No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

DANIEL LEVI, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

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QUESTION PRESENTED

The Ninth Circuit dismissed Mr. Levi's criminal appeal due to an appellate waiver in the plea agreement. Mr. Levi argues that the appellate waiver in his case was unknowing and involuntary (and therefore unenforceable) because though one may knowingly and voluntarily waive an unknown future sentence authorized by law, one cannot waive the constitutionally guaranteed right for the district court to follow the law when it applies the United States Sentencing Guidelines. The sentencing process must satisfy the requirements of the Due Process Clause.

The question presented is:

Is an appellate waiver knowing and voluntary when the waiver's scope includes a sentence contrary to law and unauthorized by the United States Sentencing Guidelines when a criminal defendant enjoys a constitutionally-protected liberty interest in being sentenced according to law?

OPINION BELOW

On February 28, 2024, the United States Court of Appeals for the Ninth Circuit filed dismissed Mr. Levi's appeal in United States v. Daniel Levi, No. 23-805, due to an appeal waiver. A copy of this Order is attached hereto as Appendix "A".

JURISDICTION

On February 28, 2024, the United States Court of Appeals for the Ninth Circuit dismissed Mr. Levi's appeal. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On October 11, 2023, Mr. Levi and co-defendant Ovadiah Davidian were charged by Superseding Information in count 1 with conspiracy to distribute fentanyl in violation of Title 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. (ER-74.)[1] In count 2, the defendants were charged with possession with intent to distribute fentanyl in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B). (ER-75.) The Superseding Information alleged forfeiture allegations pursuant to Title 21 U.S.C. § 853. (ER-75-76.)

[1] "ER" refers to the Excerpts of Record filed in Ninth Circuit in case number 23-805 and "PSR" refers to the Pre-Sentence Report filed in case number 23-805.

Mr. Levi and the government entered into a plea agreement on October 11, 2022. (ER-57.) Mr. Levi entered guilty pleas to count 1 and count 2 of the Superseding Information. (CR 64.)

On April 7, 2023, the district court sentenced Mr. Levi to a term of 70 months of imprisonment on count 1 and on count 2, to run concurrently. (ER-38.) Mr. Levi filed his timely Notice of Appeal on April 21, 2023. (ER-77.) On February 28, 2024, the Ninth Circuit dismissed his appeal. (Appendix "A".) On May 14, 2024, the district court granted the motion to reduce Mr. Levi's sentence pursuant to 18 U.S.C. § 3582(c)(2). Mr. Levi's sentence was reduced to 57 months.

STATEMENT OF FACTS

The plea agreement contained a factual basis for the guilty plea. Daniel Levi and co-defendant Ovadiah Davidian agreed with each other and other persons to distribute fentanyl. (ER-60-62.)

Investigators seized defendant's and Davidian's phones that included text messages of recent narcotics sales and distribution. Mr. Levi became a member of the conspiracy knowing that its object was to distribute fentanyl or some other federally controlled substance. Mr. Levi also knew that the amount of fentanyl involved in the conspiracy was at least 40 grams." (ER-

60-62.)

REASONS FOR GRANTING THE WRIT

This petition raises the question: Can a criminal defendant, who has a constitutionally-protected liberty interest to being sentenced according to the law, knowingly and voluntarily waive his right to appeal a sentence that is unlawful and is contrary to the law established by Congress in exchange for a plea of guilty?

In this case, Mr. Levi and the government entered into a plea agreement. (ER-57-73.) The plea agreement contains a waiver of appeal provision. (ER-69-70.) It states: "Defendant waives (gives up) all rights to appeal and to collaterally attack every aspect of the conviction and sentence. This waiver includes, but is not limited to, any argument that the statute of conviction or Defendant's prosecution is unconstitutional and any argument that the facts of this case do not constitute the crime charged. The only exception is defendant may collaterally attack the conviction or sentence on the basis that the defendant received ineffective assistance of counsel." (ER-69-70.)

