

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JACQUELINE BUSTAMANTE ,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Robert A. Ratliff, Esq.
Robert A Ratliff, PC
713 Dauphin Street
Mobile, Alabama 36602
(251) 438-2250

May 26, 2018

I. QUESTIONS PRESENTED FOR REVIEW

- I. Whether Petitioner's Contractual Appeal Waiver Should Be Void Under Contract Law and Thus Inapplicable to the Serious, Constitutional Fourth Amendment Concern Raised on Appeal?
- II. Whether the Fourth Amendment Guarantees the Petitioner the Right to Be Free from Any Warrantless Investigatory Stop by Armed, Law Enforcement Authorities Absent Any Reasonable, Articulable Suspicion, Based on Objective Facts, That the Person Has Engaged in Criminal Activity?

II. LIST OF PARTIES AND RULE 29.6 STATEMENT

Other than Petitioner's co-defendant, the caption of the case contains the names of all of the parties to the proceedings before the court of appeals.

The Petitioner is an individual and thus no parent corporations or publicly held corporations are involved in this matter.

III. TABLE OF CONTENTS

	Pages
I. QUESTIONS PRESENTED.....	i
II. LIST OF PARTIES.....	ii
III. TABLE OF CONTENTS.	iii
IV. TABLE OF AUTHORITIES.....	v
V. OPINIONS BELOW.....	2
VI. STATEMENT OF THE BASIS FOR JURISDICTION.....	2
VII. CONSTITUTIONAL PROVISION INVOLVED.	3
VIII. STATEMENT OF THE CASE.....	3
IX. STATEMENT OF THE FACTS.....	5
X. ISSUES PRESENTED.....	6
1. Whether Petitioner’s Contractual Appeal Waiver Should Be Void under Contract Law and Thus Inapplicable to the Serious, Constitutional Fourth Amendment Concern Raised on Appeal?	
II. Whether the Fourth Amendment Guarantees the Petitioner the Right to Be Free from Any Warrantless Investigatory Stop by Armed, Law Enforcement Authorities Absent Any Reasonable, Articulable Suspicion, Based on Objective Facts, That the Person Has Engaged in Criminal Activity?	
XI. REASONS FOR GRANTING THE WRIT.....	6
XII. CONCLUSION.....	22

XIII. CERTIFICATE OF WORD LIMITATIONS. 24

XIV. CERTIFICATE OF SERVICE. 25

XV. APPENDIX:

Exhibit 1 (Court of Appeals Opinion)

Exhibit 2 (District Court Opinion)

Exhibit 3 (Plea Agreement)

Exhibit 4 (Judgment and Commitment)

IV. TABLE OF AUTHORITIES

	Pages
Cases	
Alabama v. White, 496 U.S. 325 (1990).	19,20
Blackledge v. Allison, 431 U.S. 63 (1977).	10
Boles v. United States, 2016 U.S. App. LEXIS 20583 (11th Cir. November 17, 2016).. . . .	10
California v. Ciraolo, 476 U.S. 207 (1986).	18
Coppedge v. United States, 369 U.S. 438 (1962).	22
Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985).	11
INS v. Delgado, 466 U.S. 210 (1984).	19
Katz v. United States, 389 U.S. 347 (1967).	18
Kernan v. Cuero, 138 S. Ct. 4 (2017).	7
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).	21
Tollett v. Henderson, 411 U.S. 258 (1973).	10
United States v. Andis, 333 F.3d 886 (8th Cir. 2003).	8,12
United States v. Arnett, 628 F.2d 1162 (9th Cir. 1979).. . . .	11
United States v. Blake, 888 F.2d 795 (11th Cir. 1989).	20
United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991).	9,14
United States v. Brown, 232 F.3d 399 (4th Cir. 2000).. . . .	9

