

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMIAN O'NEIL TOWNE,
Defendant - Appellant,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

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ATTORNEY FOR PETITIONER
DAMIAN O'NEIL TOWNE

QUESTION PRESENTED FOR REVIEW

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER A GROSS MISCALCULATION OF THE SENTENCING GUIDELINE RANGE SHOULD BE CORRECTED WHERE A DEFENDANT'S APPELLATE WAIVER DOES NOT PRECLUDE AN APPEAL BASED ON COUNSEL'S INEFFECTIVENESS AND WHERE THE GOVERNMENT FAILED TO TIMELY OBJECT TO THE DEFENDANT'S UNTIMELY NOTICE OF APPEAL.

LIST OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Damian O'Neil Towne, defendant;
2. LaKeith Dentrell Smith, Theodore Dempsey Towne, Aubrey Knox, Jr., Princeton Scott Know, Kenneth O'Neal Knox, Catina Towne Henderson, Jessica Mariana Romero, Codefendants;
3. Michael L. Fondren and John William Weber, III, attorneys for Towne in district court;
4. Julie Ann Epps, attorney for Towne on appeal;
5. Annette Williams and Gaines Cleveland, Assistant US Attorneys for the Southern District of Mississippi;
6. Honorable Louis Guirola, Jr., III, USDC Judge;
7. Honorable Robert H. Walker, US Magistrate Judge.

This, the 22nd day of September, 2018.

SJULIE ANN EPPS
ATTORNEY FOR PETITIONER

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OPINIONS BELOW

Damian O'Neill Towne pled guilty to Count I of an indictment that charged that he and other co-defendants knowingly stole firearms from a licensed firearms dealer in violation of 18 U.S.C. §§2, 922(u) and 924(m). ROA.67, 108. By judgment entered on February 2, 2015, he was sentenced to 120 months in the Bureau of Prisons, 36 months of supervised release, and \$112,751.90 in restitution. ROA.67-72.

On November 20, 2017, he filed a notice of appeal. Present counsel was appointed to represent him on appeal. ROA.89-90. After Towne filed his initial appellate brief, the government moved to dismiss Towne's appeal.

By order issued June 29, 2018, a three-judge panel of the Fifth Circuit dismissed Towne's appeal, stating: "IT IS ORDERED that the appellee's opposed motion to dismiss the appeal is GRANTED." A true and correct copy of that order is attached as Exhibit A. Towne did not file for rehearing.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., §1254(1), which provides that this Court may grant a petition for writ of certiorari by any party to a criminal case after rendition of judgment by a Court of Appeals. This petition is timely, the order of the Fifth Circuit dismissing Towne's appeal being entered on June 29, 2018. *See*, Exhibit A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Amendment V (in part):

No person shall . . . be deprived of life, liberty, or property,
without due process of law. . . .

2. USSG §2K2.1(a)(1)(B) (in part):

Base Offense Level (Apply the Greatest)

(1) if (B) the defendant committed any part of the instant
offense subsequent to sustaining at least two felony convictions
of either a crime of violence or a controlled substance offense . .
. .

3. USSG §4B1.1 (a) and (b) (in part):

(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.

STATEMENT OF THE CASE

Mr. Towne pled guilty to stealing firearms from a licensed firearms
dealer in violation of 18 U.S.C. §§2, 922(u) and 924(m). ROA.67, 108. At
sentencing, the trial court adopted the presentence report without change.

ROA.158-59, 170. The trial court found Towne's base offense level should be increased from 20 to Level 26 pursuant to USSG, §2K2.1(a)(1)(B) because he had qualifying felony convictions for a crime of violence (burglary and robbery). ROA.158-59. The court also increased his criminal history from Category IV to VI because these convictions qualified him as a career offender pursuant to USSG §4B1.1 (a) and (b). ROA.161. Based on a criminal history of VI and a Total Offense Level of 41, the guideline imprisonment range was 360 months to life. ROA.166. However, because the maximum term of imprisonment was ten years, the trial court limited Towne's custodial sentence to ten years. ROA.67-72.

On appeal, Mr. Towne argued that the trial court committed plain error in sentencing using the prior convictions to enhance his base offense level and to sentence him as a career offender because neither was a "crime of violence" as that term is defined in the sentencing guidelines. He argued alternatively that counsel was ineffective for failing to object. *See*, Towne's Response to the Government's Motion to Dismiss his Appeal, p. 8.