The government filed a motion to dismiss this appeal due to this appellate waiver. The Ninth Circuit granted the government's motion and

dismissed the appeal. (App. A.)

Normally, an express waiver of the right to appeal is valid as long as it is knowingly and voluntarily made. United States v. Blitz, 151 F. 3d 1002, 1006 (9th Cir. 1998). The touchstone in considering the validity of a waiver is whether the waiver was voluntary, intelligent, and knowing. Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed 2d 378 (1981). A criminal defendant retains "the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary". Garza v. Idaho, 139 S. Ct. 738, 745, 203 L. Ed. 2d 77 (2019).

Mr. Levi argues that the waiver of the appeal of his sentencing order was not knowingly and voluntarily made because he expected the district court to adhere to the law as it relates to the imposition of the 2-level increase for weapon possession pursuant to U.S.S.G. § 2D1.1(b). "A defendant cannot know what he or she has given up by waiving the right to appeal until after the judge and counsel have reviewed a yet-to-be-prepared presentence investigation report, after the judge has considered other information not known to the

defendant at the time of the plea, and after the judge has actually imposed sentence. By then it is too late, no matter how disproportionate the sentence or how egregious the procedural or substantive errors committed by the sentencing judge or the defendant's own counsel." United States v. Medina-Carrasco, 815 F. 3d 457, 464 (9th Cir. 2016) (dis. opn. of Friedman, P.).

"It is hard to see how a defendant at the plea hearing can ever knowingly and intelligently – that is, with 'a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon it,' Moran v. Burbine, 475 U.S. 412, 422, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)—waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such prospective waivers in anticipation of unknown future events are inherently unknowing and unintelligent." United States v. Medina-Carrasco, supra, 815 F. 3d at 464 (dis. opn. of Friedman, P.).

The district court's decision to increase Mr. Levi's offense level by two levels pursuant to U.S.S.G. § 2D1.1(b)(1) is contrary to law pursuant to United States v. Briggs, 623 F. 3d 724, 731 (9th Cir. 2010). Furthermore, the district court's finding that a weapon was used

during the conspiracy to distribute fentanyl was incorrect because this fact is unsupported by the record. United States v. Robertson, 895 F. 3d 1206, 1213 (9th Cir. 2018). In fact, the government agreed the record did not support a finding that a weapon was used during the conspiracy and advocated that the district court not impose the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1). (ER-29, ER-30.)

In Briggs, the law provides a two-level enhancement for weapon possession pursuant to U.S.S.G. § 2D1.1(b)(1) only applies when there is proof or evidence that weapons were present during the offense. United States v. Briggs, supra, 623 F. 3d at 731. The defendant in Briggs "repeatedly bragged about the guns he had access to, but none of these firearms were ever recovered". Id. In the present case, similar to Briggs, though weapons were discussed in the text message between Mr. Levi and co-defendant, no firearm was ever recovered.

More important, the Ninth Circuit has held that the plain language of § 2D1.1(b)(1) requires possession of a weapon that was *possessed and present* during the crime. United States v. Briggs, supra, 623 F. 3d at 731;

United States v. Alaniz, 69 F.4th 1124, 1126 (9th Cir. 2023. "Under § 2D1.1(b)(1), the government simply bears the burden of proving that the weapon was possessed at the time of the offense." United States v. Alaniz, supra, 69 F. 4th 1126-1127. This means that the defendant must possess a weapon at the time when the charged offense was committed. In order for Mr. Levi to receive the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1), the government had to prove a weapon was present at the time when Mr. Levi was conspiring to distribute fentanyl. United States v. Alaniz, supra, 69 F. 4th 1126-1127.

In this case, government argued that the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) was inapplicable to this case and conceded that weapons discussed in the text messages were not connected to the conspiracy to distribute fentanyl: the government "could not tie essentially that conversation to the greater distribution scheme" and "in the greater context of how those text messages were made, we could not specifically link what the violent conduct was displayed in those text messages to the actual distribution scheme that Mr. Levi was actually involved in at that time". (ER-29, ER-30.)