United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993).	10
United States v. Bustamante, 714 Fed. Appx. 965, 2018 U.S. App. LEXIS 5458 (11th Cir. Ala. February 28, 2018).	2
United States v. Chandler, 534 F.3d 45 (1st Cir. 2008).	8
United States v. Feichtinger, 105 F.3d 1188 (7th Cir. 1997).	9
United States v. Garcia, 178 F.Supp.3d 1250 (S.D. Ala. 2016).	2
United States v. Garcia, 890 F.2d 355 (11th Cir. 1989).	18
United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991).	16
United States v. Guillen, 561 F.3d 527 (D.C. Cir. 2009).	19
United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004).	8
United States v. Johnson, 992 F. Supp. 437 (D.D.C. 1997).	13
United States v. Khattak, 273 F.3d 557 (3d Cir. 2001).	8,12
United States v. Krasn, 614 F.2d 1229 (9th Cir. 1980).	11
United States v. Mathews, 534 Fed. App'x 418 (6th Cir. 2013).	8
United States v. Medina-Carrasco, 806 F.3d 1205 (9th Cir. 2015).	13
United States v. Melancon, 972 F.2d 566 (5th Cir. 1992).	12
United States v. Mezzanatto, 513 U.S. 1965 (1995).	9,11
United States v. Nguyen, 235 F.3d 1179 (9th Cir. 2000).	12
United States v. Perez, 46 F. Supp. 2d 59 (D. Mass. 1999).	15,16

United States v. Powell, 222 F. 3d 913 (11th Cir. 2000).	18
United States v. Raynor, 989 F. Supp. 43 (D.D.C. 1997).	13,15,16
United States v. Teeter, 257 F.3d 14(1st Cir. 2001).	11
Whren v. United States, 517 U.S. 806 (1996).	18
Statutes; Rules; Guidelines	
18 U.S.C. §3742(c)(1)-(2).	9
21 U.S.C. §841(a)(1).. . . .	3
21 U.S.C. §846.	3
28 U.S.C. §1254(1).. . . .	2
Fed. R. Civ. Proc. 11.	9
U.S.S.G. §6B1.2.	10
U.S.S.G §6B1.4.	10
U.S. Attorneys Manual, Criminal Resource Manual (“CRM”) Section 626.	9
Law Review and Journal Articles	
Kevin Bennardo, Post-Sentencing Appellate Waivers, 48 U. Mich. J. L. Reform 347 (2015).	8
Robert K. Calhoun, Waiver of the Right to Appeal, 23 Hastings Const. L. Q. 127 (1995).	8

Kristine Cordier Karnezis, Annotation, Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement, 89 A.L.R.3d 864 (1979).	8
Andrew Dean, Comment, Challenging Appeal Waivers, 61 Buff. L. Rev. 1191 (2013).....	8
Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 YALE L. J. 1909, 1911 (1992).....	10

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JACQUELINE BUSTAMANTE,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

PETITION OF WRIT OF CERTIORARI

The Petitioner, by and through her undersigned counsel, hereby respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in the herein-referenced matter.

V. OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2a), dismissing the appeal before it, is found at *United States v. Bustamante*, 714 Fed. Appx. 965, 2018 U.S. App. LEXIS 5458 (11th Cir. Ala. February 28, 2018) . The judgment and commitment order of the district court convicting and sentencing Petitioner is also attached hereto (App., *infra*, 28 a) The district court's opinion regarding Petitioner's original Motion to Suppress is published at *United States v. Garcia*, 178 F.Supp.3d 1250 (S.D. Ala. 2016)(App., *infra*, 4a)

VI. STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the district court was entered on May 12, 2017. (App., *infra* 28a) A timely notice of appeal was filed on May 18, 2017 and the case was docketed in the court of appeals (Eleventh Cir., No. 17-12250). The court of appeals filed its opinion on February 28, 2018. (App., *infra*, 2a)

Petitioner hereby files this petition for a writ of certiorari and

invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

VII. CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision is the Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

VIII. STATEMENT OF THE CASE

Petitioner Jacqueline Bustamante (hereinafter referred to as “Petitioner” or “Ms. Bustamante”) and one co-defendant were named in a two-count indictment by the January 2016 Federal Grand Jury for the Southern District of Alabama, Mobile, Alabama. Count one charged that on or about December 1, 2015, and continuing through December 15, 2015, the two defendants did knowingly conspire with each other to distribute and possess with the intent to distribute methamphetamine, contrary to 21 U.S.C. §841(a)(1), in violation of 21 U.S.C. §846. Count two charged that on December 15, 2015, both defendants did knowingly

and intentionally unlawfully possess with the intent to distribute a Schedule II controlled substance. Specifically, the substance was approximately three kilograms of methamphetamine in violation of 21 U.S.C. §841(a)(1).

