

No. _____

=====

IN THE
SUPREME COURT OF THE UNITED STATES

JERMALL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the United States Court of Appeals for
the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

D. ROBERT MARION JR., ESQUIRE
Counsel of Record
CHARLTON LAW
617 S. Pike Road
Sarver, PA 16055
bobby@charltonlawyers.com
(724) 540-1161
(724) 540-1164 (Fax)

QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals erred in granting the Government's Motion for Summary Action.

PARTIES TO THE PROCEEDING

The Petitioner is Jermall Johnson, an individual. The Respondent is the United States of America. There is no party with an interest to disclose pursuant to Rule 29(6).

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit, entered on May 10, 2024 with an Order granting the Respondent's Motion for Summary Action at case number 34-138 and on June 27, 2024 denying Petitioner's Petition for Re-hearing. (Appendix, pages 1-2). The judgment of the United States District Court for the Western District of Pennsylvania, entered on February 27, 2024 (Appendix, pages 3-9), sentenced Mr. Johnson to 57 months incarceration.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
OPINIONS BELOW	4
JURISDICTION.....	4
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	4-5
STATEMENT OF THE FACTS	6
REASONS FOR GRANTING THE PETITION.....	6
1. The Third Circuit Court of Appeals erred in enforcing the appellate waiver in this case because the appeal was not a challenge to the underlying conviction.....	6
2. Enforcing the appellate waiver in this case has resulted in a miscarriage of justice because the Petitioner's sentence violates the recent amendments to the United States Sentencing Guidelines..	6
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
Cases	
<i>United States v. Corso</i> , 549 F.3d 921, 927 (3d Cir. 2008).....	7
<i>United States v. Jermall Johnson</i> No. 24-1378 (3d Cir. June 27, 2024).....	4
<i>United States v. Jermall Johnson</i> , No. CR 2-21-00265-008, 2021 WL 3025898 (W.D. Pa. Feb 27, 2024).....	4
<i>United States v. Khattak</i> , 273 F.3d 557, 563 (3d Cir. 2001).....	8
<i>United States v. Rivera</i> , 62 F.4th 778, 784 (3d Cir. 2023).....	7
<i>United States v. Smith</i> , 500 F.3d 1206, 1212 (10th Cir. 2007)	8
<i>Sotirion v. United States</i> , 617 F.3d 27, 36 (1st Cir. 2010).....	8
Other Authorities	
United States Sentencing Guidelines § 4A1.3, Application Note 3	4, 9
United States Sentencing Guidelines § 4A1.3, Policy Statement	5, 9

OPINIONS BELOW

1. ***United States v. Jermall Johnson*** No. 24-1378 (3d Cir. June 27, 2024).
2. ***United States v. Jermall Johnson***, No. CR 2-21-00265-008, 2021 WL 3025898 (W.D. Pa. Feb 27, 2024)

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The time for filing a Petition for Writ of Certiorari began to run on June 27, 2024 when the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing and Rehearing *En Banc*. The time for filing a Petition for Writ of Certiorari expires after September 25, 2024.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Sentencing Guidelines, § 4A1.3, Application Note 3

Downward Departures.—

(A) Examples.—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

- (i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.
- (ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

United States Sentencing Guidelines, § 4A1.3, Policy Statement

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

STATEMENT OF THE FACTS

This is an appeal raising an error committed by the District Court for the Western District of Pennsylvania. Specifically, Mr. Johnson alleges that the District Court erred by ignoring the United States Sentencing Guidelines and refusing to grant him a downward departure in his criminal history category. Mr. Johnson requested that the District Court depart downward because two of his criminal history points were based on convictions for small amounts of marijuana (or cannabinoids) that were clearly for personal use.

On June 27, 2024, the District Court denied these requests and sentenced Mr. Johnson to 57 months incarceration, the low end of the guidelines range. Mr. Johnson appealed this decision to the Third Circuit Court of Appeals. The Government filed a Motion for Summary Action seeking to enforce an appellate waiver. The Third Circuit granted the Motion and then denied Mr. Johnson's Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

1. The Third Circuit Court of Appeals erred in enforcing the appellate waiver in this case because the appeal was not a challenge to the underlying conviction.
2. Enforcing the appellate waiver in this case has resulted in a miscarriage of justice because the Petitioner's sentence violates the recent amendments to the United States Sentencing Guidelines.

I. THE THIRD CIRCUIT ERRED IN ENFORCING THE APPELLATE WAIVER BECAUSE PETITIONER'S APPEAL WAS NOT WITHIN THE SCOPE OF THE WAIVER.

In the Third Circuit, an appellate waiver is enforced if the following three criteria are met: “(1) that the issues he pursues on appeal fall within the scope of his appellate waiver and (2) that he knowingly and voluntarily agreed to the appellate waiver, unless (3) enforcing the waiver would work a miscarriage of justice.” *United States v. Corso*, 549 F.3d 921, 927 (3d Cir. 2008). “In determining the scope of an appellate waiver provision, we look to the ‘well-established principle that plea agreements, although arising in the criminal context, are analyzed under contract law standards.’” *United States v. Rivera*, 62 F.4th 778, 784 (3d Cir. 2023). “The language of the appellate waiver, like that of a contract, is critical to the analysis, and “such waivers must be ‘strictly construed.’” *Id.* (quoting Khattak, 273 F.3d at 562).

