No.

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IN THE SUPREME COURT OF THE UNITED STATES

ALBERT TRAMPIS DOGSKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is an exception to an appeal waiver in a plea agreement where the district court relied on false or unreliable information in sentencing.

RULE 14.1(B)(iii) STATEMENT OF RELATED CASES

United States District Court for the Eastern District of Washington:

United States v. Albert Trampis Dogskin, No. 2:22-Cr-00122-SAB (Sept. 6, 2024) (amended judgment).

United States Court of Appeals for the Ninth Circuit:

United States v. Albert Trampis Dogskin, No. 23-4301 (June 20, 2024) (order dismissing appeal for appellate waiver);

United States v. Albert Trampis Dogskin, No. 23-4301 (August 27, 2024) (order on motion for reconsideration).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Other Authorities

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Albert Trampis Dogskin, through court-appointed counsel, respectfully petitions for a writ of certiorari to review the order from the United States Court of Appeals for the Ninth Circuit dismissing his direct appeal based on an appeal waiver in his plea agreement.

OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals, App. 1a and 2a, were not designated for publication in the Federal Reporter. They are included in the Appendix Volume.

JURISDICTION

The judgment of the Court of Appeals, denying the Petitioner's motion for reconsideration, was entered on August 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

This case raises the question of the magnitude of constitutional procedural error that can occur during the imposition of a criminal sentence before an appeal waiver is considered unenforceable.

A district court may consider a wide variety of information at sentencing that could not otherwise be considered at trial, *see* 18 U.S.C. § 3661, and is not bound by the rules of evidence, *see* Fed. R. Evid. 1101(d)(3). A sentencing judge may also "conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come." *Nichols v. U.S.*, 511 U.S. 738, 747 (1994) (quoting *U.S. v. Tucker*, 404 U.S. 443, 446 (1972)). However, where a defendant is sentenced on the basis of information that is materially untrue, that result is inconsistent with due process of law. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). This Court addressed this most directly in *United States v. Tucker*, where the district court relied on two constitutionally invalid convictions. 404 U.S. 443, 445 (1972). The government argued that resentencing

was not necessary because a sentencing court has wide and largely unreviewable discretion, and the relevant inquiry in not whether the defendant has been formally convicted, but whether and to what extent the defendant has in fact engaged in criminal conduct. *Id.* at 446. The Court disagreed, finding that the sentence was not imposed in the "informed" discretion of a trial judge because it was based on misinformation of a constitutional magnitude. *Id.* at 447. In other words, while a sentencing court can conduct a broad inquiry, largely unlimited as to the kind and source of information, the court's inquiry must be "informed" and, therefore, cannot be based on information that is false or unreliable.

The issue here is how the Court should now construe these due process concerns in sentencing where they intersect with appeal waivers: or put simply, are there due process violations at sentencing are not waivable. Criminal defendants in federal court generally have appellate rights under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and as this Court has stated, "no appeal waiver serves as an absolute bar to all appellate claims. . . . [W]hile signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain." *Garza v. Idaho*, 586 U.S. 232, 238-39 (2019). The claims that should remain despite an appeal waiver include sentences imposed based on false and unreliable information where the district court did not exercise an "informed"

discretion, and where the district court did nothing procedurally, such as hold an evidentiary hearing, to ensure that it would be properly informed.

The Court should grant certiorari.

STATEMENT OF THE CASE

On February 7, 2023, the government filed a superseding indictment, charging the Petitioner with four counts of Aggravated Sexual Abuse in Indian Country, 18 U.S.C. §§ 2241(a), 1153, tampering with a witness, 18 U.S.C. § 1512(c), Assault with a Dangerous Weapon in Indian Country, 18 U.S.C. §§113(a)(3), 1152, and Domestic Assault by a Habitual Offender, 18 U.S.C. §§ 117, 1153. Those charges alleged conduct related to three different women, J.I., C.G., and K.D. The three women were all related to each other either as relatives and/or roommates, and all three were at various points girlfriends, consensual sex partners, and drug use partners of the Petitioner. The Petitioner maintained his innocence to all the charges, stating they were false claims by spurned, vindictive women with motives to lie. The defense investigation into the women and their allegations undermined their claims.

