NO. _____

In the

Supreme Court of the United States

JOSEPH IRA PATTERSON, III, ***Petitioner***,

v.

UNITED STATES OF AMERICA, ***Respondent***.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Joseph Ira Patterson, III, asks leave to file the attached Petition for Writ of Certiorari, without prepayment of costs, and to proceed in forma pauperis. Pursuant to the provisions of the Criminal Justice Act, Petitioner was previously granted leave to proceed in both the United States District Court for the Southern District of West Virginia and the United States Court of Appeals for the Fourth Circuit on this case.

JOSEPH IRA PATTERSON, III

By Counsel

Jonathan D. Byrne, Appellate Counsel
Office of the Federal Public Defender
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Dated: May 8, 2024

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

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

Dated: May 8, 2024

I. QUESTION PRESENTED FOR REVIEW

Whether a provision in a plea agreement which bars a defendant from appealing "any sentence of imprisonment" can be knowingly entered into well before the sentence has been imposed and the right to appeal has accrued.

II. TABLE OF CONTENTS

III. **TABLE OF AUTHORITIES**

Cases

Constitutional Provision

Federal Statutes

Rules

Other Authorities and Sources

IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Patterson*, No. 3:21-cr-0218-1, U.S. District Court for the Southern District of West Virginia. Judgment entered August 17, 2022.
- *United States v. Patterson*, No. 22-4481, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on February 8, 2024.

V. OPINIONS BELOW

The order partially granting the Government's motion to dismiss Patterson's appeal before the United States Court of Appeals for the Fourth Circuit in *United States v. Patterson*, No. 22-4481, is unpublished and is attached to this Petition as Appendix A. The Fourth Circuit's ultimate affirmance of Patterson's sentence came in an unpublished opinion that is attached to this Petition as Appendix B. The district court's determination that the plea agreement, including the appeal waiver provision, was entered into knowingly and voluntarily occurred during the guilty plea hearing. The transcript is attached to this Petition as Appendix C. The final judgment order of the district court is unreported and is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on February 8, 2024. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

This case requires interpretation and application of 18 U.S.C. § 3742, which says, in pertinent part:

> **(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) 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.

This case also requires interpretation and application of Rule 11(b)(1) of the Federal Rules of Criminal Procedure, which provides, in pertinent part:

> 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.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On October 27, 2021, a six-count indictment was filed in the Southern District of West Virginia charging Joseph Ira Patterson, III with distribution of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Counts One and Two), possession with intent to distribute methamphetamine, cocaine, and fentanyl, also in violation of 21 U.S.C. § 841(a)(1) (Counts Three, Four, and Five), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Six). JA10-16.[1] Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Patterson pleaded guilty to Count Five of the indictment. JA61. A Judgment and Commitment Order was entered on August 17, 2022. JA137-144. Patterson filed a timely notice of appeal on August 25, 2022. JA145. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from an investigation of Patterson for selling controlled substances in and around Huntington, West Virginia. Ultimately, the primary issue in the case was whether Patterson "maintained" a storage unit in which drugs were found, justifying an enhancement under the Sentencing Guidelines. The Fourth

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[1] "JA" refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

Circuit did not review that issue, but instead dismissed the appeal on that ground at the Government's request due to a waiver of appellate rights in Patterson's plea agreement.

1. Patterson pleads guilty to possession of drugs with intent to distribute them.

Police made two controlled purchases of narcotics from Patterson in March and April 2021. JA149. After the second controlled buy, police used the same confidential informant to set up a third purchase. Before that purchase could take place, however, Patterson was pulled over and arrested. In addition to finding drugs in Patterson's car, police also searched his home, where more drugs were found. JA150. The next day, officers executed a search warrant at a storage unit, based on the fact that their surveillance of Patterson showed that he stopped there prior to the traffic stop. JA26-27; JA150. In the unit the officers found more drugs, along with a set of digital scales, and several firearms. JA150.

As a result of this investigation, Patterson was charged in a six-count indictment with charges related to the distribution of drugs and possession of a firearm. JA10-16. Patterson entered into a plea agreement with the Government, in which he agreed to plead guilty to Count Five of the indictment, charging him with possession with intent to distribute methamphetamine, cocaine, and fentanyl, in return for which the Government would forgo filing an information based on his criminal history that would increase his statutory sentencing range. JA63. Patterson also agreed to waive "his right to seek appellate review of his conviction and of any sentence of imprisonment . . . or the manner in which the sentence was determined,

on any ground whatsoever," unless the sentence exceeded the statutory maximum for his offense of conviction. JA67. Patterson specifically reserved his right to allege ineffective assistance of counsel in "a post-conviction collateral attack or direct appeal." JA68.