The Petitioner’s appeal did not fall within the scope of the appellate waiver. He was not challenging his underlying conviction, the facts underlying the plea, or even his Offense Level. Instead, he was challenging the calculation of his Criminal History Category. The waiver does not mention the Petitioner’s prior criminal record or the calculation of his Criminal History Category. Thus, if the language of the waiver is strictly construed in favor Petitioner, his challenge falls outside of the waiver.

II. ENFORCING THE WAIVER WOULD CAUSE A MISCARRIAGE OF JUSTICE

Different circuits have different factors and considerations when determining whether enforcing an appellate waiver would result in a miscarriage of justice. In the Third Circuit, a court should consider the following factors:

[T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001). In the Tenth Circuit, a miscarriage of justice occurs under the following circumstances:

...[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful.

United States v. Smith, 500 F.3d 1206, 1212 (10th Cir. 2007).

In the First Circuit, “[t]he miscarriage of justice standard requires a strong showing of innocence, unfairness, or the like...” ***Sotirion v. United States***, 617 F.3d 27, 36 (1st Cir. 2010)(internal citations omitted). Some of these standards appear to be more strict than others, so clarification from this Court as to what factors to consider in determining whether a miscarriage of justice occurred would give clearer guidance to all of the Circuit Courts and District Courts.

Regardless of the standard, factors, or considerations utilized, enforcing Petitioner’s appellate waiver constituted a miscarriage of justice. The District Court clearly erred in calculating the Appellant’s sentencing guidelines. Specifically, the

District Court erred in denying the Appellant's request for a downward departure in his criminal history category. The Petitioner received one criminal history point for a 2020 conviction for possession of a small amount of marijuana and drug paraphernalia even though the PSIR noted that the marijuana was for personal use. (Appendix, pages 10-11, 13-14). In addition, the Petitioner was assigned two points for a 2023 disorderly conduct conviction. (Appendix, pages 10-11, 13-14). This conviction was based on a piece of paper found in the Petitioner's cell that tested positive for synthetic marijuana. (Appendix, pages 10-11, 13-14). Such a small amount indicates it was for personal use.

Under the amended Sentencing Guidelines, a downward departure is appropriate if a "defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person." § 4A1.3, application note 3. Further, the policy statement explaining these changes states, "[t]his policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism and provides guidance for the consideration of such departures." § 4A1.3, policy statement.

The three points mentioned above that add to the Petitioner's Criminal History Score clearly fall under the amendment to the guidelines. In both instances, the amount of marijuana involved indicates that it was possessed for personal use. The 2020 conviction explicitly states it was for personal use and the 2023 conviction

involved one piece of paper. In addition, the 2023 conviction was reduced to a summary disorderly conduct, thus indicating that this was not a drug trafficking situation, but instead someone who possessed marijuana for personal use. Meaning, the Petitioner's situation falls under the amendment to the Sentencing Guidelines and the District Court clearly erred in refusing to depart downward in relation to Petitioner's Criminal History Category.

The error is grave because it increases the Petitioner's sentencing guidelines and ignores the amendments made by the Sentencing Commission. If the departure requested by the Appellant was granted, then his guideline range would have been reduced to forty-six (46) months to fifty-seven (57) months incarceration. All other individuals in the Petitioner's situation that have convictions for minor marijuana offenses will also face higher penalties if they are in front of this judge in the Western District of Pennsylvania. Thus, the changes will not have the effect that Congress (through the Sentencing Commission) has mandated should occur.

The character of the error relates to Criminal History categories. This is important because the error does not relate to the actual Offense Level. The Petitioner is not challenging what he plead guilty to, but instead how the District Court calculated his Criminal History Category. As such, this is not an appeal challenging the underlying facts of the case or even his underlying conviction. The Appellant is only challenging the application of the principles used to calculate his Criminal History Category.

The impact of the error on the Petitioner is substantial. As stated before, if the departure was granted, he would be able to confidently request a lower guideline

range sentence and be in a stronger position to argue for a variance. It should be noted that the District Court sentenced the Petitioner at the low end of the guideline range. Meaning, even without a variance, if the District Court sentenced him again on the low end of the range, his sentence would be reduced by eleven (11) months.

The impact of correcting the error on the Government is minimal. The Petitioner is not attempting to withdraw his guilty plea or seeking to enforce his constitutional right to a jury trial. Instead, he is simply seeking to have his sentencing guidelines reduced to the appropriate level. The burden on the Government would constitute one additional sentencing hearing.

The Petitioner also did not acquiesce to the result of the sentencing hearing at the District Court. To the contrary, he objected to the calculation of his Criminal History Category through a Position With Respect to Sentencing Factors, a Motion for Departure, a Sentencing Memorandum, and during the hearing itself. Thus, enforcing the appellate waiver in this case would result in a miscarriage of justice. As such, the Appellant should be authorized to appeal the District Court's decisions related to this Criminal History Category for the Third Circuit Court of Appeals to consider.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted so that this Court can clarify what constitutes a “miscarriage of justice” as it relates to appellate waivers and to ensure that justice is done in the Petitioner’s case.

Respectfully submitted,

/s/ D. Robert Marion Jr.

D. ROBERT MARION JR., ESQUIRE
Counsel for Appellant
CHARLTON LAW
617 S. Pike Road
Sarver, PA 16055
(724) 540-1161
(724) 540-1164 (Fax)