No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 2024

SHAQUAN DANNARD MCCALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On 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

1. IS A DEFEDANT'S RIGHT TO DUE PROCESS OF LAW VIOLATED WHEN THE GOVERNMENT REQUIRES AN APPEAL WAIVER AS PART OF A PLEA AGREEMENT?

LIST OF PARTIES

All parties to this case appear in the caption of cases on the cover page.

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The Petitioner, Shaquan Dannard McCall, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit announced on April 10, 2025, dismissing Petitioner's appeal, finding that he had previously waived his right to appeal his sentence.

OPINIONS BELOW

A Panel of the Fourth Circuit Court of Appeals dismissed Petitioner's appeal by Order filed April 10, 2025, a copy of which appears as Appendix A.

JURISDICTION

This petition is filed within 90 days of the decision of the Court of Appeals and is therefore timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, no person in any criminal case shall be "deprived of life, liberty or property, without due process of law;..."

STATEMENT OF THE CASE

On June 28, 2021, appellant was indicted by a grand jury in the Middle District of North Carolina with one count of conspiracy to commit Hobbs Act Robbery in violation of 18 U.S.C. § 1951(a) and six counts of Hobbs Act Robbery in violation of 18 U.S.C. § 1951(a). Pursuant to a plea agreement, appellant entered a plea of guilty to one count of Hobbs Act Robbery in violation of 18 U.S.C. § 1951(a).

Appellant's presentence investigation report set his guideline range at 70 - 87 months based on a total offense level of 23 and a criminal history category of IV. Appellant did not object to the calculation of his guideline range. However, the probation officer recommended an upward variance to 132 months. The Probation Department justified this recommendation by first citing the number of robberies that were actually involved. The Probation Department also stated that appellant was the most culpable of all the codefendants. The Probation Department further determined that had appellant been convicted of Count One in the indictment, he would have faced a guideline range of 151-188 months. This was based on an assumption that appellant would have received a role enhancement for leadership along with a multiple count adjustment enhancement. While not objecting to the guideline calculation, appellant did contest the conclusions made by the probation

officer that appellant was the most culpable of the group and that he would have received leadership enhancement had he been convicted of the conspiracy count.

The Court specifically declined to rely on appellant's purported leadership role in assessing grounds for an upward variance. Nevertheless, the Court did impose a sentence of 132 months based primarily on appellant's prior criminal history which the Court noted included a prior federal conviction that the Court cited as being an insufficient deterrence for the appellant. The Court also imposed a term of three years of supervised release.

STATEMENT OF THE FACTS

On August 16, 2020, the Boost Mobile store in Thomasville, North Carolina was robbed. Two males wearing face coverings entered the store at approximately 5:43 p.m. One was armed with a suspected firearm. He pointed it at the Clerk, who raised her arms and stepped away from the counter. One of the men removed money from the cash register and placed it into a bookbag. The men then demanded "where are the phones" and stated that they wanted iPhones only. They escorted the Clerk to the back room where they took what was later determined to be seven phones and $938.14 in U.S. currency.

REASONS FOR GRANTING THE WRIT

As part of the plea agreement in this case, Petitioner was required to waive his appellate rights. While the appeal waiver allowed Petitioner to appeal on the basis of ineffective assistance of counsel or prosecutorial misconduct, the waiver specifically

required Petitioner to waive his right to appeal the sentence imposed. He also waived his right to contest his conviction or sentence in post-conviction proceedings, including proceedings under Title 28 § 2255. Petitioner's presentence report correctly identified his guideline range as 70-87 months. However, the probation department recommended an upward variance to a sentence of 130 months based on a specific assessment that the plea agreement resulted in a guideline range that did not reflect the seriousness of the offense. Specifically, the probation officer argued that the defendant would have received a role enhancement for leadership which would have resulted in a guideline range of 151-188 months. At the sentencing hearing, defendant challenged the probation officer's assessment that defendant would have received a leadership enhancement for his role in the offense. While declining to use that stated basis as a reason for an upward variance, the Court nevertheless, imposed the exact same sentence recommended by the probation officer based on a different basis identified by the court for and upward variance.

