
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2017 TERM

AL TORRELL BEASLEY

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari to
the United Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whether in conflict with *Newton v. Rumery*, 480 U.S. 386, 394 (1987), and because of the pre-sentence waiver of the right to contest his sentence in the plea agreement, the Fifth Circuit dismissed Beasley's appeal of his sentence. Only after a district judge pronounces sentence, does a defendant know what errors exist to be appealed, or waived. Before then, a defendant cannot make a voluntary and knowing pre-sentence waiver of the right to contest his sentence because the right-to-appeal sentencing error has not yet come into existence.

LIST OF PARTIES

AL TORRELL BEASLEY. Petitioner

UNITED STATES OF AMERICA. Respondent

TABLE OF CONTENTS

Question Presented	ii
Whether in conflict with <i>Newton v. Rumery</i> , 480 U.S. 386, 394 (1987), and because of the pre-sentence waiver of the right to contest his sentence in the plea agreement, the Fifth Circuit dismissed Beasley’s appeal of his sentence. Only after a district judge pronounces sentence, does a defendant know what errors exist to be appealed, or waived. Before then, a defendant cannot make a voluntary and knowing pre-sentence waiver of the right to contest his sentence because the right-to-appeal sentencing error has not yet come into existence.	ii
List of Parties	iii
Table of Contents	iv
Table of Authorities	vi
Index To Appendix	vii
Opinion below.	1
Jurisdiction	1
Statutory Provision Involved in the Case	1
Statement of the Case With Facts Relevant to the Issue.	2
I. Course of Proceedings	2
A. The Indictment	2
B. The November 3, 2015 Plea Agreement with Sentencing Appellate Waiver & Factual Resume	2
C. At the November 6, 2015 arraignment, the court accepted and adjudged Beasley guilty, but deferred accepting or rejecting the plea agreement (which contained the sentencing appellate waiver) until he read the PSR	3
D. At the May 5, 2017 sentencing, Beasley objected to the enhancement for weapon's possession and the conversion to base cocaine.	3
1. At the sentencing hearing, the government offered the testimony of a surrogate, FBI Special Agent Hillman, instead of the actual FBI Special Agent who was involved in the matters at issue. Beasley did not object to the surrogate testifying.	3
2. Beasley objected to the unreliable and not credible statement of the CI that an unindicted co-conspirator (UCC-1) had a weapon in his/her waistband	5

3.	Beasley also objected to the sentencing enhancement based on conversion of powder cocaine to base cocaine	8
4.	The district court overruled all of the objections of Beasley, and pronounced sentence	9
E.	A timely Notice of Appeal was filed. The Fifth Circuit dismissed the appeal apparently because of the pre-sentencing appellate waiver	11
Reasons for Granting the Writ		13
The dismissal of the appeal by the Fifth Circuit is in conflict with <i>Newton v. Rumery</i> because a defendant <u>cannot</u> knowingly and voluntarily waive a pre-sentencing right to appeal. Until a judge pronounces sentence, the defendant does not know what errors exist to be appealed or waived.		13
Conclusion		15
Appendices		16
Appendix A: Judgment, dated 5-5-2017.		16
Appendix B: Fifth Circuit Order, dated 11-13-2017, dismissing appeal		16

TABLE OF AUTHORITIES

CASES

<i>Bullcoming v. New Mexico</i> , 564 U.S. 647 (2011).....	4
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	14
<i>Marshall v. Lonberger</i> , 459 U.S. 422 (1983)	14
<i>McKinney v. United States</i> , 403 F.2d 57 (5th Cir.1968)	14
<i>Newton v. Rumery</i> , 480 U.S. 386 (1987)	13
<i>United States v. Attar</i> , 38 F.3d 727 (4th Cir.1994)	15
<i>United States v. Marin</i> , 961 F.2d 493 (4th Cir.1992)	14
<i>United States v. McKinney</i> , 406 F.3d 744 (5th Cir. 2005)	11
<i>United States v. Melancon</i> , 972 F.2d 566 (5 th Cir. 1992)	13, 14
<i>United States v. Purser</i> , 747 F.3d 284 (5th Cir. 2014).....	11
<i>United States v. Rodriguez-Estrada</i> , 741 F.3d 648 (5th Cir. 2014)	11
<i>United States v. Sanchez Guerrero</i> , 546 F.3d 328 (5th Cir. 2008).....	11
<i>United States v. Teeter</i> , 257 F.3d 14 (1 st Cir. 2001)	14