2. The district court applies a sentencing enhancement for maintaining a premises for the purpose of distributing drugs.

A Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. JA146-172. The probation officer recommended a base offense level of 36 and a pair of two-level enhancements, one for possession of a firearm and the other for maintaining "a premises for the purpose of manufacturing or distributing controlled substances." JA153. The premises enhancement was based on the drugs found in the storage unit, to which Patterson had a key. *Ibid*. The recommended advisory Guideline range, therefore, was 324 to 405 months in prison. JA164.

Patterson objected to the imposition of the premises enhancement, arguing that the storage unit was rented by Whitney Mounts, who had not given Patterson "permission to have access." JA170. Instead, he used a key to the unit obtained from his wife without her knowledge. In addition, Patterson had used the unit on only one occasion. The Government had no objections to the Guideline calculations in the PSR. *Ibid*.

A sentencing hearing for Patterson was held on August 15, 2022, at which Patterson presented two witnesses in support of his objection. JA86-136. The first

was the owner and manager of the storage facility where the unit at issue was located. JA90-91. He testified about the lease agreement for that unit and that it had been rented by Mounts. JA92-93. He also testified that records showed that the unit was always paid for by Mounts. JA94. He explained that renters would be given a code to use to get into the facility itself and that the individual units were locked with locks provided by the renters. JA96. Patterson's other witness was Mounts. JA97-104. She testified that there was one key to the lock on the unit, which she provided, along with the access code, to Patterson's wife. Mounts did not give her permission to give them to Patterson, nor did Mounts give them to Patterson herself. JA99. Mounts explained that she had not accessed the unit for a "couple months." JA102. When she learned about drugs and weapons having been found in the unit she terminated the lease. JA101. She agreed she was not "very happy" with Patterson. JA100.

The Government argued that the fact that Patterson "was observed going to that storage unit before the deal, that he had access to it, the key was on his key ring, and that the drugs and the guns that were found in there are his" all were sufficient to show he had control over the storage unit. JA104-105. Patterson argued that the Government was required to prove both a possessory interest in the unit and that one of its primary purposes had to be related to the distribution of drugs. In this case Patterson lacked a possessory interest and the primary purpose of the unit was to store Mounts' personal property. JA105-106. As he did not have Mounts' permission to use the unit, Patterson argued he was "a trespasser." JA107.

The district court overruled the objection, concluding that Patterson's position that he was a trespasser was "contradicted by the evidence." JA110. That the police followed Patterson to the unit, that he was alone and had access to it, and that "he obtained over 900 grams of fairly pure methamphetamine" by using the key to the unit was "ample evidence . . . that he controlled access to it, that he had constructive control because he's the one that's got the key to the lock." JA111. Therefore, the district court adopted the advisory Guideline calculations in the PSR. JA116-117. The district court ultimately imposed a sentence of 220 months prison, to be followed by a five-year term of supervised release. JA130.

3. The Fourth Circuit partly dismisses Patterson's appeal at the Government's and affirms his sentence.

Patterson appealed his sentence to the Fourth Circuit Court of Appeals. *United States v. Patterson*, No. 22-4481. In his opening brief, he set forth two issues: (1) whether the premises enhancement was properly applied and (2) whether he received ineffective assistance of counsel at sentencing because of trial counsel's erroneous conception of what the Government had to prove regarding the enhancement. *Id*. at Dkt. No. 19 at 5-20. The Government filed a motion to dismiss Patterson's appeal on two grounds. *Id*. at Dkt. No. 26. First, the Government argued that the issue of whether the enhancement was properly applied was covered by a valid appeal waiver. *Id*. at Dkt. No. 26 at 4-7. Second, the Government argued that the ineffective assistance of counsel claim, although not covered by the appeal waiver, nonetheless

was not sufficiently developed in the record or in Patterson's brief to be cognizable on direct appeal. *Id*. at 7-8.