On appeal, defendant argued that the court's stated reason was pretextual and therefore, the court abused its discretion in imposing a sentence which varied significantly upwards from petitioner's guideline range. Petitioner sought to challenge this ruling by right of appeal. The government moved to dismiss Petitioner's appeal. That motion was allowed by the Fourth Circuit based on Petitioner's appeal waiver in his plea agreement.

Petitioner asserts that the appeal waiver violates his right to due process of law for a variety of reasons. When considering appeal waivers, other courts have found them to be problematic for a variety of reasons. First, as noted in *U.S. v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring specially), an appeal waiver can never be knowingly and intelligently entered into.

> As an initial matter, I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that is yet to be imposed at the time he or she enters into the plea agreement; such a "waiver" is inherently uninformed and unintelligent.

U.S. v. Melancon, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring specially).

Further, appeal waivers have been found to undermine the very purpose of the sentencing guidelines:

> The very purpose of the Sentencing Guidelines was to assume more uniformity in criminal sentencing. That was the intent of Congress and the intent of the Guidelines. See 28 U.S.C. §§ 991(b)(1)(B), 994(f); United States Sentencing Commission, Guidelines Manual, Chapter One – Introduction, Part A at 2 (Nov. 1997); S. Rep. No. 225 at 150-51 (1984), reprinted in U.S.C.C.A.N. 3182, 3334; *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996). What the government seeks to do through the appeal waiver provision is inconsistent with the goals and intent of Congress and the goals and intent of the Sentencing Commission. It will insulate from appellate review erroneous factual findings, interpretations and applications of the Guidelines by trial judges and thus, ultimately, it will undermine uniformity. The integrity of the system depends on the ability of appellate courts to correct sentencing errors, but the waiver provision at issue here inevitably will undermine the important role of the courts of appeals to correct errors in sentencing, a role that Congress has specifically set out for them.

U.S. v. Raynor, 989 F. Supp. 43, 48 (D.D.C. 1997).

Additionally, other courts have found that the power of the government to extract appeal waivers in the plea bargain process is inherently unfair to defendants and results in an unconstitutional shift of the power to the prosecutor's side.

> Finally, the Court is unwilling to accept the specific waiver of appeal rights provision offered to the defendant because the same plea agreement does not limit the government's right to appeal a sentence. This glaring inequality strengthens the conclusion that this kind of plea agreement is a contract of adhesion. As a practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought and thus the ultimate sentence to be imposed under the guidelines scheme – is up to the prosecution. See *United States v. Roberts*, 726 F. Supp. at 1363. To vest in the prosecutor also the power to require the waiver of appeal rights is to add that much more constitutional weight to the prosecutor's side of the balance.

U.S. v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997).

As in *Johnson*, the appeal waiver in this case only limits Petitioner's right to appeal and not the government's right to appeal. Accordingly, Petitioner contends that the plea agreement he entered into was a contract of adhesion. Petitioner asserts that when defendants enter into plea agreements that amount to contracts of adhesion, which cannot by definition be knowingly and intelligently entered into, it necessarily violates the defendants' due process rights as guaranteed by the Fifth Amendment to the United States Constitution.

This Court should use this case as a vehicle to address the government's inherently unfair use of appeal waivers as part of the plea negotiation process. Appeal waivers have become commonplace in various jurisdictions across the country. The time has come for this Court to determine the constitutionality of appeal waivers.

CONCLUSION

For reasons set forth above, Petitioner requests this Court grant a writ of certiorari to review the United States Court of Appeals for the Fourth Circuit judgment below to answer this important question of constitutional law.

Respectfully submitted this the 13th day of June 2025.

/s/ John D. Bryson
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APPENDIX A

Fourth Circuit Court of Appeals Order filed on April 10, 2025, Dismissing Petitioner's Appeal.

FILED: April 10, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4614
(1:21-cr-00227-WO-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAQUAN DANNARD MCCALL,

Defendant - Appellant.

ORDER

Shaquan Dannard McCall seeks to appeal his sentence. The Government has moved to dismiss the appeal as barred by McCall's waiver of the right to appeal included in the plea agreement. Upon review of the record, we conclude that McCall knowingly and voluntarily waived his right to appeal and that the issue McCall seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss.

Entered at the direction of the panel: Judge Wilkinson, Judge Rushing, and Senior Judge Floyd.

For the Court

/s/ Nwamaka Anowi, Clerk