The two defendants were subsequently named in a superseding indictment by the February 2016 Federal Grand Jury for the Southern District of Alabama, Mobile, Alabama. The superseding indictment added a count directed only to Petitioner's co-defendant, charging illegal entry into the United States by an alien previously removed. (Counts one and two of the original indictment correspond to counts two and three of the superseding indictment.)

On January 20, 2017, Petitioner pled guilty to Count One of the original indictment pursuant to a written plea agreement (App., *infra.*, 11a) with the Government and was subsequently sentenced on May 12, 2017 to a term of incarceration of 188 months and a subsequent term of supervised release of five years. (See, App., *infra.*, 28a)

A timely notice of appeal was filed by Petitioner on May 18, 2017. The Government moved to dismiss the appeal pursuant to the Petitioner's Plea Agreement (App., *infra.*, 11a), which motion was

granted.

Petitioner is currently in the care and custody of the United States Attorney General through the Federal Bureau of Prisons at the Federal Correction Institution at FCI Aliceville, Aliceville, Alabama.

IX. STATEMENT OF FACTS

The instant case arises out of a pretextual traffic stop. At approximately 9:30 in the morning of December 15, 2015, Petitioner, together with her co-defendant and an infant child, were traveling eastbound on Interstate 10 near the Alabama/Mississippi state line. Posted and parked on the same Interstate was a Mobile County Sheriff's Office ("MCSO") officer who noticed the Petitioner's vehicle and began to follow it for no articulable illegal activity. After following the vehicle for a short time, Petitioner's vehicle was stopped by the MCSO officer under the pretext that it had allegedly changed lanes without signaling. (Petitioner contends that no violation occurred, and that the officers were not in a position to observe whether the vehicle had signaled. No ticket for a violation was ever given, only a "warning.")

The vehicle was driven by Petitioner's co-defendant, however

Petitioner informed the officers that the vehicle was hers.

Subsequently, the Petitioner's vehicle was searched and methamphetamines were discovered.

Petitioner was subsequently indicted in the Southern District of Alabama.

X. ISSUES PRESENTED

- I. Whether Petitioner's Contractual Appeal Waiver Should Be Void Under Contract Law and Thus Inapplicable to the Serious, Constitutional Fourth Amendment Concern Raised on Appeal?
- II. Whether the Fourth Amendment Guarantees the Petitioner the Right to Be Free from Any Warrantless Investigatory Stop by Armed, Law Enforcement Authorities Absent Any Reasonable, Articulable Suspicion, Based on Objective Facts, That the Person Has Engaged in Criminal Activity?

XI. REASONS FOR GRANTING THE WRIT

Whether Petitioner's contractual appeal waiver should be void under contract law and thus inapplicable to the serious, constitutional Fourth Amendment concern raised on appeal?

The Government moved to dismiss Petitioner's appeal based upon a limited appeal waiver contained in the Petitioner's plea agreement. It was the Government's argument that as part of the broad and

unilateral representations represented in this Plea Agreement (App., *infra.* 11a), the Petitioner waived the right to file any direct appeal.

However, it is fundamentally important to society in general and judicially in particular to be consistent in interpreting agreements. Throughout the circuits, although the appellate courts have been consistent in their micro-review of appeal waivers contained in plea agreements, courts have been inconsistent in any macro-interpretation, claiming on one hand that plea agreements should be interpreted under contract law, yet then misapplying contractual rules of construction. See, *Kernan v. Cuero*, 138 S. Ct. 4, 199 L. Ed. 2d 236, 2017 U.S. LEXIS 6631, (2017)(Plea agreements amount to, and should be interpreted as, contracts under contract law.)

As part of Petitioner's Plea Agreement, she was required to assent to an appeal waiver. (Plea Agreement, App., *infra.*, 11a) The appeal waiver was, in essence, a unilateral waiver with no mutuality balancing the covenants of both the Petitioner and the Government. Since plea agreements, and the appeal waivers contained therein, are contractual in nature, they must be viewed as contracts of adhesion, prospective, asymmetric, unfair, and held to be unenforceable.

