

NO. _____

In The
Supreme Court of the United States

JAMAAL ELWOOD DANCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

WAS THE APPEAL BARRED BY THE APPEAL WAIVER IN THE PLEA AGREEMENT, I.E. SHOULD THE COURT OF APPEALS HAVE ENFORCED AND THUS APPROVED THE APPEAL WAIVER?

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases and Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
Statement of the Facts	2
Reason Why the Court Should Grant the Writ	3
Argument	3
Conclusion	5
Appendix:	
Order of the United States Court of Appeals for the Fourth Circuit, filed April 18, 2024	A1

TABLE OF CASES AND AUTHORITIES

	<u>Page</u>
<u>United States v. Hahn</u> , 359 F.3d 1315 (10 th Cir. 2004).....	4
<u>United States v. Jacobo Castillo</u> , 924 F.2d 1227 (2 nd Cir. 1991).....	4
<u>United States v. Story</u> , 439 F.3d 226 (5 th Circuit 2006).....	4
<u>United States v. Teeter</u> , 257 F.3d 14 (1 st Cir. 2001).....	4
<u>United States v. West</u> , ____ F.4 th ____, 2024 WL 1793048 (5 th Cir., April 25, 2024).....	4
<u>United States v. Wiggins</u> , 905 F.2d 41 (4 th Cir. 1990).....	4

FEDERAL STATUTES AND RULES

21 U.S.C. 841(a)(1).....	2
21 U.S.C. 846	2
FRCP 11(c)(2).....	1
FRCP 11(c)(3).....	1
FRCP 11(c)(4).....	2

OTHER AUTHORITIES

<u>Criminal Defendant's Waiver of the Right to Appeal-An Unacceptable Condition of a Negotiated Sentence or Plea Bargain</u> , 65 Notre Dame Law Review, pages 649-670 (1990)	3
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OPINION BELOW

The Court of Appeals for the Fourth Circuit decided this case on April 18, 2024 in an order dismissing the appeal, United States v. Dance, No. 23-4692 (4th Cir. 2024). The order appears in the Appendix herein, p. A-1.

JURISDICTION

The case in the Court of Appeals was decided on April 18, 2024. This petition is timely filed within 90 days, pursuant to Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

RULE 11(c)(2), FEDERAL RULES OF CRIMINAL PROCEDURE

DISCLOSING THE PLEA AGREEMENT. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

RULE 11(c)(3), FEDERAL RULES OF CRIMINAL PROCEDURE

JUDICIAL CONSIDERATION OF A PLEA AGREEMENT. A. To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

B. To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B) or (C), the Court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

RULE 11(c)(4), FEDERAL RULES OF CRIMINAL PROCEDURE

ACCEPTING A PLEA AGREEMENT. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

STATEMENT OF THE CASE

Jamaal Elwood Dance was charged in a one count indictment returned December 14, 2022 with violating 21 U.S.C. 841(a)(1) and 21 U.S.C. 846 over the period 2019 – June 2, 2022 with conspiracy to possess and distribute 40 grams or more of fentanyl and 100 grams or more of a para-fluorofentanyl. He was convicted on his guilty plea and was sentenced on October 26, 2023 to a term of 150 months. Judgment was entered October 30, 2023. Notice of appeal was timely filed pro se on November 9, 2023. Jamaal Dance is now in BOP custody at FCI Butner, North Carolina, with a January 5, 2033 release date.

STATEMENT OF THE FACTS

The Government's evidence showed that Dance and others imported illicit drugs from a supplier in New Jersey to North Carolina, and delivered money and firearms to the New Jersey supplier. The drugs were then distributed in North Carolina.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

The practice of conditioning the acceptance of sentence or plea bargains upon defendants' waiving their rights to appeal represents a systematic deprivation of defendants' rights to have their convictions reviewed.