Review of this text conversation between Mr. Levi and Mr. Davidian

confirms the government's argument that the discussion had nothing to do with anything related to fentanyl distribution. (PSR, ¶ 10.) As defense counsel stated, "this conversation was Mr. Davidian's effort to antagonize Mr. Levi into some nebulous retribution that, frankly, never occurs." (ER-14.)

Therefore, because the law requires that government must prove a weapon was possessed at the time of the offense for the two-level enhancement to apply pursuant to U.S.S.G. § 2D1.1(b)(1)—the fact that the government conceded the conversation between Mr. Levi and Mr. Davidian could not establish any weapons were connected to the offense charged in this case, shows that as matter of law the two-level enhancement could not be applied.

Here, the appellate waiver is invalid because Mr. Levi could not have waived his right to challenge the district court's decision that is contrary to law. At a minimum, Mr. Levi expected the district court to adhere to the law when determining his sentence. "When the government proposes a plea agreement, when the defendant accepts it and when the district court enforces it, there must be a meeting of minds on all of its essential terms." United States v. Bradley, 381 F. 3d 641, 648 (7th Cir. 2004). Here, an essential term is that the district court impose the sentence in conformance

with the law. There was no meeting of the minds on a sentence that was not based on established law.

In United States v. McIntosh, 482 F. 3d 956, 959, 960 (8th Cir. 2007), the defendant and the government entered into an appellate waiver including those involving the sentence imposed. However, in McIntosh, the defendant did not agree with the Government's recommendations in the plea agreement regarding the amount of loss attributable to the scheme. These objections were noted in the plea agreement and McIntosh objected to the PSR, which mirrored the Government's recommendation on these two issues." United States v. McIntosh, supra, 482 F. 3d at 960. Therefore, the court in McIntosh considered the merits defendant's amount of loss issue under guidelines despite of the appellate waiver. Id.

In the present case, both Mr. Levi and the government believed the weapons enhancement pursuant to U.S.S.G. §2D1.1(b)(1) did not apply because there was no factual basis in the record to establish that a weapons was used during the conspiracy to distribute fentanyl. (ER-14, ER-29-30.)

Mr. Levi did not waive his right to raise this issue on appeal.

United States v. McIntosh, supra, 482 F. 3d at 960; Garza v. Idaho, supra, 139 S. Ct. at 745. Therefore, the district court should have considered the merits of the sentencing issue relating to the improper two-level increase of the offense level for weapons possession pursuant to U.S.S.G. §2D1.1(b)(1).

Congress mandates that absent an upward or downward departure, "the court shall impose a sentence of the kind, and within the range" set forth in the guidelines issued by the United States Sentencing Commission. 18 U.S.C. § 3553 (b). This congressional mandate anticipates that the sentence will reflect the *correct* application of the guidelines. To assure sentencing accuracy, Congress expressly afforded a right to appeal where sentence "was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742 (a)(2). Congress also expressly afforded a right to appeal where the sentence was imposed in violation of law. 18 U.S.C. § 3742 (a)(1).

Here, Mr. Levi argues that his sentence was imposed in violation of law. "The question of whether a waiver is made 'knowingly' and 'voluntarily' thus involves inquiring into whether the

defendant would plead guilty and unilaterally give up his right to appeal *if* he understood that the court might impose a legally erroneous sentence….from which the defendant cannot appeal." (Emphasis in original) United States v. Han, 181 F. Supp. 2d 1039, 1042 (N.D. Cal. 2002).

Here, Mr. Levi did not understand that the appellate waiver's scope included an unauthorized and unlawful sentence that he could not appeal. A plea bargain that purports to authorize the court to exercise a power it does not have is unlawful and may not be enforced.

