No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

JUANITA L. BERRY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

David E. Schafer, Esq.
3131 Princeton Pike
Bldg. 3D, Ste. 200
Lawrenceville, NJ 08648
(609) 439-7790
<schafdave@gmail.com>

Attorney for Petitioner
Juanita L. Berry

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

JUANITA L. BERRY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Juanita L. Berry, pursuant to Supreme Court of the United States Rule 39 and 18 U.S.C. §3006A(d)(7), requests leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under 18 U.S.C. §3006A(b) and (c) in the United States District Court of the District of New Jersey and on appeal by the United

of the United States Rule 39, no Affidavit is required to be filed in support of this motion.

Respectfully submitted,

David E. Schafer, Esq.
3131 Princeton Pike
Bldg. 3D, Ste. 200
Lawrenceville, NJ 08648
(609)439-7790
<schafdave@gmail.com>

Attorney for Petitioner
Juanita L. Berry

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the District Court's legal holding that promissory notes between Berry and a vendor were income and not loans under the Internal Revenue Code and IRS Regulations.

2. Whether the Court of Appeals erred in affirming the District Court's holding that loss included the value of parts that belonged to AT &T, which was not named as a victim in the Second Superseding Indictment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Constitutional Provisions and Statutes

Other Authorities

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

JUANITA L. BERRY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

Petitioner Juanita L. Berry respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 30, 2018.

OPINION BELOW

On April 30, 2018, a panel of the United States Court of Appeals for the Third Circuit issued an unreported opinion affirming petitioner's conviction and sentence. This opinion is appended at 1a to 13a.

JURISDICTION

The judgment and opinion of the Third Circuit was filed on April 30, 2018. This petition has been filed within 90 days after entry of the judgment. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, "No person shall be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

On September 23, 2015, Berry was charged in the District of New Jersey under Second Superseding Indictment 13-769 with four counts of wire fraud and two counts of tax evasion. Berry was convicted of all six counts on December 2, 2015. On July 13, 2016, Berry was sentenced to 60 months imprisonment on Counts 1 to 4 (the wire fraud counts) and 60 months on Counts 5 and 6 (the tax counts) to run concurrently, and was also ordered to pay $3,440,885 restitution.

The wire fraud counts involved new and used telecommunications parts that were sold while Berry's Pennsylvania subchapter S corporation, J. Starr Communications, Inc. ("J Starr"), served as a consultant to Telamon Corporation

("Telamon"), a company based in Indiana with a location in Dayton, New Jersey, which provided telecommunications parts and support to Verizon and AT&T.

During this consultation period, which lasted from 2005 to 2011 when J Starr's agreement with Telamon was terminated, J Starr sent telecommunications parts to a Florida telecommunications parts vendor, WestWorld, pursuant to loan agreements attached to a business relationship that had begun before J Starr's agreement with Telamon and had continued after J Starr's termination from Telamon.

The contemporaneous contract between Telamon and AT&T unequivocally stated that the telecommunications parts were Telamon's until they were installed, at which time the ownership of the now used parts transferred to AT&T. Thus, all of the used parts that Berry sent to WestWorld belonged to AT&T, not Telamon. AT&T was mentioned by name in the wire fraud counts of the second superseding indictment of which Berry was convicted, but only as a customer of Telamon and not as a victim. (20a to 25a). Telamon was labeled Company A in the second superseding indictment and was alleged to be the victim.

REASONS FOR GRANTING THE WRIT

1. This Court should grant review of the lower courts' holdings that loans from a telecommunications parts vendor to Berry's company pursuant to promissory notes were loans and not income

The promissory notes between J Starr, Berry's corporation, and WestWorld, a telecommunications parts vendor, were written documents signed by both parties. (16a to 19a). Therefore, the money transferred from WestWorld to Berry were legally loans and not income. Therefore, the loans should not have been ruled income by the District Court and affirmed by the Third Circuit.

WestWorld's Chief Financial Officer drafted two promissory notes in Florida between WestWorld and J Starr, one dated January 29, 2010 for $400,000 and the other dated July 13, 2011 for $500,000. They were explicitly drafted loans:

> *Borrower* shall be entitled to *borrow* up to the full principal amount of the Promissory Note and to repay and to *reborrow* from time to time ... (16a and 18a, second full paragraphs, emphasis added).
>
> *Borrower* grants *Lender* a security interest in all of the *Borrower's* rights, title and interest in *Borrower's* accounts receivable ... (*Ibid*, emphasis added).

The terms "borrower," "reborrow" and "lender" as drafted by WestWorld unequivocally demonstrated the intent of the parties to create a loan agreement. Subsequently, WestWorld's officer, son of the CEO, would email Berry with the

heading, "tracking of loan repayments" and depicting a column and bracket for "Loans" and "Loan Amount."

Boilerplate contract law, embodied in the parol evidence rule, clearly define these promissory notes as loans:

> The principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing.

Black's Law Dictionary, Garner, West Publishing Co., 7th edition (1999), p. 1139.