STATUTORY PROVISIONS

18 U.S.C. § 3742.....	2
18 U.S.C. § 3742(a)	1
21 U.S.C. § 846.....	2
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	2

INDEX TO APPENDIX

Appendix A: Judgment, dated 5-5-2017

Appendix B: Fifth Circuit Order, dated 11-13-2017, dismissing appeal

IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

Appendix B: Fifth Circuit Order, dated 11-13-2017, dismissing appeal

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Fifth Circuit entered its order on November 13, 2017 dismissing the appeal of Al Torrell Beasley.

STATUTORY PROVISION INVOLVED IN THE CASE

This case involves a federal criminal defendant's statutory right to appeal his sentence under 18 U.S.C. § 3742(a), which provides:

“Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;”

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

I. Course of Proceedings

A. The Indictment

On May 5, 2012⁵, Appellant Al Torrell Beasley (“Beasley”) was charged in the first and second counts of a multi-count, multi-defendant indictment, which was unsealed, (ROA17-10556.9-17), with conspiracy to distribute a controlled substance (cocaine base or crack - count 1; and powder cocaine - count 2), in violation of 21 U.S.C. § 846, 841(a)(1) & (b)(1)(C). (ROA17-10556.9-17).

B. The November 3, 2015 Plea Agreement with Sentencing Appellate Waiver & Factual Resume

On November 03, 2015, Appellant Beasley entered into a plea agreement with the government. ROA17-10556.169. The Plea Agreement contained a Waiver of Right to Appeal or Otherwise Challenge Sentence provision that contained very limited appellate-rights-exceptions, as follows:

11. Waiver of right to appeal or otherwise challenge sentence. Beasley waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. Beasley, however, reserves the rights to bring (a) a direct appeal of (i) a sentence exceeding the statutory maximum punishment, (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of his plea of guilty or this waiver, or (c) to bring a claim of ineffective assistance of counsel.

ROA17-10556.172. Beasley also entered into a Factual Resume admitted to certain stipulated facts. ROA17-10556.58.

C. At the November 6, 2015 rearraignment, the court accepted and adjudged Beasley guilty, but deferred accepting or rejecting the plea agreement (which contained the sentencing appellate waiver) until he read the PSR

On November 6, 2015, the rearraignment hearing was held before U.S. District Judge Fitzwater. Beasley plead guilty. ROA17-10556.106. Judge Fitzwater accepted the plea of guilty by Beasley and adjudged him guilty of the offense charged in count 1 of the plea agreement. ROA17-10556.122, Rearrg. Hg. at 17. However, Judge Fitzwater stated: "The court will defer accepting or rejecting the plea agreement until it has read and considered the presentence report." ROA17-10556.120, Rearrg. Hg. at 15.

D. At the May 5, 2017 sentencing, Beasley objected to the enhancement for weapon's possession and the conversion to base cocaine

On May 5, 2017, the sentencing hearing was held and presided over by Judge Fitzwater. Beasley through his counsel, abandoned objection 1 to the presentence report (PSR), but asked to be heard on Objections 2 & 3 (CI and weapon's possession) and 4 (cocaine conversion).

1. At the sentencing hearing, the government offered the testimony of a surrogate, FBI Special Agent Hillman, instead of the actual FBI Special Agent who was involved in the matters at issue. Beasley did not object to the surrogate testifying

An unknown FBI Special Agent had handled the CI and drug transactions in the case at bar. The government did not call that agent. Instead, the government called FBI Special Agent Hillman ("Hillman"), a surrogate, to testify about the credibility and reliability of the CI, and the persons interviewed about the drug transactions that resulted in the conversion to cocaine base.

