NO. ___________

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

ERIC STANTON KUTZ, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case**.

At Petitioner's resentencing following relief under 28 U.S.C. § 2255, he unsuccessfully challenged the application of the career offender recidivist enhancement guideline on the basis that one of his prior convictions was not a crime of violence. Shortly thereafter, and in a different case, the Tenth Circuit Court of Appeals held Petitioner's prior conviction did not qualify as a crime of violence, thereby substantiating Petitioner's challenge to career offender classification. Despite this holding, the Tenth Circuit granted the Government's motion to enforce an appellate waiver and dismissed Petitioner's appeal.

The question presented here is:

Is it a violation of due process to enforce an appellate waiver in a federal criminal case when the appellant's claim to relief is clearly meritorious?

(b) **List of all Parties to the Proceeding**

The caption of the case accurately reflects all parties to the proceeding before this Court.

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(d) **Reference to the Official and Unofficial Reports of any Opinions**

United States v. Eric Stanton Kutz, No. 16-6266
2017 WL 2799859 (10th Cir. June 28, 2017) (unpublished).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked**.

(i) Date of judgment sought to be reviewed.

The Order and Judgment of which review is sought was filed June 28, 2017;

(ii) Date of any order respecting rehearing.

Rehearing and rehearing en banc was denied August 24, 2017;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) **The Constitutional Provisions, Statutes and Rules which the Case Involves**.

(1) Constitutional Provisions:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V

(2) Statutes Involved:

None.

(3) Rules Involved:

None.

(4) Sentencing Guidelines Involved:

USSG § 4B1.1. Career Offender

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

> (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

(g) **Concise Statement of the Case**.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on alleged violations of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. 18 U.S.C. § 3231.

Facts Material to Consideration of Question Presented

Original Criminal Proceedings

On July 7, 2010, Mr. Kutz was charged by indictment with three counts: (1) possession of a firearm and ammunition after having been convicted of a felony in violation of 18 U.S.C. § 922(g); (2) possession with intent to distribute fifty or more grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1); and (3) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Pursuant to a plea agreement that included a waiver of right to appeal the sentence and how it was determined, Mr. Kutz pled guilty to Counts 1 and 2 of the Indictment and Count 3 was dismissed.

The Presentence Report (hereinafter PSR) identified prior convictions used to classify Mr. Kutz as an Armed Career Criminal on Count 1 pursuant to 18 U.S.C. §924(e) and as a career offender on Count 2 pursuant to USSG §4B1.1. Mr. Kutz objected to applicability of the Armed Career Criminal Act (hereinafter ACCA). The district court overruled Mr. Kutz's objections and sentenced him under the mandatory minimum sentencing provisions of the ACCA.

Mr. Kutz was sentenced to 180 months' incarceration on Counts 1 and 2, to be served concurrently. The Government expressly waived enforcement of the appeal waiver as it concerned the district court's determination Mr. Kutz's prior convictions qualified as predicate convictions under the ACCA. Mr. Kutz appealed his sentence to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed Mr. Kutz's sentence. *United States v. Kutz*, 439 Fed.Appx. 751 (10th Cir. 2011) (unpublished) *cert. denied*, 565 U.S. 1227 (2012).

Resentencing after Johnson v. United States*, 135 S.Ct. 2551 (2015)*

Following this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Kutz filed a pro se motion under Title 28, United States Code, Section 2255. In his sole ground for relief, Mr. Kutz argued *Johnson* rendered his sentence under the ACCA invalid. The government filed a response in opposition. The district court granted Mr. Kutz's request for relief, vacated his sentence, and ordered the United States Probation Office to prepare a revised PSR.

The revised PSR concluded Mr. Kutz qualified as a career offender on Count 2 due to two remaining prior convictions deemed to constitute crimes of violence, one of which was a conviction for the crime of pointing a firearm at another in violation of OKLA. STAT. tit. 21, § 1289.16. As a result, Mr. Kutz's advisory guideline range was calculated as 188 to 235 months' imprisonment. Mr. Kutz objected to application of the career offender enhancement. Without the career offender provision, Mr. Kutz's advisory guideline range would have been 110 to 137 months. The government responded in support of the career offender classification.

