

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 2018

DAVID PATE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

LIST OF PARTIES

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The Petitioner, David Pate, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit issued on May 25, 2018 dismissing Petitioner's appeal, finding that he had previously waived his right to appeal his sentence.

OPINIONS BELOW

A Panel of the Fourth Circuit Court of Appeals dismissed Petitioner's appeal by Order filed May 25, 0218, a copy of which appears as Appendix A.

JURISDICTION

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

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

On November 8, 2016, an arrest warrant was issued for the Petitioner in the Western District of North Carolina. Petitioner was arrested the following day. On November 18, 2016, a grand jury sitting in the Western District of North Carolina indicted Petitioner, along with eight other co-defendants. Petitioner was charged in Count One with conspiracy to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and in Count Three with possession of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c).

On March 22, 2017, Petitioner entered a plea of guilty pursuant to a plea agreement to Count One of the indictment. Petitioner’s plea agreement was filed with the court on March 14, 2017. The Plea Agreement contained an appeal waiver. The presentence report, finalized on June 6, 2017, assessed Petitioner a two-level increase for the specific offense characteristic enhancement under USSG § 2D1.1(b)(12), indicating that he maintained a hotel room for the purpose of manufacturing or distributing a controlled substance. Petitioner objected to the report’s assessment of that two-level enhancement and filed a sentencing memorandum to support his objection on July 2, 2017.

Petitioner appeared for sentencing on September 22, 2017. The court overruled his objection to the presentence report and calculated Petitioner’s guideline range with the two-level increase for the specific offense characteristic enhancement. The court’s calculation of the

guidelines set his range at 135-168 months. The government recommended a 50% downward departure under USSG § 5K1.1. The court ultimately sentenced Petitioner to a term of 67 months imprisonment, to be followed by a term of three years of supervised release. On October 20, 2017, Petitioner filed a timely notice of appeal. On April 11, 2018 the Government filed a Motion to Dismiss Defendant's Appeal alleging that Petitioner's challenge to his sentence fell within the scope of the appellate waiver contained in his plea agreement. On May 25, 2018 the United States Court of Appeals for the Fourth Circuit granted the Government's Motion and dismissed Petitioner's Appeal finding that his challenge to his sentence was barred by the appeal waiver contained in his Plea Agreement.

STATEMENT OF THE FACTS

At the end of 2015, special agents of the Federal Bureau of Investigation began to investigate the actions of Jamie Blunder, who was employed as an officer at the Transportation Security Agency at the Charlotte Douglas International Airport. During the course of their investigation, Blunder was observed traveling to the Petitioner's residence in High Point, North Carolina, on multiple occasions. The agents obtained warrants for telephone intercepts, which allowed them to monitor Blunder's telephone conversations. Those conversations suggested to them that Blunder and Pate were involved in a cocaine trafficking conspiracy.

On November 9, 2016, agents from the Federal Bureau of Investigation conducted surveillance on Jamie Blunder. He was followed to a meeting with David Pate. The meeting took place at a Biscuitville off of Eastchester Drive in High Point, North Carolina. Agents believed that a sale of cocaine was going to occur. After the meeting was completed, Blunder and Pate both left the area. Agents followed Pate down Whites Mill Road as he was headed toward his

residence at 4307 Oak Hollow Drive. He was stopped prior to reaching his residence. At that time agents found on his person a Courtyard Marriott room key.

When agents went to the hotel, they discovered that Pate had rented the room the prior evening. He had only rented the room for a single day. Check out time was 12:00 noon. Even though Petitioner had given consent for the hotel room to be searched, the agents actually searched the room based on the hotel's authority, as when they arrived it was 12:05 p.m. and Pate was no longer in control of the hotel room. The agents then found approximately 220 grams of cocaine.

REASONS FOR GRANTING THE WRIT

As part of the plea agreement in this case, Petitioner was required to waive his appellate rights. While the appeal waiver allowed Petitioner to appeal on the basis of ineffective assistance of counsel or prosecutorial misconduct, the waiver specifically required Petitioner to waive his right to appeal the sentence imposed. He also waived his right to contest his conviction or sentence in post-conviction proceedings, including proceedings under Title 28 U.S.C. § 2255. Petitioner was unsuccessful at his sentencing hearing regarding the computation of his guideline range. The trial court overruled his objection and found that Petitioner had maintained a premises for the purpose of distributing controlled substances under USSG section 2D 1.1(b)(12). This resulted in a two level increase in Defendant's guideline calculation. Petitioner sought to challenge this sentence by right of appeal. The Government moved to dismiss Petitioner's appeal. That motion was allowed by the Fourth Circuit based on Petitioner's appellate waiver.

Petitioner asserts that appeal waivers violate his right to due process of law for a variety

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

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

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

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

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

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

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

Finally, the Court is unwilling to accept the specific waiver of appeal rights provision offered to the defendant because the same plea agreement does not limit the government’s right to appeal a sentence. This glaring inequality strengthens

the conclusion that this kind of plea agreement is a contract of adhesion. As a practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought and thus the ultimate sentence to be imposed under the guidelines scheme – is up to the prosecution. See *United States v. Roberts*, 726 F. Supp. At 1363. To vest in the prosecutor also the power to require the waiver of appeal rights is to add that much more constitutional weight to the prosecutor’s side of the balance.

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

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

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

CONCLUSION

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

Respectfully submitted this the 16 day of August, 2018.

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