The Fourth Circuit entered an order partially granting and partially denying the Government's motion to dismiss. Appendix A. The court agreed with the Government that "Patterson's waiver of appeal rights is valid and enforceable and that his challenge to the sentencing enhancement falls squarely within the scope of his waiver of appellate rights" and granted the "Government's motion to dismiss the appeal as to this challenge." *Id*. at 1. As to the ineffective assistance of counsel claim, however, the court concluded that it was not covered by the waiver and "the Government has not shown that the cognizability of the claim is appropriate for disposition by motion prior to full briefing" and denied the motion on that claim. *Id*. at 2. After full briefing, the court affirmed Patterson's sentence, concluding that the record did not establish a "conclusive claim" of ineffective assistance of counsel. *United States v. Patterson*, 2024 WL 489478 at *1 (4th Cir. 2024).

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether a provision in a plea agreement which bars a defendant from appealing "any sentence of imprisonment" can be knowingly entered into well before the sentence has been imposed and the right to appeal has accrued.

This Court has recognized that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 372-373 (guilty pleas account for 95% of all

criminal convictions). A large percentage of those convictions come about as a result of plea agreements between the prosecution and defense, and "many-if not most-of those plea agreements contain waivers of the defendant's right to appeal." Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 Vt. L. Rev. 149, 150-151 (2003). Although this Court has never addressed the issue directly, the Circuit Courts have agreed that defendants in criminal cases may waive their right to appeal their sentences, if such a waiver is made knowingly and intelligently. *See, e.g.*, *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir.1993), *cert. denied*, 509 U.S. 931 (1993) ("[i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement."); *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009)(collecting cases). However, that waiver of a right guaranteed by statute, *see* 18 U.S.C. § 3742, is given at the guilty plea stage of proceedings, well before any potential sentencing error occurs. Whether a defendant may waive his right to appeal his sentence, well in advance of when that sentence is imposed or even contemplated, is an important questions of federal law this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. Plea bargains, and the assorted waivers that can be part of them, must be knowingly and voluntarily entered into.

This Court recognized the importance of plea bargains and approved their role in the modern criminal justice system in *Santobello v. New York*, 404 U.S. 257 (1971).

If plea bargaining were not appropriate and "every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id*. at 260; *see also Frye*, 566 U.S. at 144 (to "note the prevalence of plea bargaining is not to criticize it"). Among other benefits, plea bargains lead "to prompt and largely final disposition of most criminal cases." *Santobello*, 404 U.S. at 261. The usefulness of plea bargaining, however, "presuppose[s] fairness in securing agreement between an accused and a prosecutor." *Ibid*. Therefore, the plea must be "be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Id*. at 261-262.

The Fourth Circuit first approved of appellate waivers as part of a plea bargain in *Wiggins*. Wiggins pleaded guilty to obstruction of justice as part of a plea agreement in which he agreed to waive "the right to appeal his sentence on any ground." *Wiggins*, 905 F.3d at 52. Nonetheless, he filed an appeal challenging the district court's decision to deny him credit for acceptance of responsibility at sentencing. The court concluded that he had waived his right to such review. The court first noted that it was "well settled that a defendant may waive his right to go to trial, to confront the witnesses against him, and to claim his Fifth Amendment privilege against self-incrimination" by pleading guilty. *Ibid*. In comparison to those rights based in the Constitution, the "right of direct appeal after judgment on a plea is very limited." *Ibid*. Without any real analysis, the court concluded that it was "clear that a defendant may waive in a valid plea agreement the right of appeal under

18 U.S.C. § 3742," because as the "court has recognized, '[i]f defendants can waive fundamental constitutional rights . . . surely they are not precluded from waiving procedural rights granted by statute.'" *Id*. at 53, quoting *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989). That logic controls the resolution of appeal waiver cases in the Fourth Circuit today. *See United States v. Blick*, 408 F.3d 162 (4th Cir. 2005). It is also the logic adapted by most other Courts of Appeals. *See United States v. Melancon*, 972 F.2d 566, 566-567 (5th Cir. 1992); *United States v. Khattak*, 273 F.3d 557, 560 (3d Cir. 2001); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003)(*en banc*); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

It is axiomatic that a waiver of rights can only be enforceable "if the defendant knowingly and intelligently agreed to it." *United States v. Manigan*, 592 F.3d 621, 627 (4th Cir. 2010). However, the analogy drawn by the Fourth Circuit and other courts between constitutional rights related to trial waived as part of a guilty plea and the preemptive waiver of the right to appeal a sentence is deeply flawed by not recognizing that it is impossible for a defendant to knowingly agree to waive something which does not accrue until some future date. A waiver is an intentional and knowing "relinquishment of a ***known*** right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(emphasis added). As one judge explained, "one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty." *Melancon*, 972 F.2d at 571 (Parker, J., concurring). The same cannot

be said for a person during a guilty plea hearing waiving his right to appeal a sentencing decision to be made weeks, if not months, in the future.