The district court held a resentencing hearing on August 22, 2016 and overruled Mr. Kutz's objection to the career offender enhancement. The district court varied downward from the guideline range and sentenced Mr. Kutz to 120 months on Count 1 and 150 months on Count 2, to run concurrently.

Direct Appeal of New Sentence

Mr. Kutz timely appealed the district court's determination he qualified as a career offender. After briefing, but before oral argument, the Tenth Circuit held the Oklahoma crime of pointing a firearm at another was not a crime of violence for purposes of the ACCA. *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017). Based on *Titties*, Mr. Kutz's argument that his advisory sentencing guidelines were erroneously calculated pursuant the career offender provision became a fact. Mr. Kutz's advisory sentencing guideline range of punishment should have been 110 to 137 months. Mr. Kutz's sentence of 150 months' imprisonment was based on the district court's variance downward from what is now established as an incorrect guideline range of 188 to 235 months imprisonment.

Even though the government recognized Mr. Kutz was erroneously sentenced pursuant the career offender classification, it argued Mr. Kutz waived his right to appeal the sentence imposed on resentencing pursuant the appeal waiver in his original Plea Agreement. Specifically, the government argued the appeal fell within the scope of the appeal waiver, Mr. Kutz knowingly and voluntarily waived his right to appeal, and enforcing the appeal would not result in a miscarriage of justice.

In an Order and Judgment dated June 28, 2017, a panel of the Tenth Circuit dismissed Mr. Kutz's appeal pursuant the appeal waiver in the Plea Agreement. *United States v. Kutz*, ___ Fed.Appx. ___ 2017 WL 2799859 (10th Cir. June 28, 2017). The panel concluded Mr. Kutz's appeal of the sentence imposed on resentencing fell within the scope of the appellate waiver in his plea agreement (*Id*. at 12); the waiver was knowing and voluntary (*Id*. at 18); and enforcement of the waiver would not result in a miscarriage of justice (*Id*. at 19 - 22). Mr. Kutz's petition for rehearing and en banc consideration was denied.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

Reasons for allowance of the writ

This case presents an important question of federal law that should be settled by this Court. It is high time for the Court to weigh in on the application and scope of appellate waivers. This case presents a clear opportunity to review a sentence of incarceration that all parties agree is patently incorrect, but is left in place because of an agreement in a waiver of appeal entered into before any such error or claim was cognizable.[1]

Argument

Limitations on appellate waivers are necessary to prevent occasional manifest injustice. The Tenth Circuit purports to limit blanket enforcement of appellate

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[1]The unpublished order and judgment holds, in part, "*If the district court committed any legal error* in making that Guidelines calculation, it is within the scope of the waiver enumerated in [the plea agreement]." *Kutz*, 2017 WL 2799859, at *6 (emphasis added). The Tenth Circuit's order is telling in what it does not say. Nowhere does the Court reference the clear legal error made. It does not cite to the interim case decided in Petitioner's favor. *See Titties*, 852 F.3d 1257 (holding Petitioner's prior conviction under OKLA. STAT. tit. 21, § 1289.16 does not qualify as a violent felony under parallel provision in Armed Career Criminal Act). It is noteworthy that the order does not inform the reader Petitioner's claim is clearly meritorious.

