No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

SEALED APPELLEE, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the rules governing the construction of plea agreements and in light of due process fairness considerations, sentence-waiver provisions in plea agreements should be construed as barring government appeals as well as appeals by defendants.

2. Whether, when a district court finds that the government's declination to file a motion under 18 U.S.C. § 3553 violates due process because the government, contrary to the intent of the plea agreement, prevents the sentencing court from considering relevant information and affording defendant an individualized hearing on his liberty interest, it may remedy the violation.

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Sealed Appellee asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 10, 2018.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals, reported at 887 F.3d 707 (5th Cir. 2018), is attached to this opinion as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on April 10, 2018. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that no person shall be "deprived of life, liberty, or property, without due process of law[.]"

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 3353(e) provides, in pertinent part, that "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence . . . ."

STATEMENT

Pursuant to a plea agreement, Petitioner Sealed Appellee pleaded guilty to conspiring to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. § 841(a), (b)(1)(A) and 21 U.S.C. § 846.[1] As part of the plea agreement, Petitioner admitted

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231

that his offense involved more than 1,000 kilograms of marijuana. Fifth Circuit Electronic Record on Appeal (EROA) 162 (factual basis portion of plea agreement). Section 841(b)(1)(A) sets a mandatory-minimum sentence of 10 years' imprisonment for offenses involving over 1,000 kilograms of marijuana.

Another part of Petitioner's plea agreement dealt with the possibility of appeal in the case. Petitioner agreed to waive his right to appeal the sentence imposed on him. EROA.163. The government reserved a single right related to appeal: "the right to advocate in support of the [District] Court's judgment should this case be presented to an appellate court." EROA.166.

After Petitioner pleaded guilty, a presentence report was prepared. The probation officer recommended that Petitioner be assigned a base offense level of 36 under guideline §2D1.1(c)(2). EROA.215. The officer also recommended assessment of a two-level marijuana-importation upward adjustment and a three-level supervisory-role upward adjustment. EROA.215 (citing U.S.S.G. §2D1.1(b)(15)(C) and §3B1.1(b)). Finally, the officer recommended that the offense level be reduced by three levels to recognize that Petitioner had accepted responsibility for his conduct. EROA.215; U.S.S.G. §3E1.1. These adjustments yielded a total offense level of 38, which, combined with Petitioner's criminal history category of I, created an advisory guideline sentence range of 235 to 293 months' imprisonment. EROA.219; *see* U.S.S.G., Ch.5, Pt.A (sentencing table).

At sentencing, the district court observed that Petitioner came from an educated, successful, supportive, and law-abiding family. The court also observed that Petitioner had

voluntarily abandoned his involvement in the drug conspiracy by 2013. EROA.130-33. Petitioner told the court that he had done so because "I was completely empty and going the wrong–the wrong direction and path in my life." EROA.135. He had resolved to change "my life 180 degrees." EROA.136.

Petitioner joined the New Harvest Worship Center in his hometown, and he went to work in a convenience store. He found himself "fulfilled spiritually" and in control of his life. EROA.136. In 2015, Petitioner's past caught up with him when the government included him in an indictment charging the men he had once dealt marijuana with. EROA.137. Petitioner admitted his wrongdoing.

Defense counsel acknowledged at sentencing that the government had filed a motion under U.S. sentencing guidelines §5K1.1, but he argued to the district court that the guideline calculations overstated the sentence necessary, and thus overstated the point of departure for the §5K1.1 motion. EROA.140-41. Counsel pointed out that the probation officer's calculations counted marijuana that was distributed by the other conspirators before Petitioner joined in 2010 and after he left in 2013. EROA.141-42. Counsel also argued that it was unjust for Petitioner to face the same guideline sentence as those who had not voluntarily repudiated their unlawful conduct. EROA.144-47. A mandatory-minimum sentence of ten years' imprisonment for Petitioner, defense counsel argued, was greater than necessary and "just wrong." ROA.147. The government, despite Petitioner's withdrawal, his reformation, and his cooperation, refused to move under 18 U.S.C. § 3553(e) for a sentence below the mandatory-minimum term. EROA.145. The district court

sentenced Petitioner to 80 months' imprisonment. EROA.100-05. The government objected to the sentence.