The record reflects that Hillman had no personal knowledge as to the alleged weapon's possession by the UCC-1 or the drug transactions. Hillman's testimony was premised on his out-of-court conversations with the FBI handling agent for the CI, as Hillman's testimony reflects:

Q. That individual [the CI], was that person paid or was that person working off a case?

A. That [CI] was working off a case, that's my understanding. I wasn't actually the handling agent for that individual.

Q. Was there another FBI agent handling that person?

A. Yes, ma'am.

Q. Have you talked to that person?

A. Yes, ma'am.

Q. Have you talked to that person specifically about this CI?

A. Yes, ma'am.

Q. In regards to the credibility of that CI?

A. Yes, ma'am.

Q. Did that agent express any concerns regarding the credibility of that CI?

A. No, ma'am.

ROA17-10556.133, Sent. Hg. at 8.

Beasley did not object to the surrogate testimony of Hillman at the sentencing hearing on the basis of a Sixth Amendment right of confrontation, which he raised on direct appeal.¹

¹ In his direct appeal brief, Beasley argued that Hillman's surrogate testimony was prohibited by *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011). The question presented in *Bullcoming* was "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of

2. Beasley objected to the unreliable and not credible statement of the CI that an unindicted co-conspirator (UCC-1) had a weapon in his/her waistband

Objections 2 and 3 were a challenge to the credibility and reliability of the confidential informant (CI), himself, and the information that he/she provided about an unindicted co-conspirator-1 ("UCC-1," ROA17-10556.185, see Sealed PSR para. 13).

Based on his conversation with the FBI Special Agent who handled the CI, Hillman testified that the CI was credible and that the information related by the CI was reliable. Hillman testified the CI stated that the UCC-1 possessed a .45-caliber firearm in his/her waistband on October 2, 2013 at the time of a drug transaction, in which Beasley was alleged to have been involved. ROA17-10556.133-134, Sent. Hg. at 8-9. Beasley had been given a two-level enhancement based on USSG 2D1.1B1 for this weapon, though he himself had not physically used or possessed it, nor did he have any weapon on his person at that time. ROA17-10556.128, Sent. Hg. at 3; ROA17-10556.189, Sealed PSR at para. 27.

that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.").

In the case at bar, the information in the PSR and Addendum is akin to the laboratory report in *Bullcoming*. And the surrogate testimony of Hillman called by the prosecution to provide an adequate evidentiary basis for the facts recited in the PSR and Addendum, is akin to the eschewed "in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification" in *Bullcoming*. Hillman had been assigned to the gang task force investigating Beasley. ROA.131, Sent. Hg. at 6. The prosecutor called Hillman to testify about the credibility and reliability of the CI, with whom Hillman had no dealings. Hillman testified the CI was credible and reliable only because the handling agent of the CI told Hillman the CI was credible and reliable. Such testimony was an unsubstantiated conclusory, hearsay statement with no adequate supporting evidentiary foundation that has sufficient indication of reliability to support its probable accuracy.

Also based on his conversation with the FBI Special Agent who handled the CI, Hillman testified that Beasley was with the UCC-1, who had possessed the weapon when the drug transaction was conducted at a trap house on October 2, 2013. ROA17-10556.133, Sent Hg. at 8; ROA17-10556.176, Sealed PSR at para. 14. Hillman testified that Beasley did not have a gun, and was not known to carry a gun at that time. ROA17-10556.34, Sent at 9. On cross examination, Hillman testified that there was no evidence Beasley had a firearm that day of the drug sale. ROA17-10556.148, Sent Hg. at 23.

On cross examination, Hillman also admitted that despite his years of training, he could not identify a weapon as a .45 caliber by sight, particularly one tucked into the waistband of another individual. Hillman testified he had no personal knowledge about the CI's experience or knowledge in dealing with firearms. ROA17-10556.144, Sent Hg. at 19.

Q. ... And the information that's been provided to us says that the CI identified somebody carrying an all black .45 caliber firearm. Can you explain to the court how this individual came to the conclusion, or had the experience or knowledge in dealing with firearms, that this was a .45 caliber firearm?

A. I have no idea.

Q. Do you know if he had any training in firearms?

A. No, sir.

Q. Any reason – he doesn't say that anybody brandished it, does it?

A. He did not. It was stuck in someone's waistband.

Q. Well, can you, as – as a trained FBI agent and I'm sure with many years of experience and training in firearms, can you look at a weapon when somebody walks by and tell if it's a .45 caliber?