When reviewing the concept of appeal waivers, a concept unexamined for many years by this Court, it is posited that the legal existence of an appeal waiver is ethically and constitutionally suspect as it is grounded purely in resource conservation considerations advocated by prosecutors and judges. See, e.g., Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. Mich. J. L. Reform 347 (2015); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. 127 (1995); Kristine Cordier Karnezis, *Annotation, Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R.3d 864 (1979); see also Andrew Dean, *Comment, Challenging Appeal Waivers*, 61 Buff. L. Rev. 1191 (2013).

Almost all of the circuits have concluded that, absent some egregious circumstance or a miscarriage of justice, a unilateral waiver of the right to appeal is enforceable, despite its contractual foundation. See, *United States v. Mathews*, 534 Fed. App'x 418 (6th Cir. 2013); *United States v. Chandler*, 534 F.3d 45 (1st Cir. 2008); *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004); *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Khattak*, 273 F.3d 557 (3d Cir.

2001); *United States v. Brown*, 232 F.3d 399 (4th Cir. 2000); *United States v. Feichtinger*, 105 F.3d 1188 (7th Cir. 1997); *United States v. Bolinger*, 940 F.2d 478 (9th Cir. 1991).

The right to appeal one's sentence in plea agreements derives from federal statute, which permits filing an appeal by a defendant if the sentence imposed by the judge was greater than the sentence set forth in the plea agreement, or by the government if the sentence imposed was less. 18 U.S.C. §3742(c)(1)-(2). Appeal waivers are implicitly authorized by Federal Rule of Civil Procedure 11 that acknowledges the existence of the waiver of the right to appeal by requiring the court to discuss any such terms in a plea agreement explicitly with defendants. Fed. R. Civ. Proc. 11.

Appeal waivers, the unilateral prospective waiver of the constitutional right of appellate review, is unfortunately now a recognized national practice. With roughly 97% of all federal convictions resulting from guilty pleas, and the majority of guilty pleas including appeal waivers, the enforceability of these provisions is quite fundamental especially in light of the context of such waivers involving unequal bargaining positions. Recognizing this unilateral leverage, federal prosecutors have outlined the parameters and the legality in their U.S. Attorneys Manual, Criminal Resource Manual (“CRM”), Section 626.

In the CRM, the legality of these provisions generally is confirmed. See *United States v. Mezzanatto*, 513 U.S. 1965 (1995);

Tollett v. Henderson, 411 U.S. 258 (1973); Blackledge v. Allison, 431 U.S. 63 (1977), cert. denied, 116 S. Ct. 548 (1995).

Consistent with that principle, most appellate courts have upheld the general validity of a sentencing appeal waiver in a plea agreement. See, e.g., United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993), cert. denied, 115 S. Ct. 652 (1994); however, see Boles v. United States, 2016 U.S. App. LEXIS 20583 (11th Cir. November 17, 2016) (double jeopardy claim is not barred by a knowing and voluntary waiver). However, it is important to note that the United States Sentencing Commission's policy statements allow judges to accept plea agreements as long as the agreements do not undermine the statutory purposes of sentencing or the Sentencing Guidelines. U.S.S.G. §§6B1.2 and 6B1.4 (Nov. 1994).

A plea bargain is a contract between the prosecutor and a defendant, and an appeal waiver is part of that contract. Plea agreements must be construed in light of, and subject to, the rights and obligations created by the Constitution. Guilty pleas are generally negotiated outside the courtroom, between just the lawyers, without the defendant, and in the absence of any witness or recording mechanism. See, Robert E. Scott & William J. Stuntz, Plea Bargaining

as Contract, 101 YALE L. J. 1909, 1911 (1992). This “scandalously casual” process of “horse trading,” which determines who goes to prison and for how long, is “not some adjunct to the criminal justice system; it is the criminal justice system.” *Id.* at 1911-12.