waivers. *See United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc). Other circuit courts of appeal provide modest exceptions to appellate waivers, though they are not uniform. *See United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) ("Our basic premise, therefore, is that if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver. As a subset of this premise, we think that the same flexibility ought to pertain when the district court plainly errs in sentencing."); *United States v. Johnson*, 347 F.3d 412, 414 (2d Cir. 2003) ("Although Johnson did waive his right of appeal, we follow this Circuit's prior decisions in determining that the agreement does not foreclose Johnson from pursuing his constitutional claim."); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001) ("There may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver"; such circumstance is measured in part by "the clarity of the error" and "its gravity."); *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994) ("[A] defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations."); *United States v. Powell*, 574 Fed. Appx. 390, 394 (5th Cir. 2014) (unpublished) ("Some courts . . . inquir[e] whether this court's 'failure to consider [the defendant's] claim will result in a miscarriage of justice,' though this court has not found it necessary to adopt or reject this step."); *Campbell v. United States*, 686 F.3d 353, 358 (6th Cir. 2012) ("[E]ven the broadest waiver does not absolutely foreclose some degree of appellate review."); *United States v. Adkins*, 743 F.3d 176, 193 (7th Cir. 2014) ("[D]espite a waiver of appellate review, the Due Process Clause permits review when a special condition [of supervised release] is so vague that no reasonable person could know what conduct is permitted and what is prohibited."); *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003) (en banc) ("[W]e reaffirm that in this Circuit a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver."); *United States v. Johnson*, 176 F.3d 485, 1999 WL 273236 at *1 (9th Cir. 1999) (unpublished; emphasis added; citations omitted) ("A defendant may, in a plea agreement, waive a statutory right to appeal his sentence. . . . Such a waiver may be invalid, however, if the sentence imposed is illegal. . . . We have 'defined an illegal sentence as one which is not authorized by the judgment of conviction, or is in excess of the permissible statutory penalty for the crime, or is in violation of the Constitution.'"); *United States v. Guillen*, 561 F.3d 527, 530-31 (D.C. Cir. 2009) (citations omitted) ("Nor should a waiver be enforced if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice."). *See also* Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347 (2015) (in addition to surveying scope and application of appellate waivers, argues inclusion of plea waivers creates bargaining inefficiencies and removes important incentives from the sentencing process).

The framework set forth in *Hahn* is a useful one, and could serve as foundation for limitations on enforcement of appellate waivers. However, as will be shown, the Tenth Circuit has departed from *Hahn*.

In *Hahn*, the Tenth Circuit adopted a three part test for determining whether to enforce a waiver of a defendant's right to appeal:

> (1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice as we define herein.

Id., 359 F.3d at 1325, *citing United States v. Andis*, 333 F.3d 886, 890–92 (8th Cir. 2003) (en banc). The majority incorporated four additional factors for determining whether a miscarriage of justice would occur if the waiver were enforced:

> [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*.

Hahn, 359 F.3d at 1327, *citing United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 2001) (emphasis added).

The Tenth Circuit originally spelled out the operative language for the "otherwise unlawful" factor of the miscarriage of justice exception:

> We further hold that to satisfy the fourth *Elliott* factor—where the waiver is otherwise unlawful—"the error [must] seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings[,]" as that test was employed in *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Hahn, 359 F.3d at 1327. By quoting and citing to *Olano*, the en banc opinion imported the fourth prong of plain error analysis to operate as the test for the "otherwise unlawful" factor. *Olano*, of course, controls the "plain error" standard of review of an unpreserved error presented for the first time on appeal. *Olano*, 507 U.S. at 732; *see also United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). The fourth prong of plain error analysis is a substantial burden on litigants raising error for the first time on appeal; it permits courts to decline to correct errors even if the error is plain and affects the substantial rights of the appellant. *Johnson*, 520 U.S. at 469-70; *United States v. Brown*, 400 F.3d 1242, 1254 (10th Cir. 2005). A party seeking relief under plain error analysis bears the burden to establish the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *Olano*, 507 U.S. at 732).

Hahn did not qualify the test, nor did it place a "gloss" on the *Olano* / *Elliot* factor governing "otherwise unlawful." When it came time to analyze Mr. Hahn's alleged error with respect to the fourth *Elliot* factor, the en banc court reasoned as follows:

> Finally, even if the district court's conclusion regarding its lack of sentencing discretion was in error, a determination that we need not reach here, this error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See Olano*, 507 U.S. at 732, 113 S.Ct. 1770; *Elliott*, 264 F.3d at 1173. Indeed, the district court's consecutive sentence is specifically allowed by 18 U.S.C. §§ 924(c) and 3584. Subjecting Mr. Hahn to a sentence sanctioned by Congress does not constitute an error seriously affecting the fairness, integrity, or public reputation of judicial proceedings. As such, we find that enforcing Mr. Hahn's waiver of appellate rights would not constitute a miscarriage of justice.