As loans agreed to be repaid pursuant to the terms of the notes, the money loaned to Berry's company was not gross income under the Internal Revenue Code. *United States v. Swallow,* 511 F.2d 514, 522 (10th Cir. 1975). Nonetheless, the District Court instructed the jury, "In this case, Ms. Berry *claims that she believed* the promissory notes constituted a loan." By doing so, not only did the District Court misstate the law, but it lowered the Government's burden of proof. This failure of the Government to meet its burden of proof carried over into sentencing, where the Presentence Investigation Report and the District Court accepted the Government's argument that all of the money loaned to Berry from WestWorld should result in a higher loss, a higher guideline range for Berry, and a higher restitution figure.

In affirming the District Court, the Third Circuit relied upon a Pennsylvania

court's interpretation of the its parol evidence rule:

> We disagree; Pennsylvania's parol evidence rule expressly allows for admission of parol evidence where a contract "does not state fully the agreement among the parties." (9a-8 to 10; citations omitted).

However, the contract was drafted in Florida by the Florida corporation WestWorld. Florida's parol evidence law mandates a literal meaning for the terms of the promissory notes with no parol evidence allowed by trial testimony of WestWorld employees to alter those terms:

> Florida law, of course, recognizes the parol evidence rule. "(E)vidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract. This rule applies when the parties intend that a written contract incorporate their final and complete agreement." ... The rule is one of substantive law, not evidence, so it is applied by federal courts sitting in diversity.

Ungerleider v. Gordon, 214 F. 3d 1279, 1282 (11th Cir. 2000) (citations omitted).

2. This Court should grant a review of the lower courts' holdings that loss included the value of parts that belonged to AT&T, which was not named as a victim in the second superseding indictment

The huge corporation AT&T was named in the second superseding indictment as a customer of Telamon ("Company A"). (21a, paragraph 4). No property of AT&T was charged as being stolen by Berry, and there was only that

single mention of AT&T in the wire fraud counts (or any other part) of the second superseding indictment. (20a to 25a). However, the pertinent part of the contract between "Company" AT&T and "Supplier" Telamon, (26a to 33a), unequivocally stated that, once Telamon had installed telecommunications parts in one of AT&T's substations, the ownership of the parts shifted to AT&T and remained there. (26a to 33a):

> TITLE AND RISK OF LOSS – Title and risk of loss and damage to material purchased by Company under this Agreement shall vest in Company when the material has been delivered at the FOB point.... (31a-7 to 15)

Yet the District Court adopted the recommendation of the Presentence Report to include the cost of all of AT&T's used parts Berry sent to WestWorld to pay back her loans. This was in accordance with the inaccurate language of the second superseding indictment that depicted the used parts—as opposed to the new parts, that belonged to Telamon—as owned by Telamon:

> 12. It was a further part of the scheme and artifice to defraud that between in or about 2008 through in or about 2011, defendant Berry received:
>
> a. At least approximately $254,000 from the Florida Company for equipment orders that included *new* telecommunications equipment that defendant BERRY stole from Company A and provided to the Florida Company; and
>
> b. At least several million dollars from the

> Florida Company for *used* telecommunications equipment that defendant BERRY stole from Company A. (23a-19 to 24a-5; emphasis added).

The Third Circuit upheld the District Court's inclusion of the used parts as loss (and restitution) by holding:

> (t)he government introduced testimony from a Telamon employee, as well as certain documentary evidence, showing that AT&T and Telamon subsequently agreed that Telamon would retain ownership of the removed equipment. (11a-2 to 7).

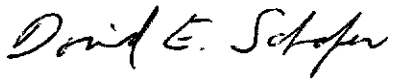
However, the Telamon employee cited above by the Third Circuit identified DEFENDANT'S EXHIBIT 308, (26a), as a purchase order from AT&T that was used "On every job." The documentary evidence cited above by the Third Circuit was a series of emails and a proposed meeting in 2007 to alter the terms of the title and risk of loss that the above Telamon employee admitted, "I don't recall it being held." The Third Circuit did not address the vital fact that, even if the 2007 meeting had been held, the 2010 purchase orders with boilerplate contract language regarding ownership were used on every job after that.

The jury did not decide the issue of the *used* parts, since the four wire fraud counts of which it convicted Berry involved only *new* parts. (24a and 25a). Thus, the District Court's conclusion that the jury did decide the issue of the used parts was unfounded.

CONCLUSION

For the above reasons, Petitioner Juanita Berry respectfully requests that the Court grant her Petition for a Writ of Certiorari so that she is not attributed a loss amount based upon two clear misinterpretations of contract law by the District Court and affirmed by the Third Circuit, resulting in a greater term of incarceration advised by the federal sentencing guidelines and a higher restitution amount.

Respectfully submitted,



David E. Schafer, Esq.
3131 Princeton Pike
Bldg. 3D, Ste. 200
Lawrenceville, NJ 08648
(609) 439-7790
<schafdave@gmail.com>

Attorney for Petitioner
Juanita L. Berry