A. Not generally, no, sir.

- Q. Okay. Do you find it a little peculiar that this individual claims that he saw a firearm in a waistband, can reach the conclusion that it was a .45 caliber handgun, and then being reduced and put into this report? How would he know that?
- A. I could only assume, but it would just be an assumption.
- Q. It would just be a guess, wouldn't it?
- A. Yes, sir.
- Q. And whether or not this confidential informant – I mean, he made a deal with you, right? He made a deal with the FBI to do some things and not break the deal?
- A. That's correct.
- Q. But he lied to you, didn't he?
- A. He – he broke the deal.
- Q. Well, he said he was going to do what you told him to do and not break the law –
- A. Yes.
- Q. – and he didn't do it, did he?
- A. That's correct.
- Q. So that's a lie, isn't it?
- A. I guess, yes, sir.

ROA17-10556.144-45, Sent Hg. at 19-20.

Once again, based on his conversation with the FBI Special Agent who handled the CI, Hillman testified about two other handguns found at the time of Beasley's arrest and located at Beasley's residence – a location different from the trap house where the October 2013 drug transaction had occurred. The first handgun was found "in a drawer in his dresser in his bedroom on top of men's boxer briefs." ROA17-10556.134, Sent Hg. at 9. The other handgun also found

at the residence where Beasley was staying, "may have been" in a nightstand. ROA17-10556.135, Sent Hg. at 10. Beasley lived with Judy Shields, an indicted co-conspirator at the residence and the weapons belonged to her. ROA17-10556.148, Sent Hg. at 23.

Hillman testified that the CI was terminated because he had committed a new offense, but that it did not have to do with the information that the CI had provided in regard to drug deals in the case at bar. ROA17-10556.148, Sent Hg. at 10.

3. Beasley also objected to the sentencing enhancement based on conversion of powder cocaine to base cocaine

The government then responded to Beasley's Objection 4, which pertained to the nature of the drugs proceeds and whether they were from cocaine base or from powder cocaine. ROA17-10556.129, Sent Hg. at 4. Once again, the government offered the surrogate testimony of Hillman.

There were three (3) transactions in particular at issue: the November 21, 2014, the December 4, 2014, and the December 5, 2014 transactions, which resulted in a conversions of 84 grams of powder cocaine into cocaine base, and in turn resulted in a higher sentence for Beasley. *See* ROA17-10556.186, Sealed PSR, para. 16.

Paragraph 16 of the PSR recites that Beasley stipulated that the proceeds were from the sale of cocaine base. However, the Addendum contradicts the statement and recites that Beasley did not specifically stipulate in the Factual Resume that the proceeds were from the sale of cocaine base. ROA17-10556.129, Sent. Hg. at 4; Sealed Objections to PSR and to Addendum by Beasley [Docs 341; 364]; PSR, para. 16; Sealed Addendum to PSR, para. IV. & V [Doc 358-1, p. 2]. The

Addendum to the PSR also recites that the probation department had no factual basis to conclude that the proceeds were from cocaine base.

Hillman testified that in the investigation of Appellant Beasley, his assignment was to the gang task force. ROA17-10556.131, Sent. Hg. at 6. Yet, the prosecutor called Hillman to testify that Beasley was dealing in crack or cocaine base, and that the probation officer correctly converted the money to crack. ROA17-10556.137, Sent Hg. at 12. Hillman testified about an intercepted telephone conversation that was the basis for using crack and not powder cocaine. ROA17-10556.137-38, Sent Hg. at 12-13; also 25-26 (cross exam). Hillman also testified about the drug transactions that gave rise to the cocaine conversion from powder to base agreeing it was his "belief" that it was cocaine base. ROA17-10556.137, Sent. Hg. at 12.

Hillman also testified to the royal "we" who conducted interviews. (e.g., "[a]ll of the – the interviews that we have done regarding Mr Beasley indicate that Beasley and Roger Jackson were selling crack cocaine."). ROA17-10556.138, Sent. Hg. at 13. If Hillman conducted any of the interviews, the record is silent as to who he interviewed and if those persons were credible, and or that the information from those interviews were credible and reliable.

