do not and cannot know at the time they plead guilty what sentence they will receive, and whether the

district court will commit sentencing errors. Mr. Carter and others like him are thus committed to federal prison based on the effectively unreviewable decision of a district court. Mr. Carter acknowledges the broad enforcement of appeal waivers at the circuit level, but he respectfully contends that the Fourth Circuit and other appellate courts have it wrong, particularly where, as here, the district court did not question Mr. Carter about his appeal waiver. As shown below, Mr. Carter did not knowingly and intelligently waive his right to appeal the district court's sentencing errors, and the Fourth Circuit erred by dismissing his appeal.

DISCUSSION

MR. CARTER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO APPEAL HIS SENTENCE WHERE THE DISTRICT COURT DID NOT QUESTION HIM ABOUT HIS APPEAL WAIVER AND OTHERWISE FAILED TO CONDUCT AN ADEQUATE ARRAIGNMENT.

Congress conferred on every federal criminal defendant the right to appeal her sentence. 18 U.S.C. § 3742(a). However, the Fourth Circuit and other courts of appeal hold that this right is waivable—according to circuit-level precedent, "[a]n appellate waiver is valid if the defendant knowingly and intelligently agreed to it." *United States v. Manigan*, 592 F.3d 621, 627 (4th Cir. 2010). "Whether a defendant knowingly and intelligently agreed to waive his right of appeal 'must be evaluated by reference to the totality of the circumstances.'" *Id.* (quoting *United States v. General*, 278 F.3d 389, 400 (4th Cir. 2002)). "An important factor in such an evaluation is whether the district court sufficiently explained the waiver to the defendant during the Federal Rule of Criminal Procedure 11 plea colloquy." *Id.*

Rule 11 requires the district court to address the defendant personally in open court prior to the court's acceptance of a guilty plea. Fed. R. Crim. P. 11(b)(1). The court "must inform the defendant of, and determine that the defendant understands," a variety of consequences of pleading guilty. *See id.* As relevant here, during the Rule 11 colloquy, the court must inform the defendant of, and determine that the defendant understands, "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N). The requirement that the court address such a waiver during the plea colloquy is intended to ensure that "a complete record exists regarding any waiver provisions," and "that the waiver was voluntarily and knowingly made by the defendant." Fed. R. Crim. P. 11 advisory committee note to 1999 amendments.

"Although a district court's failure to strictly abide by Rule 11 will not alone render an appellate waiver unenforceable," the Fourth Circuit has held that "a waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver[.]" *Manigan*, 592 F.3d at 627 (quotation and citations omitted). As shown below, even under the Fourth Circuit's precedents, Mr. Carter did not knowingly and voluntarily waive the right to appeal his sentence because the district court failed to specifically question Mr. Carter about the waiver during the Rule 11 colloquy, and the record does not show that Mr. Carter understood the full significance of the waiver. *See id.*

A. The District Court Failed to Comply with Rule 11(b)(1)(N) Because the Court Did Not Inform Mr. Carter of the Terms of the Appeal Waiver or Question Him About the Waiver.

At arraignment, "[t]he district court did not strictly comply with Fed. R. Crim. P. 11(b)(1)(N)." *United States v. Bailey*, No. 22-4524, 2023 WL 3578819, at *2 (4th Cir. May 22, 2023). During the Rule 11 hearing, the district court summarized the terms of the plea agreement. JA22-23. Near the outset of this summary, the district court said that Mr. Carter agreed "to waive [his] right to appeal and to waive [his] right to contest the conviction in any post-conviction proceeding." JA22. The court did not inform Mr. Carter of all the terms of the appeal waiver—the court did not read the full text of the appeal waiver, mention that it applied both to appeals of Mr. Carter's convictions and his sentence, or explain the exceptions to the appeal waiver. JA22; *see* JA58. The court did not pause to ask Mr. Carter if he understood the appeal waiver. JA22. Instead, the court proceeded to recite other terms of the plea agreement, asked the deputy clerk about Count 5, advised Mr. Carter that the punishment for Count 5 was the same as for Count 2, recited still other terms of the plea agreement, and only then asked, "Is that what you've agreed to?" JA22-23. In doing so, the district court failed to "inform the defendant of, and determine that the defendant understands, . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." *See* Fed. R. Crim. P. 11(b)(1), (b)(1)(N).