“Although plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and ‘subject to contract-law standards.’” *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980) (quoting *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979)). The terms of a plea agreement are interpreted according to “objective standards” and, in the event of a dispute, the “dispositive question” is what the parties “reasonably understood.” *Arnett*, 628 F.2d at 1164. However, given their context, plea agreements are contracts of adhesion, and must be strictly construed against the Government. See, *United States v. Mezzanatto*, *Id.*

Notwithstanding the utilitarian acceptance of appeal waiver provisions in plea agreements, there are major issues of fairness and equity impacted by requiring a defendant to enter into an asymmetric provision, requiring a defendant to waive appellate rights, but leaving the Government fully able to seek review for any reason. See, Paragraph 24, Plea Agreement, App., *infra*, __a. Under the well-established provisions of contract law, this lack of mutuality directly impacts the enforceability of the contractual plea agreement. See, *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985)

In enforcing unilateral waivers of appellate rights, the various circuits have reasoned that, because a defendant may waive constitutional rights, he or she may also waive the statutory right to appeal a sentence. See, *United States v. Andis*, 333 F.3d at 889 ("the right to appeal is not a constitutional right but rather 'purely a creature of statute'"); *United States v. Khattak*, 273 F.3d at 561 ("The ability to waive statutory rights, like those provided in 18 U.S.C. §3742, logically flows from the ability to waive constitutional rights."); *United States v. Teeter*, 257 F.3d 14 at 21-22(1st Cir. 2001) ("the idea of permitting presentence waivers of appellate rights seems relatively tame because the right to appeal in a criminal case is not of constitutional magnitude"); *United States v. Nguyen*, 235 F.3d 1179, at 1182 (9th Cir. 2000)(noting that the right to appeal "is statutory, rather than constitutional, in nature"). This analysis, which focuses solely on the sources of the rights being relinquished, ignores the important distinction between contemporaneous and prospective waivers.

Unlike a contemporaneous waiver (for example, the waiver of the right to remain silent that occurs when a defendant speaks, or the waiver of the right to have a jury determine guilt that occurs when a

defendant admits guilt), a prospective waiver raises concerns about the facts known to the defendant at the time the waiver is executed. *United States v. Melancon*, 972 F.2d 566, 571-72 (5th Cir. 1992) (Parker, D.J., concurring specially); see *United States v. Medina-Carrasco*, 806 F.3d 1205, 1212 (9th Cir. 2015) (Friedman, D.J., dissenting) ("Sentencing . . . does not occur contemporaneously with the plea and waiver. It is a future event, and the mistakes from which one might have reason to appeal have not yet occurred at the time a defendant waives the right to appeal . . ."). Generally, when a guilty plea is entered and the right to appeal the ensuing sentence is waived, the scope of the record that will be considered at sentencing has not yet been defined, the presentence report has not yet been prepared, the applicable U.S.S.G. range has not yet been calculated, and the sentence has not yet been imposed. Given the quantum of information usually unavailable at the time of the plea, a prospective waiver of appellate rights might often be "unknowing and unintelligent." *United States v. Medina-Carrasco*, 806 F.3d 1205, 1212 (Friedman, D.J., dissenting); see, *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997)(refusing to accept a plea containing a waiver of the right to appeal); *United States v. Raynor*,

989 F. Supp. 43, 48 (D.D.C. 1997) (same).

Recognizing the dichotomy between contemporaneous and prospective waivers, the District of Columbia Circuit has held that a defendant who waives the right to appeal a sentence does not thereby agree "to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court." *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009). According to *Guillen*, an appellate waiver "relieves neither [the defendant's] attorney nor the district court of their obligations to satisfy applicable constitutional requirements." *Id.* The District of Columbia Circuit has indicated that it will not enforce a waiver of the right to appeal "if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice." *Id.* at 531. This pronouncement resonates with the view that the provisions of 18 U.S.C. § 3742 do not merely confer a right to appeal, but rather impose limitations on judicial authority, which cannot be "waived" by the parties. See, *United States v. Bolinger*, 940 F.2d 478, 483 (9th Cir. 1991) (D.W. Nelson, C.J., dissenting in part) (observing that, because "a salient purpose of the Guidelines is to reduce sentencing disparity and

to create uniformity," an appeal asserting that the district court "misapplied the Guidelines . . . should not be barred by waiver").