4. The district court overruled all of the objections of Beasley, and pronounced sentence

The court overruled all the defense objections stating:

In this case, based on upon the presentence report, the addendum, and the testimony offered this morning, I overrule the defendant's objections. I find that the presentence report, the addendum, and the testimony are sufficient to find by a preponderance of the evidence that has a sufficient indicia of reliability to support its probable accuracy that the firearm was present and is attributable to the defendant.

It is not difficult to make this finding in the context of a trap house, where, as the witness testified, weapons are often found at – at a minimum for protection of the people who are dealing the drug transaction.

The defendant asserts that he did not possess a firearm, but has offered no contrary evidence.

The court also overrules the objections related to the conversion to cocaine base, finding that the presentence report and the addendum supported by the testimony are supported by a preponderance of evidence that has a sufficient indicia of reliability to support its probable accuracy.

So all objections to the presentence report and the addendum are overruled.

ROA17-10556.156-57, Sent Hg. at 31-32.

Beasley was sentenced to a term of 110 months as to count 1, with three (3) years of supervisory release. No fine or restitution was imposed. Count Two was dismissed. Standard and special conditions were imposed, with \$100 special assessment. ROA17-10556.163-65, Sent Hg. at 38-40.

As aforementioned, at the rearraignment, the court had deferred accepting the plea agreement at the re-arraignment hearing. *See supra*. The docket "Electronic Minute Entry" dated 5/5/2017, Doc 686, the same date as the sentencing hearing recites "Court accepts plea agreement." ROA17-10556.6. However, the docket does not link to a specific document in which the judge accepts the plea agreement. No where in the sentencing transcript itself does the judge state on the record that he accepted the plea agreement.

E. A timely Notice of Appeal was filed. The Fifth Circuit dismissed the appeal apparently because of the pre-sentencing appellate waiver

Appellant Beasley filed a timely Notice of Appeal on 5/12/2017. ROA17-10556.90.

In his brief, he made alternative arguments concerning the pre-sentencing appellate waiver. He argued that the appeal waiver in the plea agreement did not bar his appeal because the sentencing transcript does not reflect that the trial court accepted the plea agreement. In the alternative, Beasley argued that the plea waiver was not knowingly and voluntarily made.

In response, the government filed a Motion to ‘Dismiss the Appeal or Alternatively, for an Extension of Time. In the motion, the government argued:

Beasley claims on appeal that his appellate waiver cannot be enforced because it was not knowing and voluntary and, "at the time of signing the plea agreement, he lacked the fundamental ability to foresee that the court would violate his Sixth and Fourteenth Amendment rights in ruling that the PSR and Addendum supported by the surrogate testimony of Hillman had ‘sufficient indicia of reliability to support its probable accuracy’ thereby increasing Beasley's sentence." (Brief 22-23.) Thus, while conceding that he waived his right to appeal, Beasley argues that (1) his waiver should not be enforced, and (2) the district court violated his Sixth and Fourteenth Amendment rights in relying on the PSR in determining his sentence. (Brief at 20-30.) However, the record and binding authority demonstrate that the waiver is valid and bars this appeal.

To determine whether an appeal is barred by an appellate waiver, the Court conducts a two-step inquiry, asking whether the waiver was "(1) knowing and voluntary and (2) applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Purser*, 747 F.3d 284, 289 n.10 (5th Cir. 2014). Whether an appellate waiver is valid is a question of law reviewed *de novo*. *United States v. Rodriguez-Estrada*, 741 F.3d 648, 650 (5th Cir. 2014).

"To be valid, a defendant's waiver of his right to appeal must be informed and voluntary." *United States v. McKinney*, 406 F.3d 744, 746 n.2 (5th Cir. 2005) (internal quotation marks omitted). When the record indicates that a defendant "read and understood the plea agreement, which included a clear waiver of appellate rights, and acknowledged that he understood specifically that he was giving up his appellate rights, his waiver was both knowing and voluntary." *United States v. Sanchez Guerrero*, 546 F.3d 328, 335 (5th Cir. 2008).

USA Motion to Dismiss, at 2-3.

On November 13, 2017, in one-sentence the Fifth Circuit dismissed the appeal, ruling:

“IT IS ORDERED that appellee’s opposed motion to dismiss appeal is GRANTED.” Appendix B.

This petition for writ of certiorari to this Supreme Court follows.