For an appellate waiver to be enforceable, the disputed appeal must fall within its scope. United States v. Vega, 241 F. 3d 910, 912 (7th Cir. 2001). An appellate waiver provision that permits an unauthorized act by the district court in exchange for a guilty plea is not enforceable. *See* In re Williams, 83 Cal. App. 4th 936, 945 (2000); United States v. Melancon, 972 F. 2d 566, 577 (5th Cir. 1992)(Parker, J., concurring), citing to Gardner v. Florida, 530 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed 2d 393 (1977)("the sentencing process must satisfy requirements of the Due Process Clause")

A plea agreement is a type of contract subject to contract law

principles but is limited by constitutional considerations. United States v. Bownes, 405 F. 3d 634, 636 (7th Cir. 2005). A criminal defendant enjoys a constitutionally-protected liberty interest in being sentenced according to the Guidelines. United States v. Melancon, supra, 972 F.2d at 577, citing to Burns v. United States, 501 U.S. 129, 111 S. Ct. 2182, 2186-2188, 115 L. Ed 2d 123 (1991). The sentencing process must satisfy the requirements of the due process clause. Id., at 2190-2192, 2196-2197 (Souter, J, dissenting.) "Every erroneous application of the Guidelines frustrates the complex policy goals that Congress and the United States Sentencing Commission intended for the Guidelines to further." United States v. Melancon, supra, 972 F.2d at 575.

In this case, appellate review of the imposition of the two-level enhancement for weapon possession pursuant to U.S.S.G. § 2D1.1(b)(1) is essential to assure that United States Sentencing Guidelines are applied properly and to develop case law demonstrating when a weapon possession enhancement is appropriate pursuant to U.S.S.G. § 2D1.1(b)(1).

The waiver of appeal provision in the plea agreement is not valid and is

unenforceable because it was not knowingly and voluntarily made. The waiver of appeal of Mr. Levi's sentence was not knowingly and voluntarily made because Mr. Levi expected the district court to adhere to the law as it relates to the imposition of his sentence The district court's decision to increase Mr. Levi's sentence by two-levels pursuant to U.S.S.G. § 2D1.1(b)(1) because it found Mr. Levi possessed a weapon during the conspiracy to distribute fentanyl is unsupported by the record and the imposition of this enhancement was unlawful.

It is true that a criminal defendant may waive a constitutional right as part of a plea-bargaining agreement. However, these rights involve a known quantity. For example, in Newton v. Rumery, 480 U.S. 386, 392-398, 107 S. Ct. 1187, 94 L. Ed 2d 405 (1987), the right waived was the right to sue under 42 U.S.C. § 1983. Thus, the waiver was of a known quantity: a lawsuit—of which the one waiving had full knowledge, and over which the one waiving exercised control. United States v. Melancon, supra, 972 F. 2d at 572.

The waiver of any sentencing issue in this case, "contrasts with every other waiver provision typically included in a plea agreement. Every other right that normally is relinquished is a known, well-

defined right, and the quid pro quo is understandable. For example, when a defendant gives up the right to trial in favor of a plea, he or she knows that there will no longer be twelve jurors setting in judgment, that there will no longer be live testimony and the right to confront witnesses, and that there will be no speedy and public trial." United States v. Raynor, 989 F. Supp. 43, 44 (Dist. of Columbia 1997). "Moreover when a defendant waives the right to a trial by jury in exchange for a plea to few counts or lesser offense, the defendant not only gives up any advantages that may come with a jury trial but also is relieved of the uncertainties that may result from exercising the right to trial. United States v. Raynor, supra, 989 F. Supp. at 44.

"When a defendant waives the right to appeal a sentence, however, he or she is freed of none of the uncertainties that surround the sentencing process in exchange for giving up the right to later challenge a possibly erroneous application or interpretation of the Sentencing Guidelines or a sentencing statute." United States v. Raynor, supra, 989 F. Supp. at 44. "Under the plea agreement proffered by the government, the defendants would have no right to ask the court of appeals to correct the illegal or unconstitutional

ramifications of such sentencing errors." United States v. Raynor, supra, 989 F. Supp. at 44.