The district court filed a written order explaining the sentence. The court determined that, correctly calculated, Petitioner's advisory guideline sentence range was 168 to 210 months. EROA.271-72. The court reviewed the basis of the government's §5K1.1 motion, and it identified other facts and circumstances warranting a reduced sentence, among them that Petitioner had voluntarily withdrawn from the conspiracy and had rehabilitated himself by finding work, supporting his family, and volunteering through his church. EROA.271-75. The court observed that these facts set Petitioner apart from other defendants facing a similar sentence. ROA.271-75.

After identifying the relevant sentencing factors, the district court stated "a defendant has a constitutional right to due process during the sentencing," EROA.276, and noted that the due process clause also forms a limit on prosecutorial discretion, EROA.277. The court decided that, by "effectively nullifying other grounds for departure and/or variance" the government's failure to make a motion to sentence below the mandatory-minimum sentence denied Petitioner his right to due process of law. EROA.280. The court reached this conclusion based upon its finding that "the Government did not take such grounds into consideration in exercising its discretion and limiting the scope of its motion and, therefore, this Court's decision to depart below the statutorily minimum of ten years

is warranted[.]" EROA.282.[2] In these circumstances the court concluded that a mandatory-minimum sentence would "be based on an arbitrary distinction which would violate the Due Process Clause of the Fifth Amendment." EROA.282.

The government appealed to the U.S. Court of Appeals for the Fifth Circuit. That court held that the district court lacked authority to sentence Petitioner below the 10-year statutorily required sentence in the absence of a § 3553(e) motion filed by the government. 887 F.3d at 709-10; App. A at 3-4. The court of appeals rejected Petitioner's argument that the appeal had to be dismissed because the government had not retained, in the plea agreement it drafted, a right to appeal the sentence. 887 F.3d at 710; App. A at 5 & n.1.

[2] The court found that *United States v. Melendez*, 518 U.S. 120 (1996) was "distinguishable from the case at bar." EROA.279-80.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE AS TO HOW TO INTERPRET SENTENCE-APPEAL WAIVER PROVISIONS IN PLEA AGREEMENTS AND TO RESOLVE A CIRCUIT SPLIT OVER WHETHER SUCH WAIVER PROVISIONS KEEP THE GOVERNMENT, AS WELL AS THE DEFENDANT, FROM APPEALING A SENTENCE.

"[C]riminal justice today is for the most part a system of pleas[.] *Lafler v. Cooper,* 566 U.S. 156, 170 (2012). With more than 95% of federal cases being resolved through guilty pleas, plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye,* 566 U.S. 134, 143-44 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992)). Many factors have brought plea bargaining to its predominant place. Plea bargains can be beneficial to a defendant, reducing the number of charges he confronts or the potential sentence he faces. *Frye,* 566 U.S. at 144. Prosecutors and the courts benefit from plea bargaining because neither has been allotted the resources to handle, without plea bargaining, the number of cases that must be heard. Trial of all cases would be logistically impossible. *Santobello v. New York,* 404 U.S. 257, 260-61 (1971). Society can benefit from the plea bargaining system because it tends to allow quick resolutions of cases thus "enhancing whatever may be the rehabilitative prospects of the guilty," and because plea bargaining encourages "finality of judgments." *Santobello,* 404 U.S. at 260-61 (1971).

Santobello settled that voluntary and intelligent plea agreements between the government and an accused are valid. 404 U.S. at 260-61. *Santobello* also taught that, because of the broadly dispersed benefits of a plea-bargaining system and the contractual

nature of plea-bargain agreements, the government must strictly adhere to the terms and conditions of any plea agreement that is reached. *Id.* at 262; *United States v. Roberts,* 624 F.3d 241, 245-46 (5th Cir. 2010). Holding the government strictly to its agreement furthers "the trust between defendants and prosecutors that is necessary to sustain plea bargaining" as an "essential" and "highly desirable" part of the criminal justice system. *Puckett v. United States,* 556 U.S. 129, 141 (2009) (quoting *Santobello,* 404 U.S. at 261-62). The presupposition that underlies our criminal justice system of plea bargains is one of "fairness in securing agreement between an accused and a prosecutor." *Santobello,* 404 U.S. at 261.