Hahn, 359 F.3d at 1329. This passage is important to note because it establishes the "otherwise unlawful" factor relates to the alleged error, and not the terms of the waiver itself. When the Court analyzed the defendant's claim it did not review whether the waiver itself was otherwise unlawful. Instead, the Court determined the alleged error was permissible because the sentence itself did not "constitute an error seriously affecting the fairness, integrity, or public reputation of judicial proceedings." *Hahn* at 1329.

Yet, the Tenth Circuit does not currently apply *Hahn* in the same manner in which it was written. *See, e.g.*, *United States v. Smith*, 500 F.3d 1206, 1212-13 (10th

Cir. 2007) ("otherwise unlawful" refers to the waiver itself), *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007) (same), and *United States v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005) (same).

Mr. Kutz's sentence fits within the "otherwise unlawful" factor of the miscarriage of justice exception because the district court committed clear and unambiguous error when it classified him as a career offender.

To be clear, when the *Hahn* court reviewed the appellant's error in the context of the "otherwise unlawful" factor, it reviewed the alleged sentencing error and determined it did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 1329. Indeed, the dissent also understood the "otherwise unlawful" factor to relate to the alleged error for which appellate review was sought. Though disagreeing with the jurisdictional analysis, Judge Murphy's dissent also reviewed the appellant's waiver through the miscarriage of justice test: "[T]here is no suggestion in the record that the district court relied on an impermissible factor, imposed a sentence above the statutory maximum*, or failed or refused to arrive at an appropriate sentence under the Sentencing Guidelines and otherwise applicable law*." *Hahn*, 359 F.3d at 1346 (Murphy, J., dissenting) (emphasis added). While not dispositive of the issue, viewing the factors through the perspective of the judges on the panel further suggests the fourth factor is not concerned solely with waiver specific errors, but centered on the nature of the alleged error.

In theory, *Hahn* lays out a workable and practical framework within which a court can decide whether enforcement of an appellate waiver would frustrate justice. Yet in practice, appellants such as Petitioner are deprived of clear error correction despite having plainly meritorious claims.

Public policy considerations merit review

Further supporting review in this case are the public policy concerns inherent in the appellate waiver context. Waivers are, like most aspects of plea bargaining, discretionary and negotiable. But plea agreements are not entered into under normal contractual circumstances. The parties are not equal—"the prosecutor has all the power." Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014).[2] And thus appeal and collateral-attack waivers have become "standard language that the Government includes in virtually every plea agreement and that defendants throughout this district and across the country have no choice but to accept." *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1336-37 (W.D. Wash. 2016) (striking standard waiver from plea agreement as unilateral, inherently unknowing, and unnecessary); *accord United States v. Johnson*, 992 F. Supp. 437,

[2]Available at https://perma.cc/GGD4-3XDR

439-40 (D.D.C. 1997) ("[T]he government has bargaining power utterly superior to that of the average defendant. To vest in the prosecutor also the power to require the waiver of appeal rights is to add that much more unconstitutional weight to the prosecutor's side of the balance."). These waivers should not be lightly enforced, especially in the face of serious, clearly meritorious error.

In addition, waivers severely limit appellate courts' ability to oversee the constitutional parameters of federal sentencing: "When a district court errs in sentencing, that error may be manifest on the record. Thus, in addition to concerns about fairness to the defendant, an institutional interest—confidence in the judicial system—may be adversely affected if such errors go uncorrected." *Teeter*, 257 F.3d at 23; *see also Mutschler*, 152 F. Supp. 3d at 1339-40 (emphasizing the "distorting effects" appeal waivers have on sentencing jurisprudence).

Appellate statistics bear out this concern. The government, free to choose its appeals carefully, rarely files sentencing appeals. In fiscal year 2015, the government was the appellant in only 22 resolved sentencing appeals nationwide. United States Sentencing Commission, INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Appeals Data Table 56A (2015).[3] Seventeen of those appeals resulted in reversals; only two of them were dismissed. *Id.* In contrast, 596 of

[3] Available through links at isb.ussc.gov.

4,896 federal sentencing appeals by criminal defendants nationwide were dismissed during that same time period (49 of 210 in the Tenth Circuit). *Id.*, Appeals Data Table 56. While many of these may have been voluntarily dismissed, the Tenth Circuit alone enforced appeal waivers to dismiss the appeals of at least 38 defendants in 2015.