In an appellate waiver, 'what is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence." United States v. Melancon, supra, 972 F. 2d at 572. This Court has held that a party may waive any provision either of a contract or of a statute intended for his benefit. Shutte v. Thompson, 82 U.S. 151, 159, 21 L. Ed. 123 (1873). Waiver of the constitutional right to be sentenced according to law cannot be to a defendant's benefit…because a criminal defendant enjoys the right to be sentenced according to the law. United States v. Melancon, supra 972 F.2d at 577.

The government argued and the Ninth Circuit agreed that Mr. Levi waived the right to appeal a sentence that was imposed "contrary to law". (App. "A") However, Mr. Levi could never knowingly or intentionally waive an appeal of a sentence that was imposed in violation of law. Allowing a waiver of an appellate right of an unlawful sentence would drastically curtail the role of appellate review in assuring the correct and uniform application of sentences by the district courts. Appellate review

allows the correction of aberrant, illegal, or biased sentencing determination and furthers the purpose of legislative sentencing reform by promoting uniformity and fairness with the system as a whole. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. , 127, 200, 200-211 (1995).

The government's waiver theory would require that courts find that Mr. Levi "knowingly and voluntarily" waived any objection to a sentence imposed in violation of established Ninth Circuit law. Here, Mr. Levi argues that his sentence was not imposed within the law. At the time of the plea agreement, Mr. Levi could not anticipate that the district court would impose a sentence not in conformance with the law. Therefore, his waiver of appeal could not have been knowingly and voluntarily made. No one could knowingly and voluntarily waive an appeal of a sentence that was imposed in violation of the law.

There is not a circuit split on whether an appellate waiver is knowing and voluntary when the waiver's scope includes a sentence contrary to law and unauthorized by the United States Sentencing Guidelines. However, there are some district courts that take the position that a waiver of appeal of an illegal or unauthorized sentence

can never be enforced. United States v. Han, supra, 181 F. Supp. 2d at 1040-1044; United States v. Raynor, supra, 989 F. Supp. at 44-48. And, there are circuit courts that have held that appellate waivers of sentencing issues should be enforced. United States v. Hahn, 359 F.3d 1315, 1325-1327 (10th Cir. 2004); United States v. Khattak, 273 F. 3d 557, 559-563 (3rd Cir. 2001); United States v. Teeter, 257 F. 3d 14, 21 (lst Cir. 2001).

Based on the foregoing, Mr. Levi requests that this Court grant certiorari in this case to answer the question of whether an appeal waiver is knowing and voluntary when its scope includes a sentence contrary to the United States Guidelines when a criminal defendant enjoys a constitutionally-protected liberty interest in being sentence according to the law. This petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Mr. Levi respectfully submits that the petition for writ of certiorari should be granted.

Dated: May 23, 2024

Respectfully Submitted,

Karyn H Bucur

Karyn H. Bucur
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 28 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DANIEL LEVI, Defendant - Appellant.	No. 23-805 D.C. No. 3:22-cr-01176-TWR-1 Southern District of California, San Diego ORDER

Before: CLIFTON, CALLAHAN, and H.A. THOMAS, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 22) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Appellant's argument that the waiver is unenforceable because he did not knowingly and voluntarily waive his right to appeal a sentence that is "contrary to law," is unavailing. *See United States v. Medina-Carrasco*, 815 F.3d 457, 462-63 (9th Cir. 2016) ("That [the defendant] did not realize the strength of his potential appellate claims at the time that he entered into the plea agreement does not permit him to invalidate his knowing and voluntary waiver of appellate rights." (internal quotation marks omitted)); *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998) ("When a plea agreement expressly waives a defendant's right to appeal

a sentence, the waiver extends to an appeal based on an incorrect application of the sentencing guidelines.").

DISMISSED.