In the past two decades, plea agreements have increasingly included provisions waiving the right to appeal the sentence imposed upon the defendant. Not infrequently in many federal districts, prosecutors treat the sentence-appeal waiver provision as a routine and necessary part of a plea agreement. Defendants often agree to these government-mandated waiver provisions, or at least accede to them, because doing so helps them avoid even harsher potential punishment or the possibility of a superseding indictment. *Cf. Frye,* 566 U.S. at 144 (acknowledging that harsh punishments may "exist on the books largely for bargaining purposes"); *see also Branzburg v. Hayes,* 408 U.S. 665, 707-08 (1972) (recognizing significant power grand jury process affords prosecutor); *United States v. Looney,* 532 F.3d 392, 398 (5th Cir. 2008) (recognizing shadow cast over plea bargaining by possibility of prosecutor added charges). The courts of appeals routinely enforce the sentence-appeal waivers. *See, e.g., United States v. Bond,* 414 F.3d 542 (5th Cir. 2005).

This Court has never explicitly addressed the validity of sentence-appeal waivers.[3] Petitioner's case does not require it to do so. Petitioner's case asks a different, but equally important question, implicating the fairness of our plea-bargaining system: whether, under the rules governing the construction of plea agreements and in light of due process fairness considerations, sentence-waiver provisions in plea agreements should be construed as barring government appeals as well as appeals by defendants. The Fourth Circuit has held that such waivers do bar government appeals. *United States v. Guevara,* 941 F.2d 1299, 1299-1300 (4th Cir. 1991). The Fifth Circuit takes a different view, which it expressed in Petitioner's case. The Fifth Circuit ruled that, not only do sentence-appeal waivers not limit the government generally, even the reservation of a very specific appeal right by the government does not limit the government's general right to appeal a sentence. 887 F.3d at 710 n.1; see App. A at 5 n.1.

This Court has repeatedly recognized that "plea bargains are essentially contracts." *Puckett,* 556 U.S. at 137 (citing *Mabry v. Johnson,* 467 U.S. 504, 508 (1984)); *see also Santobello,* 404 U.S. at 262-63 (speaking of plea agreement in the language of contract). The courts of appeals interpret plea agreements "in accordance with principles of contract law." *United States v. Riera,* 298 F.3d 128, 133 (2d Cir. 2002); *see also United States v. Elashyi,* 554 F.3d 480, 501 (5th Cir. 2008) (same); *United States v. Frownfelter,* 626 F.3d 549, 554 (10th Cir. 2010) (same). But "plea agreements are unique contracts, and we temper the application of ordinary contract principles with special due process concerns

[3] The Federal Rules of Criminal Procedure were amended in an effort to ensure that defendants waived their sentence-appeal rights knowingly and voluntarily. *See* FED. R. CRIM. P. 11(b)(1)(N).

for fairness and the adequacy of procedural safeguards." *United States v. Granik,* 386 F.3d 404, 413 (2d Cir. 2004). As such, the courts "construe plea agreements strictly against the government," *United States v. Vaval,* 404 F.3d 144, 152 (2d Cir. 2005), resolving "any ambiguities in the light most favorable to" defendant. *United States v. Quintero,* 618 F.3d 746 (7th Cir. 2010); *see also United States v. Somner,* 127 F.3d 405, 408 (5th Cir. 1997). As explained by the Seventh Circuit, "[t]he government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea." *United States v. Ingram,* 979 F.2d 1179, 1184 (7th Cir. 1992)

The Fourth Circuit, one of the very first court of appeals to approve of sentence-appeal-waiver provisions, *United States v. Wiggins,* 905 F.2d 51, 53-54 (4th Cir. 1990), applied these principles when considering whether a defendant's waiver of sentence-appeal rights affected the government's appeal rights. In *Wiggins,* the court reasoned that to not uphold a matter "upon which the parties have clearly agreed" would "eliminate the chief virtues of the plea system—speed, economy, and finality" *Id.* at 54 (quoting *Blackledge v. Allison,* 431 U.S. 63, 71 (1977)). In a later waiver case, the Fourth Circuit observed that "[t]he finality of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant[.]"*United States v. Guevara,* 941 F.2d 1299, 1299-1300 (4th Cir. 1991). The *Guevara* plea agreement contained a provision that stated "defendant knowingly waives her right to appeal the sentence in exchange for the concessions made by the government in this agreement," and another provision that "the defendant, knowing that she has a right of direct appeal of the sentence under 18 U.S.C. § 3742(a) and the grounds listed therein, expressly waives the right to appeal her sentence