Reasons for Granting the Writ

The dismissal of the appeal by the Fifth Circuit is in conflict with *Newton v. Rumery* because a defendant cannot knowingly and voluntarily waive a pre-sentencing right to appeal. Until a judge pronounces sentence, the defendant does not know what errors exist to be appealed or waived

Beasley preserved in his plea agreement, the right “to challenge the voluntariness of ... this [appellate] waiver,” even if Beasley did not object at the sentencing hearing to the specific Sixth Amendment right of confrontation violation arising from the testimony of surrogate FBI Agent Hillman. ROA17-10556.172. Beasley exercised his statutory, and plea-agreement, right to appeal by raising it in the direct appeal brief he filed in the Fifth Circuit. In his brief, Beasley argued that he did not knowingly and voluntarily waive his right to appeal his sentence when he signed the plea agreement containing the appellate waiver. Beasley asserted that he lacked the fundamental ability to foresee that the court would violate his Sixth Amendment right to confrontation, and his Fourteenth Amendment right to due process at the sentencing hearing, and applied the enhancements which increased Beasley's sentence. ROA.156-57, Sent Hg. at 31-32.

In *Beasley*, the Fifth Circuit granted the government's motion to dismiss the appeal, which is in conflict with *Newton v. Rumery*, 480 U.S. 386, 394 (1987). In *Newton v. Rumery*, the waiver was “both knowing and voluntary” because “the right waived was the right to sue under 42 U.S.C. § 1983. Thus, the waiver in *Newton*, ... was of a known quantity: a lawsuit of which the one waiving had full knowledge, and over which the one waiving exercised control.” *United States v. Melancon*, 972 F.2d 566, 572 (5th Cir. 1992) (Parker, J., dissenting).

In contrast, in *Beasley*, the record reflects that Mr. Beasley's sentencing appellate waiver was not “both knowing and voluntary.” Beasley’s waiver was of an anticipatory right to appeal all

sentencing determinations later made by the sentencing court – some of which never had occurred either to Beasley or to the government at the time the pre-sentence waiver was executed. It is this which distinguishes a pre-sentence appellate waiver in *Beasley* from other waivers contained in a plea agreement, and in this case, made Mr. Beasley's waiver not knowingly or intelligently made. *See United States v. Teeter*, 257 F.3d 14, 17 (1st Cir. 2001).

In his dissent in *Melancon*, Judge Parker illustrated the point when he wrote:

In the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty. *See Marshall v. Lonberger*, 459 U.S. 422, 436 (1983) (in order for plea agreement to be valid, accused must have notice of the nature of the charge); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waiver as “an intentional relinquishment or abandonment of a known right or privilege. ”) (emphasis added). *Cf. McKinney v. United States*, 403 F.2d 57, 59 (5th Cir.1968) (“the right to appeal should not be considered as having been waived or abandoned except where it is clearly established that such is the case.”) (emphasis added). While one cannot fully know the consequences of confessing or pleading guilty, one does know what is being yielded up at the time he or she yields it.

(Emphasis supplied) *Melancon*, 972 F.2d at 572 (Parker, J., dissenting).

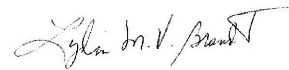
Unlike the waiver in *Newton*, Mr. Beasley's right to appeal had not yet come into existence, and he could not execute a valid waiver of that right to appeal his sentence because until the judge pronounced sentence, Beasley could not know what errors existed to be appealed or waived. *See United States v. Melancon*, 972 F.2d 566, 572 (5th Cir.1992) (Parker, Judge Robert, concurring) (A "right can not come into existence until after the judge pronounces sentence; it is only then that the defendant knows what errors ... exist to be appealed, or waived); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir.1992) (“[A] defendant who waives his right to appeal does not subject himself

to being sentenced entirely at the whim of the district court.”). *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.”). Hence, Mr. Beasley did not knowingly and intelligently waive the right to appeal his sentence; his right to appeal the sentence had not yet occurred at the time he signed the plea agreement containing the appellate waiver.

CONCLUSION

For all of the aforementioned reasons, Mr. Beasley respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,



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APPENDICES

Appendix A: Judgment, dated 5-5-2017

Appendix B: Fifth Circuit Order, dated 11-13-2017, dismissing appeal