As Mr. Carter argued to the Fourth Circuit, the Fourth Circuit's recent decision in *Bailey* is directly on point and shows why the Government's motion to

dismiss should have been denied. In *Bailey*, the district court advised the defendant as follows:

> The plea agreement says you're going to plead guilty to Counts One and Two and *waive your right to appeal*; and forfeit any illegal property; and waive your right to have a jury decide the facts.
>
> The elements of Count One and Count Two are set out in paragraph 3 on pages 4, 5 and 6.
>
> Any active sentence would be without parole.
>
> Pleading guilty has immigration consequences if you're subject to that.
>
> And you'll also have to file under the Sex Offender Registration Form and Act.
>
> The Government agrees to dismiss Counts Three and Four.
>
> It will not further prosecute you for conduct constituting the basis of this indictment. This is limited to the U.S. Attorney in this district.
>
> A downward adjustment for acceptance of responsibility is provided.
>
> Those are the important parts of the agreement. Is that what you've agreed to?

Arraignment Transcript 5:13-6:6, *United States v. Bailey*, No. 4:20-cr-00056-BO (E.D.N.C. Oct. 24, 2022) (Dkt. 28-2) (emphasis added). This statement—that the defendant would "waive [his] right to appeal"—"was the only mention of the appellate waiver during the plea hearing and the court did not ask whether [the defendant] understood the significance of the waiver." *Bailey*, 2023 WL 3578819, at *2. When the Government sought to enforce the waiver to bar the defendant's challenge to his sentence, the Fourth Circuit rejected the Government's motion to dismiss, concluding that the district court did not strictly comply with Rule 11(b)(1)(N). *See id.*

Likewise, the district court failed to comply with Rule 11(b)(1)(N) at Mr. Carter's arraignment because the court did not inform Mr. Carter of the terms

of the appeal waiver provision, and the court did not ask whether Mr. Carter understood the waiver's significance. *See* JA22. There was no basis for the Fourth Circuit to distinguish this case from *Bailey*, and to the extent that the Fourth Circuit concluded (without saying) that the district court complied with Rule 11(b)(1)(N), that conclusion was error.

B. The Record Does Not Indicate that Mr. Carter Understood the Full Significance of the Appeal Waiver.

The surrounding context of the Rule 11 hearing does not indicate that Mr. Carter "understood the full significance of the waiver." *See generally United States v. Thornsbury*, 670 F.3d 532, 537 (4th Cir. 2012) ("Generally, if a district court questions a defendant regarding the waiver of appellate rights during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid."). The district court's failure to question Mr. Carter specifically about his appeal waiver was one of many omissions from the Rule 11 colloquy. The "totality of the circumstances" thus does not support a conclusion that Mr. Carter knowingly and voluntarily waived his right to appeal. *See Manigan*, 592 F.3d at 627.

In addition to failing to comply with Rule 11(b)(1)(N), the district court failed to inform Mr. Carter, and ensure that he understood, any of the following rights:

- "the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath," Fed. R. Crim. P. 11(b)(1)(A);
- "the right to plead not guilty, or having already so pleaded, to persist in that plea," Fed. R. Crim. P. 11(b)(1)(B);

- "the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding," Fed. R. Crim. P. 11(b)(1)(D);

- "the right at trial . . . to compel the attendance of witnesses," Fed. R. Crim. P. 11(b)(1)(E).

See JA19-27 (arraignment transcript).

Further, although the district court was required to inform Mr. Carter of, and ensure that he understood, "any maximum possible penalty, including imprisonment, fine, and term of supervised release," Fed. R. Crim. P. 11(b)(1)(H), the district court disclosed only the maximum possible terms of imprisonment, see JA21-22. The district court informed Mr. Carter that the punishment could include a fine or supervised release, but the court did not advise Mr. Carter of the maximum amount of the fine or the maximum term of supervised release. *See* JA21-22. And, when the district court described the maximum possible terms of imprisonment, it incorrectly informed Mr. Carter that he would face a term of "ten years to life" on Count 1 if Mr. Carter had "a prior conviction," JA21; in fact, the enhanced statutory range would apply only if Mr. Carter had a "prior conviction for a serious drug felony or serious violent felony," 21 U.S.C. § 841(b)(1)(B). Similarly, with respect to Count 2, the district court told Mr. Carter that he would face up to thirty years in prison "[i]f you have a prior." JA22. The court did not inform Mr. Carter that the enhanced statutory maximum would apply to Count 2 only if Mr. Carter had a particular type of prior conviction—a "felony drug offense." 21 U.S.C. § 841(b)(1)(C); *see* JA22.