on those grounds or on any ground." *Id.* at 1299. The Fourth Circuit observed that *Wiggins* had approved the validity of such a provision and that "[t]he government has added the waiver language to its standard plea precisely because it preserves the finality of judgments and sentences imposed pursuant to valid pleas of guilty." *Id.* The *Guevara* court reasoned that the "finality of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant, and *it strikes us as far too one-sided* to construe the plea agreement to permit an appeal by the government" when the defendant has accepted a plea agreement containing the government drafted waiver. *Id.* at 1299 (emphasis added). The court therefore held that "we are of opinion that such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did." *Id.* at 1299-1300.

The Fifth Circuit in Petitioner's case took a diametrically opposite view. Not only did the court of appeals reject the idea that a sentence-appeal waiver in a government-drafted plea agreement waived the government's right to appeal, it rejected the idea that a specific reservation of a particular, limited right of appeal by the government waived the government's general right to appeal a sentence. 887 F.3d at 710 & n.1.[4] In other words, the Fifth Circuit will not find that the government waived its general right to appeal a sentence unless the plea agreement contains an explicit waiver of that right by the

[4] Section 8 of the plea agreement expressly reserved for the government a limited, specific right in an appeal: "Moreover the Government reserves the right to advocate in support of the [District] Court's judgment should this case be presented to an appellate court." EROA.166.

government, even when the government has drafted language reserving only a limited right.

The Fifth Circuit's interpretation creates a conflict with the Fourth Circuit, and it aggravates, rather than ameliorating or even tolerating, the one-sided, power imbalance that concerned the Fourth Circuit. This interpretation also runs contrary to precedent in all circuits, including the Fifth Circuit, that requires plea agreements to be construed against the government as drafter. And the Fifth Circuit's decision that a limited reservation of sentence-appeal rights still allows the government to retain a general right to appeal a sentence conflicts with the general the "fundamental axiom of contract interpretation that specific provisions control general provisions[.]" *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.,* 289 F.3d 373, 377 (5th Cir. 2002); *see also United States v. Harper,* 643 F.3d 135, 142 n.2 (5th Cir. 2011) (noting axiom in plea-agreement case). This position is difficult to reconcile with *Santobello*'s, teachings about the contractual nature of a plea agreement and the need for the government to abide by an agreement's terms. 404 U.S. at 260-62. It is also difficult to reconcile with Puckett's statement that, when the government does not live up to an agreement a remedy must be available. *Puckett,* 529 U. S. at 137.

Because the Fifth Circuit's decision creates a division between the circuits and cannot be harmonized with this Court's precedent that strives to ensure fairness in plea bargaining, the Court should grant certiorari.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A DECLINATION TO MOVE FOR A SENTENCE BELOW THE MANDATORY-MINIMUM CAN VIOLATE DUE PROCESS.

The district court concluded that, in the circumstances of Petitioner's case, the government's failure to file a motion to sentence below the mandatory-minimum term violated due process. Because of this violation of Petitioner's constitutional rights, the court fashioned a remedy and sentenced Petitioner below the statutory minimum sentence to 80 months' imprisonment.

The Fifth Circuit reversed. The court of appeals cited *United States v. Melendez,* 518 U.S. 120 (1996) for the proposition that 18 U.S.C. § 3553(e) required a motion from the prosecutor before the district court could sentence below the statutory minimum. 887 F.3d at 709. The court of appeals did not engage the district court's conclusion that a constitutional violation excused that requirement. *See* 887 F.3d at 709-10. Because the district court articulated a compelling case that the constitutional violation warranted remedy and because a line of due process cases from this Court supports the district court's reasoning, the Court should grant certiorari.

It is well settled that a defendant has a constitutional right to due process during the sentencing. *Gardner v. Florida,* 430 U.S. 349, 358 (1977)). As *Gardner* explained, the "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." 430 U.S. at 358 (citing *Witherspoon v. Illinois,* 391 U.S. 510, 521-23

(1968)); *see also Pepper v. United States,* 562 U.S. 476, 480 (2011) ("highly relevant–if not essential" that court have fullest information possible in selecting a sentence).