After Towne filed his appellate brief, the government moved to dismiss Towne's appeal because his notice of appeal was untimely and also because he had signed an appellate waiver precluding appeal except for

errors based on ineffective assistance of counsel. The Fifth Circuit panel, without opinion, sustained the motion. *See*, Exhibit A.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER A GROSS MISCALCULATION OF THE SENTENCING GUIDELINE RANGE SHOULD BE CORRECTED WHERE A DEFENDANT'S APPELLATE WAIVER DOES NOT PRECLUDE AN APPEAL BASED ON COUNSEL'S INEFFECTIVENESS AND WHERE THE GOVERNMENT FAILED TO TIMELY OBJECT TO THE DEFENDANT'S UNTIMELY NOTICE OF APPEAL.

In its motion to dismiss Towne's appeal, the government did not contest that it was error to use his prior burglary convictions to enhance his sentence pursuant to USSG 2K2.1(a)(1)(B) or §4B1.1(a) and (b). Rather the government argued that (1) Towne's appellate waiver precluded any appeal not based on ineffective assistance of counsel; (2) Towne's notice of appeal was untimely, and, (3) in any event, any error in sentencing Towne was harmless because even without the enhancement to his criminal history, Towne's guideline range was still above the statutory maximum. According to the government, because Towne was sentenced below the recommended guideline sentence, any error was harmless.

The problem with the government's harmless error analysis is that it is inconsistent with this Court's opinion in *Molina-Martinez v. United States*,

___ U.S. ___, 136 S.Ct. 1338, 1343, 194 L.Ed. 444 (2016). In that case, this Court held that once a defendant has shown a clear or obvious error that affected his substantial rights, “the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings [internal citations and quotation marks omitted].” *Id.*

This Court went on to say that “[w]hen a defendant is sentenced under an incorrect Guideline range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Id.* Counsel’s failure to object to the use of prior non-qualifying felonies to enhance his guideline sentence means Towne’s counsel committed error that probably affected the outcome, not only did he trial court commit plain error in determining the guideline sentence, Towne’s counsel was constitutionally ineffective.

Given that the prior convictions relied upon to enhance Towne’s sentence were not qualifying felonies, Towne has shown error that probably affected the outcome and that his attorney was constitutionally ineffective in not objecting, an issue not was not precluded by his appellate waiver. Insofar as the Court of Appeals may have relied on the waiver to dismiss Towne’s

appeal, it acted in error. There is nothing in the record that would indicate that had the court started at the correct guideline range, it might not have considered whether to vary downward from the ten-year maximum sentence.

Insofar as the Fifth Circuit relied on Towne's failure to file a timely notice of appeal, the Court erred in dismissing the appeal on this basis. As the government conceded, the timely filing of the notice of appeal is a nonjurisdictional claim-processing rule rather than a jurisdictional one. *See, e.g., United States v. Martinez*, 496 F.3d 387, 388-89 (5th Cir. 2007). As such, it can be forfeited by the government where it fails to make timely objection. *See, Eberhart v. United States*, 546 U.S. 12, 19 (2005).

Here, the government failed to timely object and allowed Towne to proceed with filing his brief before objecting seven months after the notice of appeal was filed. Although the Fifth Circuit has held that the government's objection is timely where filed in response to an appellant's brief, principles akin to equitable estoppel should preclude the government from sleeping on its right to object until after an appellant has detrimentally relied on the government's failure to object for seven months and filed an appellate brief. *E.g., Brown v. State Farm Mut. Auto Cas. Ins. Co.*, 506 F.2d 976, 979 (5th Cir. 1975) [finding waiver of right to disclaim liability where

insurance company failed to timely object once it learned of a potential default].

CONCLUSION

This Court should grant certiorari and reverse because the Fifth Circuit in dismissing Mr. Towne's appeal, has decided important questions that have not been definitely decided by this Court but which should be decided because they have an impact on Towne's due process rights and potentially the rights of other defendants.

The trial court should have considered whether to depart downward or vary downward based on the correct guideline range rather than one that draconically increased the range. Counsel was ineffective in now ensuring his client's rights were protected and the trial court committed plain error. It is manifestly unjust to allow sentences based on gross miscalculations of guidelines regardless of any appellate waiver or untimely appeal.

Respectfully submitted,

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