On August 24, 2023, the government agreed to dismiss the entire indictment against the Petitioner, and he pled guilty pursuant to an Information and an 11(c)(1)(C) plea agreement to a single count of Assault Resulting in Serious Bodily Injury in Indian Country, 18 U.S.C. §§113(a)(7), 1153, related to a single

incident in 2018 with J.I. This charge and the underlying facts were not related to any allegations or facts underlying any of the charges in the original criminal complaint, original indictment, or superseding indictment. The Petitioner continued to maintain his innocence to all the charges in the original criminal complaint, original indictment, and superseding indictment, and all those charges were dismissed on motion of the government at sentencing. The eventual charge of conviction in the Information was previously subject to a non-prosecution agreement between the same prosecutor and the Petitioner in tribal court.

In the draft Presentence Investigation Report, the probation officer included a section entitled "Offense Behavior Not Part of Relevant Conduct." That section included a recitation of alleged facts underlying the dismissed charges from the superseding indictment. All parties, the court, and probation agreed that these alleged facts were not "relevant conduct" to the offense of conviction.

The Petitioner filed objections to the court considering or using any of these alleged facts in his sentencing, arguing that the facts were not relevant conduct, that the facts were false and full of lies, and that the court would need to find those facts by a standard of clear and convincing evidence before considering them for sentencing purposes or else the Petitioner would be deprived of due process. The Petitioner also detailed, by way of proffer, the defense investigation that significantly undermined the credibility and truth of those facts and witnesses so

that the court could determine the proper hearing procedure (1) to use to ensure due process and (2) for making any determination of facts under dispute. In his sentencing memorandum, the Petitioner continued to object to the court's use of those alleged and disputed facts underlying the dismissed charges for consideration in sentencing, and he continued to challenge the standard of proof and evidentiary procedures required for the court to make any factual findings related to facts underlying the dismissed charges.

In an addendum to the final PSIR, the probation officer acknowledged the Petitioner's challenges to the credibility and reliability of the facts in the "Not Relevant Conduct" section, but stated that the government objected to their removal, so probation just left them in the final PSIR for the court's consideration. Both the probation officer and the government only recited the alleged facts underlying the dismissed charges and did not submit any actual evidence, testimony, transcripts, or witnesses to the court for sentencing. The district court did not hold any form of evidentiary hearing related to the disputed facts and no actual evidence was admitted into the record or produced for the court to review.

At the sentencing hearing, the government argued for an upward departure based on the alleged facts underlying the dismissed charges. The Petitioner continued to object to the court's use of alleged and disputed facts underlying the dismissed charges on the basis that they were lies, unreliable, and not credible. The

Petitioner argued at the sentencing hearing that the court would need to find those facts at least by clear and convincing evidence before using them as a basis for sentencing, and that the government had not even proven those facts by a preponderance of the evidence at that point without the court conducting some further fact-finding or evidentiary hearing.

The district court explicitly rejected the Petitioner's argument as to the evidentiary standard required. The court then asked the government if those "facts" had been presented to a grand jury, the government indicated that, yes, a grand jury had issued an indictment, and the court accepted that as a sufficient evidentiary standard for using the facts in sentencing. Thus, the court explicitly adopted a probable cause standard—that a grand jury had at one point issued an indictment—for the disputed, nonrelevant facts without holding any form of evidentiary hearing or reviewing any actual evidence. The court appears to have entirely ignored the defense proffered investigation.

The court adopted the final PSIR as written, including the "Nonrelevant Conduct" section, departed upward based on those disputed, unproven, nonrelevant facts, and sentenced the Petitioner above the guideline range. The court indicated in both its oral sentencing decision and in the Statement of Reasons that the sentence was based on facts underlying the dismissed charges.

On appeal, the Petitioner challenged whether a district court violates the 6th Amendment by enhancing a sentence with a departure above the applicable guideline range on the basis of nonrelevant, disputed, uncharged conduct; whether a district court violates the 5th Amendment by using a probable cause standard for nonrelevant, uncharged conduct and without holding any evidentiary hearing prior to sentencing; and whether the standard of proof for the district court to consider nonrelevant, uncharged conduct in sentencing is by a clear and convincing standard.

The government moved to dismiss the appeal based on the Petitioner's waiver in his plea agreement. The Petitioner argued that an appeal waiver does not apply (1) where that person raises a challenge that the sentence was imposed in an unconstitutional manner, or (2) where the district court unambiguously informs a defendant that, despite an appeal waiver, he may appeal the particular issue in question on appeal. The appeals court dismissed the appeal based on the appeal waiver, and then denied a motion for reconsideration.[1]

[1] Following the conclusion of the Petitioner's motion for reconsideration in the Court of Appeals, the Petitioner filed a motion to amend the sentencing judgment in the district court. The original written judgment contained a typographical error

REASONS FOR GRANTING THE PETITION

THE CONSTITUTIONALITY OF ENFORCING AN APPEAL WAIVER WHERE A SENTENCING COURT HAS RELIED ON FALSE OR UNRELIABLE INFORMATION IS AN IMPORTANT AND RECURRING QUESTION THAT ONLY THIS COURT CAN RESOLVE.