Although courts would not intentionally impose an improper sentence, a sentencing court is not infallible and, in the course of formulating a sentence, it is often faced with issues on which reasonable minds can differ. The criminal justice system is not improved by insulating from review either simple miscalculations or novel questions of law. Moreover, in the wake of *Booker*, which rendered the sentencing guidelines merely advisory, see 543 U.S. at 245, we have returned to a sentencing regime with the potential to generate the types of unwarranted disparities that Congress attempted to eradicate in enacting the Sentencing Reform Act of 1984.

Only appellate courts have the vantage necessary to assess whether sentences are being imposed in a uniform manner within a circuit or across the country; however, the habitual acceptance and enforcement of unilateral waivers of appellate rights precludes such analysis, and is likely to lead to a wide range of sentences, despite similarities in offense levels and criminal histories. This "systemic distortion" is further intensified by the "asymmetry" in appellate

rights, which allows the Government to seek harsher sentences on review, and results in jurisprudence necessarily "skewed" toward restricting the ways in which district courts may show leniency. See, *United States v. Perez*, 46 F. Supp. 2d 59, 69 (D. Mass. 1999); *United States v. Raynor*, 989 F. Supp. 43, 46 (D.D.C. 1997).

One of the major arguments in favor of prospective appellate waivers is that unilateral waivers of the right to appeal promote finality. Such a position is disingenuous. *United States v. Perez*, Id., at 69; *United States v. Raynor*, Id. at 48 ("If the purpose of the waiver . . . is to eliminate frivolous appeals, . . . the government is engaging in overkill."). Finality is not secured simply because only the Government, and not the defendant, is entitled to appeal. *United States v. Guevara*, 941 F.2d 1299 (4th Cir. 1991).

Moreover, to the extent the Government's motive is merely to reduce the burden of appellate and collateral litigation on sentencing issues, the avenue for achieving such finality is explicitly contemplated in Rule 11(c)(1)(C), pursuant to which the Government may agree to a specific U.S.S.G. range and bind both the defendant and the court. See Fed. R. Crim. P. 11(c)(1)(C); *Raynor*, Id. at 48 (citing 18 U.S.C. §3742(c)

and former Rule 11(e)(1)(C) [now Rule 11(c)(1)(C)]). Because a defendant's ability to appeal from a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is statutorily restricted, an appellate waiver is simply cumulative and unnecessary.

In this matter, the trial court erred in denying the Petitioner's motion to suppress, allowing the court to consider evidence that was obtained without a warrant and contrary to the Fourth Amendment. Unfortunately, Petitioner was denied the right of appellate review due to an unenforceable contract term, specifically an appeal waiver.

Whether the Fourth Amendment guarantees the Petitioner the right to be free from any warrantless investigatory stop by armed, law enforcement authorities absent any reasonable, articulable suspicion, based on objective facts, that the person has engaged in criminal activity?

Whether an individual has the right, under the Fourth Amendment, to be free from any warrantless investigatory stop by armed, law enforcement authorities absent any reasonable, articulable suspicion, based on objective facts, that the person has engaged in criminal activity?

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures by law enforcement authorities of the United States government. *United States v. Garcia*, 890 F.2d 355 (11th Cir. 1989). It is the entire scope of such seizures and searches that is implicated by the Government's stopping Petitioner Bustamante's vehicle, searching the vehicle, and ultimately seeking statements regarding criminal activity from the Petitioner.

Under the Fourth Amendment, Ms. Bustamante should maintain an initial right to be free from any investigatory stop by armed, law enforcement authorities. The threshold question of whether the Fourth Amendment applies is whether "a person has a 'constitutionally protected reasonable expectation of privacy'" under the circumstances. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)). Pursuant to the cases providing guidance for the Fourth Amendment, agents of the Government may only stop a vehicle if police have probable cause to believe that a traffic violation has occurred (*Whren v. United States*,

517 U.S. 806, 116 S.Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996)) or when officers have a reasonable, articulable suspicion, based on objective facts, that the person has engaged in criminal activity (United States v. Powell, 222 F. 3d 913 (11th Cir. 2000)).

In the case at bar, law enforcement did not have a reasonable, articulable suspicion, based on objective facts, that the Petitioner had engaged in criminal activity. The facts are that the MCSO stopped the subject vehicle claiming, pretextually, that a traffic infraction occurred. None did.