B. A defendant cannot knowingly waive his right to appeal a decision that has not yet been made and for which the preconditions do not exist at the time of the waiver.

The problems inherent in forcing defendants to waive a right to appeal prior to sentencing are evident from the routine plea hearing conducted by the district court in this case. JA29-60.

After reviewing the plea agreement with Patterson, the district court explained that "I want to make sure . . . that you understand the nature of the charge and the consequence" as well as making sure "that you understand the constitutional and other legal rights you give up by pleading guilty." JA37-38. As part of that discussion, the district court asked whether Patterson had discussed with counsel "the Sentencing Guidelines and how they might apply to your case?" JA51. The district court then made clear that Patterson understood that "while you and the government have agreed on some of these guidelines, the probation office and the Court are not bound by that agreement" and that he could not withdraw from the agreement if "you disagree with my calculation of the appropriate guideline?" JA52-53. Yet, at the time of the plea hearing "there has not been a presentence investigation or Presentence Report. Therefore, the trial court cannot be fully apprised of the relevant guideline computations." *United States v. DeFusco*, 949 F.2d 114, 118 (4th Cir. 1991). As a result, "the court is not in the position to inform the defendant of the sentencing range under the Guidelines at the time the plea is entered." *Ibid*. Thus, a defendant has no

right to be advised of the proper Guideline range before entering a guilty plea, nor does he have the right to withdraw the plea later if his lawyer's advice as to the advisory Guideline range was incorrect. *DeFusco*, 949 F.2d at 119; *United States v. Lambey*, 974 F.2d 1389, 1394-1396 (4th Cir. 1992)(*en banc*).

The defendant faces a Catch-22.[2] The right to appeal a sentence arises only when certain specified errors occur when that sentence is imposed. *See* 18 U.S.C. § 3742(a); *United States v. Booker*, 543 U.S. 220, 260-262 (2005). But a waiver of appellate rights as part of a plea agreement occurs long before those errors may occur. A waiver executed in such situations cannot truly be knowing.

In 1999, the Federal Rules of Criminal Procedure were amended to require the district court during a guilty plea hearing to advise the defendant of any provisions of a plea agreement that include a waiver of appellate rights. Fed. R. Crim. P. 11(b)(1)(N). Although some courts have pointed to the adoption of the Rule as support for the propriety of appeal waivers, *see, e.g.*, *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001), the rule makers did not intend to provide such support. In explaining the need for the provision, the Advisory Committee stated that "[a]lthough a number of federal courts have approved the ability of a defendant to enter into such waiver agreement, the Committee takes no position on the underlying validity of such waivers." Advisory Committee Notes (1999 Amendments).

[2] As does defense counsel, who must file an appeal on their client's behalf if requested, even if there are no non-frivolous issues remaining to appeal. *Garza v. Idaho*, 139 S. Ct. 738, 744-747 (2019).

Guilty pleas, and the plea bargains that usually accompany them, are not only a feature of the modern criminal justice system, they have become the defining one. In federal courts, the most recent data shows that over 97% of cases that end in conviction do so as the result of guilty pleas. *Frye*, 566 U.S. at 143-144. Given the prevalence of plea bargaining in modern criminal law, it is essential that defendants know precisely what they are waiving. Therefore, this Court should grant the Petition and provide guidance to the Circuit Courts of Appeals, the Government, and criminal defendants on this issue.

X. CONCLUSION

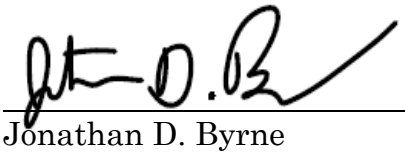
For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

JOSEPH IRA PATTERSON, III

By Counsel

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER



Jonathan D. Byrne
Appellate Counsel
Counsel of Record

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