In this case, the district court concluded that the prosecutor's declination to file a motion pursuant to § 3553(e) impaired Petitioner's "legitimate interest" in having a sentencing proceeding that was fundamentally fair. The declination thus denied Petitioner his right to due process, for the guarantee of the due process clause "expresses the requirement of "fundamental fairness[.]"' *Lassiter v. Dept. of Social Services,* 452 U.S. 18, 24 (1981). Due process "includes a freedom from all substantial arbitrary impositions and purposeless restraints [.]" *Poe v. Ullman,* 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Petitioner's case involved a violation of both freedoms: the declination was an arbitrary governmental distinction and it resulted in a needless and excessive restraint on Petitioner's liberty. This is so because, while a prosecutor's power to move or not move under § 3553(e) is discretionary, it is not standardless. The standards that govern that discretion come from the constitution. Prosecutorial decisions may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' . . . including the exercise of protected statutory and constitutional rights." *Wayte v. United States,* 470 U.S. 598, 608 (1985) (internal citations omitted).

This Court's precedent teaches that, as with other prosecutorial decisions, the filing of a motion to reduce sentence under guidelines §5K1.1 or 18 U.S.C. § 3553(e) "is subject to constitutional limitations that district courts can enforce." *Wade v. United States,* 504 U.S. 181, 185 (1992) (citing *Wayte,* 470 U.S. at 608-09). Under *Wade,* the "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion

and to grant a remedy if they find that the refusal was based on an unconstitutional motive." 504 U.S. at 185. Read together, *Wade* and *Wayte* teach that a defendant is entitled to challenge a prosecutor's discretionary declination to file a § 3553(e) motion, if the prosecutor refused to file the because of the defendant's race or religion, or for the exercise of a constitutional right, or if the prosecutor's refusal to move was not rationally related to any legitimate governmental end. *Wade,* 504 U.S. 185-86 (citing *Chapman v. United States,* 500 U.S. 453, 464-65 (1991)); *Wayte,* 470 U.S. at 608-09. No legitimate end is served by depriving a sentencing court of full and relevant information; thus Petitioner had a right to challenge, as he did, the propriety of the declination. The right to challenge implies the responsibility of the court to remedy a proven constitutional violation.

The district court found that the prosecutor's declination to file a § 3553(e) motion on the facts of Petitioner's case resulted from "an arbitrary distinction which would violate the Due Process Clause of the Fifth Amendment." EROA.282. The declination was arbitrary because the government, "in exercising its discretion and limiting the scope of its motion," ROA.280, had not considered the facts of Petitioner's substantial assistance that justified a sentence below the mandatory ten-year sentence, the goal of avoiding inequity in sentencing, and the existence of other factors–including Petitioner's extraordinary voluntary withdrawal and self-rehabilitation–that put the case outside the heartland of mandatory-minimum cases and justified a lower sentence. EROA.277-80. Because the government had not considered these matters, its declination was arbitrary and had "effectively nullif[ed] other grounds for departure and/or variance[.]" ROA.280. This denied Petitioner his right to be sentenced on full information and as an individual entitled

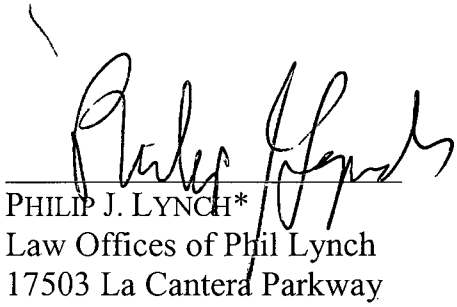
to a fair and just sentence. *Cf. Pepper,* 562 U.S. at 480 (all relevant information should be before and considered by the sentencing court); *Gall v. United States,* 552 U.S. 38, 52 (2007) (each person is to be sentenced as an individual). The district court concluded that the government's failure to make a motion to sentence below the mandatory-minimum sentence was arbitrary, not related to any rational governmental goal, and denied Petitioner his right to due process of law. ROA.277-82.

The district court, understanding the teachings of *Wayte* and *Wade,* fashioned a remedy for that violation. Its remedy, and the sentence it imposed, preserved fundamental fairness and thus accorded Petitioner the process due him. As this Court wrote long ago, the "judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." *Hurtado v. California,* 110 U.S. 536 (1884). The Court should grant certiorari to consider the power of a sentencing court to address a prosecutor's improper declination to file a motion under § 3553(e).

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.



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