As indicated above, Petitioner concedes that the Fourth Amendment permits law enforcement to stop vehicles briefly for further investigation when there is reasonable suspicion that criminal activity may be afoot. See *Alabama v. White*, 496 U.S. 325, 328-30 (1990). Reasonable suspicion requires "some minimal level of objective justification' for making the stop." *INS v. Delgado*, 466 U.S. 210, 217 (1984). This is a lower hurdle than the probable cause necessary to obtain a search warrant, given the lesser infringement on an individual's liberty. "[P]robable cause means 'a fair probability that contraband or evidence of a crime will be found,' and the level of

suspicion required for a Terry stop is obviously less demanding than for probable cause." *Alabama v. White*, Id. at 330 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Further, the stop, even if allowed, must be brief. Though the Government implies that the stop was for minutes, logic dictates longer. Petitioner was ordered out of the vehicle and patted down. She waited and waited. Clearly, this brief investigative stop was beyond its own allowable definition.

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions. "One of the well-established exceptions to the probable cause and warrant requirements is a search which is conducted pursuant to voluntary consent." *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989) "The government bears the burden of proving . . . that the consent was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily. Id.

"[V]oluntariness is a question of fact to be determined from all

the circumstances' when evaluating the validity of a consent to search." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2058-59, 36 L. Ed. 2d 854 (1973)). In evaluating the totality of the circumstances underlying consent, the court is required to review several indicators, including the presence of coercive police procedures, the extent of the defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found.

The trial court found that, as a matter of law, Petitioner's consent to the search was proper. This determination was incorrect. Any clear review of the totality of circumstances would reach just the opposite factual conclusion. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973)

First of all, it is uncontroverted that the vehicle was stopped and approached by armed, law enforcement officers. Petitioner was patted down. Coupled with these typical, traffic-stop procedures, and ignored completely by the lower court, is the fact that Petitioner has a limited education, with no high school or equivalent education coming from Guatemala. Her familiarity with law enforcement is based in that

foreign country and not the due process rights of our Constitution. That familiarity taught Petitioner that (1) real superiority lies with the officers, (2) refusing to comply with a request usually brings punishment, and (3) a request from an armed officer is akin to a demand. While these statements may not sustain an objective review in the world of the judiciary, these are principles of truth and reality in the world of the Petitioner.

In sum, Petitioner did not think she could refuse the request for a search. She was not free to make up her own mind and to arrive with an “unconstrained choice”, as the prior decisions require. Therefore, she did not. Her consent was not voluntary and the search should have been suppressed together with all evidence flowing therefrom. This Court is now requested to provide the clear guidance to the circuits as to the application of the Fourth Amendment to such a circumstance.

XII. CONCLUSION

As this Court noted in *Coppedge v. United States*, 369 U.S. 438, 449 (1962), “when society acts to deprive one of its members of his life, liberty, or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without

judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.”

The global and unrestricted use of appeal waivers deserve to be brought within some constitutional dimensions.

The Petitioner respectfully requests that this Honorable Court issue the requested writ of certiorari.

Respectfully Submitted,

/s/Robert A. Ratliff
Robert A. Ratliff, Esq.
Robert A. Ratliff, PC
713 Dauphin Street
Mobile, Alabama 36602
(251) 438-2250
rar@ratlifflegalgroup.com
Counsel For Petitioner

XIII. CERTIFICATE OF WORD LIMITATIONS

I hereby certify that the foregoing Petition, exclusive of mandated information under S.Ct.R. 33, is 25 pages in length and 5344 in word count, utilizing the word count of the word processing program used to prepare this document.

/s/Robert A. Ratliff
Robert A. Ratliff
Attorney for Petitioner

XIV. CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following via regular U.S. Mail, with sufficient postage to ensure delivery, this 26 day of May, 2018, and that all parties required to be served have been served:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

/s/Robert A. Ratliff
Robert A. Ratliff, Esq.
Robert A. Ratliff, PC
713 Dauphin Street
Mobile, Alabama 36602
(251) 438-2250
rar@ratlifflegalgroup.com
Counsel For Petitioner