The district court omitted or at least elided still other required parts of the colloquy. The court failed to mention its "authority to order restitution." Fed. R. Crim. P. 11(b)(1)(K); *see* JA19-27. Instead of informing Mr. Carter that a non-citizen defendant, if convicted, "may be removed from the United States, denied citizenship, and denied admission" to the country in the future, Fed. R. Crim. P. 11(b)(1)(O), the court said, "Pleading guilty has immigration consequences if that affects you. If it doesn't, it won't." JA23. The district court also failed to inform Mr. Carter, and thus failed to ensure that Mr. Carter understood, the district court's obligation at sentencing "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Fed. R. Crim. P. 11(b)(1)(M); *see* JA19-27.

In isolation, some of these omissions from the Rule 11 colloquy were harmless. For example, Mr. Carter is a United States citizen, JA68, so he suffered no prejudice from the district court's failure to inform him that he could be removed or denied citizenship if he was not a citizen. Restitution did not apply in Mr. Carter's case, JA109, so the district court's failure to inform him of the court's authority to order restitution had no impact. But just as in *Bailey*, "the context here is critical—the district court's failure to fully comply with Rule 11(b)(1)(N) was one of nearly a dozen errors and omissions during the plea colloquy." *Bailey*, 2023 WL 3578819, at *2. Given the number and nature of errors and omissions, the Fourth Circuit could not properly conclude from the record that Mr. Carter's appeal waiver was knowing and voluntary. *See id.*

This case is unlike *General*, where the Fourth Circuit enforced an appeal waiver despite the district court's failure to address the waiver specifically with the defendant. *See General*, 278 F.3d at 400. First, the arraignment in *General* predated the amendment to Rule 11 requiring district courts to discuss appeal waivers during the plea colloquy. *Id.* at 400 n.5. By the time of Mr. Carter's arraignment in May 2022, JA8, Rule 11 had required discussion of appeal waivers during the plea colloquy for more than twenty years. *See General*, 278 F.3d at 400 n.5 (noting that relevant amendment to Rule 11 went into effect December 1, 1999). Second, the colloquy in *General* was more thorough: the district court in *General* "confirmed that [the defendant] had an opportunity to read and discuss [the plea agreement] with his lawyer before signing it, and confirmed that [the defendant] understood 'all of the words, the language, the sentences, even any legal phrases that were contained' in the plea agreement." *Id.* at 400. The district court in *General* also advised the defendant of his appeal rights and explained that they could be waived through a plea agreement. *See id.* Here, in contrast, the district court did not ask Mr. Carter whether he had read the plea agreement or whether he understood all or even any part of the plea agreement. *See* JA19-27.

United States v. Cohen, 459 F.3d 490 (4th Cir. 2006), likewise fails to justify the Fourth Circuit's decision. In *Cohen*, the Fourth Circuit did not address the issue presented here—whether an appeal waiver can be enforced despite the district court's failure to question the defendant about the waiver and inform the defendant of the waiver's terms at arraignment. *See Cohen*, 459 F.3d at 494. Rather, the

defendant in *Cohen* challenged his appeal waiver for other reasons, citing his learning disabilities and the disparity in bargaining power between the federal government and the defendant. *Id.* The Fourth Circuit upheld the waiver, noting, among other facts, that the defendant "represented to the district court that he had read his plea agreement, discussed it with his attorney, and understood 'the terms, the language, the sentences, even legal phrases' in the agreement after discussing it with his attorney." *Id.* Mr. Carter made no such representation in this case. *See* JA19-27.

* * *

Allowing circuit-level courts to routinely enforce appeal waivers, particularly in the absence of compliance with Rule 11, removes a critical check on the sentencing authority of district courts. Although district courts have broad discretion at sentencing, appellate review of sentences for procedural and substantive reasonableness serves an important function—it promotes uniform application of the law at sentencing, ensuring that similarly situated defendants are more likely to receive similar sentences, and requires district courts to thoughtfully engage with the law, the facts of the case, and the parties' arguments in imposing a sentence. Mr. Carter asks this Court to weigh in on appeal waivers and reject circuit-level precedents allowing the routine enforcement of boilerplate waivers despite omissions in the plea colloquy.

CONCLUSION

For the foregoing reasons, Petitioner Daquan Doral Carter respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, and remand for further proceedings to allow the Fourth Circuit to consider the merits of his appeal.

This the 11th day of April, 2024.

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