District courts know that appeal waivers limit opportunities for this Court's guidance, and this awareness puts them in an undesirable position. Thus, if district courts seek a definitive ruling from an appellate court on a close issue, the district court must either decide the issue in the defendant's favor (provoking the government's appeal), or decide the issue in the government's favor while leaning on the government not to invoke the waiver (allowing the defendant's appeal). This choice has played out in at least two major sentencing cases in recent years. *See United States v. Dominguez-Rodriguez*, 817 F.3d. 1190 (10th Cir. 2016); *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014).

This Court is currently grappling with the contours of waiver on appeal. *Class v. United States*, No. 16-424, 137 S.Ct. 1065 (cert. granted Feb. 21, 2017). The question presented in *Class* is whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction. *Petition for Writ of Certiorari*, *Class v. United States*, No. 16-424, 2016 WL 5765174 (filed Sept. 30, 2016). Of particular significance is whether, in the event pleading guilty does not waiver such right to appeal the constitutionality of a statute, such a right can be bargained away in a plea agreement. *Petitioner's Reply Br.*, *Class v. United States*, No. 16-424, 2017 WL 3575180, *2 (filed Aug. 16, 2017) ("[R]ather than require a defendant to obtain the government's and the court's consent to enter a conditional plea explicitly preserving the right to appeal a constitutional challenge to the statute of conviction, this Court instead should require the government to obtain the defendant's consent via an explicit waiver of his challenge in a plea agreement."). At oral argument, Chief Justice Roberts identified a problem in enforcing plea agreements entered prior to a change in law. *Oral Arg. in Class v. United States*, No. 16-424, 2017 WL 4517133, *55 (argued Oct. 4, 2017). The Government asserted such a defendant would "easily" get relief via a Section 2255 motion. *Id*. However, many plea agreements (including the plea agreement in this case), contain explicit waivers of Section 2255 motions. As such, a defendant with a patently meritorious claim would be denied relief. Enforcement of waivers to prevent remedy of clearly erroneous errors is a perversion of justice.

And in the context of the instant case, Petitioner was incorrectly sentenced under the career offender guideline, which is a significant punitive increase in a criminal sentence. The career offender guideline is Congressionally mandated. *See* 28 U.S.C. § 994(h). Congress directed the United States Sentencing Commission to "specify a sentence to a term or imprisonment at or near the maximum term authorized" for "categories of defendants" convicted for at least the third time of a "felony that is" a "crime of violence" or "an offense described in" federal drug trafficking statutes. *Id*. This directive is manifested in USSG § 4B1.1, which operates to substantially increase the base offense level and criminal history category of the defendant. *See*, *e.g.*, United States Sentencing Commission, *Quick Facts - Career Offenders*, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY16.pdf (last accessed Nov. 21, 2017) (summarizing increases in offense level and criminal history category for offenders classified as career offenders). Though sentencing courts retain discretion to deviate from the career offender guideline, the "range is intended to, and usually does, exert controlling influence on the sentence that the court will impose." *Peugh v. United States*, 133 S.Ct. 2072, 2085 (2013). In Mr. Kutz's case, classification as a career offender increased his advisory guideline range from 110-137 to 188-235 months. The career offender classification results in a substantially increased sentence in general, and specifically in Mr. Kutz's case.

Petitioner is currently serving a sentence predicated on a legally incorrect guideline range. That is undisputed. This Court has previously made clear a sentence based on an incorrect guideline range affects a defendant's substantial rights and constitutes plain error. *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016). By enforcing appellate waivers in cases such as Petitioner's, the Government and the Court become complicit in permitting a defendant to serve an unlawful sentence. In such situations, enforcement of an appellate waiver amounts to a deprivation of due process.

(i) Appendix.

(i) Order and Judgment delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Eric Stanton Kutz, No. 16-6266, 2017 WL 2799859 (10th Cir. June 28, 2017).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

Rehearing and rehearing en banc was denied August 24, 2017;

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.

CONCLUSION

Eric Stanton Kutz, respectfully requests a Writ of Certiorari issued to review the Order and Judgment entered June 28, 2017, of the United States Court of Appeals for the Tenth Circuit in Case Number 16-6266.

Respectfully submitted,

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