ARGUMENT

The plea agreement in this case was signed, filed, and approved by the District Court on July 26, 2023, and contains the following language:

The Defendant agrees:

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. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law. (JA 130)

Sometimes help comes from unexpected sources, e.g. the official website of the U.S. Department of Justice Office of Justice Programs. There we find a law review article, Criminal Defendant's Waiver of the Right to Appeal-An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame Law Review, pages 649-670 (1990), summarized by the Office of Justice Programs as follows:

The practice of conditioning the acceptance of sentence or plea bargains upon defendants waiving their rights to appeal represents a systemic deprivation of defendants' rights to have their convictions

reviewed. Consequently, it violates the due process clause of the fourteenth amendment. The right to appeal a criminal conviction has become too integral a part of the criminal justice system to be sacrificed in the name of “efficiency.” Courts should hold that such waivers are invalid. At present, this is a minority view. The courts have yet to address the issue of permitting appeal waivers should recognize that the right to appeal a criminal conviction has taken on added significance as a safeguard in a system that depends so heavily upon plea-based convictions for its administration.

An appeal waiver does not deprive the appellate court of jurisdiction. Thus, if the Government does not assert the waiver, the waiver is waived, United States v. Story, 439 F.3d 226 (5th Circuit 2006). But in this case the Government did assert the waiver. See also United States v. Jacobo Castillo, 496 F.3d 947 (9th Cir. 2007), United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004), United States v. Teeter, 257 F.3d 14 (1st Cir. 2001), and United States v. West, ____F.4th____, 2024 WL 1793049 (5th Circuit, April 25, 2024).

We recognize that the Fourth Circuit does generally uphold appeal waivers when asserted by the Government. See for example, United States v. Wiggins, 905 F.2d 51 (4th Cir. 1990). We respectfully suggest though that the Court should not have done so in this instance.

Someone at the U.S. Department of Justice Office of Justice Programs clearly thought it important to make the Notre Dame Law Review article on appeal waiver available online. And there is no indication that anyone at the Office of Justice Programs disagrees with the thesis of the article. The article thus appears on the Office of Justice Programs website with the imprimatur of the Department of Justice and the Attorney General. Everyone at the Office of Justice Programs,

works for the Attorney General, as does everyone in the office of the United States Attorney for the Eastern District of North Carolina, not to mention the other 93 United States Attorneys around the country. In this case we thus had the unusual position of the Government arguing against itself.

We agree with the Government, i.e. with the position taken by the Office of the Justice Program, that the time for appeal waivers in plea agreements has come and gone.

CONCLUSION

For the reasons set forth above, we respectfully contend that the Fourth Circuit should not have enforced the appeal waiver in the plea agreement in this case. The case should be remanded for further proceedings in the Court of Appeals.

For all the reasons set forth above, the writ should be granted, the judgment below should be vacated, and the case remanded for further proceedings in the Court of Appeals.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
Order of the United States Court of Appeals for the Fourth Circuit, filed April 18, 2024	A1

FILED: April 18, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4692
(2:22-cr-00022-M-BM-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMAAL ELWOOD DANCE,

Defendant - Appellant.

ORDER

Jamaal Elwood Dance seeks to appeal his conviction, entered pursuant to Dance's guilty plea to conspiracy to distribute and possess with intent to distribute 40 grams or more of fentanyl and 100 grams or more of a fentanyl analogue, in violation of 21 U.S.C. §§ 841(a)(1), 846, and the resulting 150-month sentence. The Government has moved to dismiss the appeal, in part, as barred by Dance's waiver of the right to appeal included in the plea agreement, and for partial summary affirmance as to Dance's claim of ineffective assistance of counsel.

Upon review of the record, we conclude that Dance knowingly and voluntarily waived his right to appeal and that the sentencing issue Dance raises on appeal falls squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss this appeal in part. Further, we agree with the Government that, as developed in Dance's brief, the ineffective assistance of counsel claim is "manifestly unsubstantial and appropriate for disposition by motion," 4th Cir. R. 27(f)(1), and further observe that ineffective assistance is not apparent on the face of this record. Accordingly, we also grant the Government's motion for partial summary affirmance.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Thacker.

For the Court

/s/ Nwamaka Anowi, Clerk