A. THERE IS A CIRCUIT SPLIT ON THE ISSUE

There is a circuit split on whether to enforce an appeal waiver when the sentencing court has relied on false or unreliable information in sentencing, with some circuits recognizing an exception to an appeal waiver and others continuing to enforce waivers. *Compare U.S. v. Atherton*, 106 F.4th 888, 891 (9th Cir. 2024) (finding an exception to waiver where false or unreliable information that is demonstrably made the basis for the sentence) *with U.S. v. McGrath*, 981 F.3d 248, 250 (4th Cir. 2020) (finding a waiver applicable even for constitutional challenges); *U.S. v. Meirick*, 674 F.3d 802, 806 (8th Cir. 2012) (finding that due process challenges to sentencing are cognizable as reasonableness challenges and therefore subject to waiver); *U.S. v. Rubbo*, 396 F.3d 1330, 1335 (11th Cir. 2005) (applying a waiver to a challenge that the factual basis for the plea did not support

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citing the wrong statute of conviction. The district court granted that motion to amend and issued an amended judgment on September 6, 2024.

the sentence imposed); *see also Atherton*, 106 F.4th at 905-06 (Miller, J., dissenting opinion) (recognizing circuit split).[2] Circuit courts continue to struggle with how to handle procedural due process claims and appellate waivers more generally. Some have refused to enforce waivers where doing so would undermine the "fundamental fairness" of the proceedings or result in a "manifest miscarriage of justice" without defining those terms. *See, e.g., U.S. v. Adams*, 814 F.3d 178 (4th Cir. 2016); *U.S. v. Castro*, 704 F.3d 125 (3d Cir. 2013). Some courts have located the right to appeal, notwithstanding a waiver, on the principle that due process provides a non-waivable guarantee of "some minimum of civilized procedure." *See, e.g., U.S. v. Adkins*, 743 F.3d 176, 192 (7th Cir. 2014).

There is also inconsistent law *within* individual circuits on this issue, with some appellate panels recognizing an exception to appellate waiver, and other panels not. *See, e.g., Atherton*, 106 F.4th at 891 (holding that a waiver should not

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[2] On the other hand, all circuits refuse to enforce valid appellate waivers based on constitutionally impermissible factors such as race or gender. *See, e.g., U.S. v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *U.S. v. Candelario-Ramos*, 45 F.4th 521, 524 (1st Cir. 2022); *U.S. v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011); *U.S. v. Hicks*, 129 F.3d 376, 377 (7th Cir. 1997).

be enforced where unreliable or false information was used); *but see U.S. v. Dogskin*, No. 23-4301 (9th Cir. June 20, 2024) (enforcing a waiver where reliance on unreliable or false information was claimed).

B. THE ISSUE IS IMPORTANT AND RECURRING

This issue will frequently recur until this Court acts to resolve the issue. The vast majority of criminal convictions follow plea agreements. *See, e.g., Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Moreover, most plea agreements include an appeal waiver. *See, e.g.,* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 231, 232 fig.7 (2005) (sixty-five percent of plea agreements across the Federal circuits include appeal waivers).

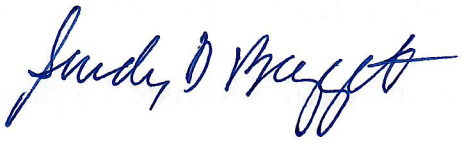
The Court recently addressed concerns over the use of acquitted conduct in sentencing, *McClinton v. U.S.*, 143 S. Ct. 1258 (2023), and the U.S. Sentencing Commission followed by prohibiting use of acquitted conduct in sentencing, U.S.S.G. § 1B1.3. Some of the same concerns are raised where a sentencing court, such as the district court in this case, relies on disputed conduct from dismissed charges without holding any form of evidentiary hearing and without using at least a preponderance of the evidence standard for making factual determinations. Enforcing appeal waivers in those circumstances makes a mockery of the

sentencing procedure and creates perverse incentives for the government to overcharge cases to force plea agreements with appeal waivers knowing that the conduct, whether proven or not, can still be used for sentencing, even if the government can't prove it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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