No. 18-6157

IN THE SUPREME COURT OF THE UNITED STATES

SEALED APPELLEE, PETITIONER

V.

UNITED STATES OF AMERICA

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

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I. IT IS IMPORTANT TO INDIVIDUAL DEFENDANTS AND TO THE FEDERAL CRIMINAL JUSTICE SYSTEM THAT THE COURT PROVIDE GUIDANCE AS TO HOW TO CONSTRUE C RESERVATIONS OF APPELLATE RIGHTS IN PLEA–BARGAIN AGREEMENTS.

Petitioner asks the Court to take his case to decide whether, when, as part of a plea agreement, the government specifically reserves the right to appeal only particular issues, it may nonetheless appeal on an issue outside that specific reservation. He observes that a sentence-appeal waiver provision has become a very common term in plea agreements, and that prosecutors often treat a waiver of the defendant's appeal rights as a necessary condition to a plea agreement. Given that pleas make up the vast majority of dispositions in the federal criminal justice system, *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012), given the imbalance in bargaining power between prosecutors who control charges that can influence or require a sentence and defendants who wish to avoid such sentences, *id*., and given the teachings of this Court that plea agreements should be construed as contracts that the government must adhere to strictly, *Santobello v. New York,* 404 U.S. 257 (1971), the question whether a specific reservation of rights by the government precludes it from appealing a matter outside that reservation is an important one that implicates precedent and the inherent fairness of our criminal justice system. Further, the courts of appeals have expressed differing views on how appeal-waiver provisions should be enforced against the government, with the Fourth Circuit taking a strict view and the Fifth Circuit in this case indulging a government appeal despite clear limiting language in the plea agreement. The Court should take this opportunity to articulate and clarify the proper approach.

The government asserts that Petitioner asks the Court to imply a term that is not present in the plea agreement and therefore review is not appropriate. BIO 11-12 (citing *United States v. Benchimol*, 471 U.S. 453 (1985)).[1] This assertion is inaccurate. The plea agreement in this case contains a specific provision limiting the government's reservation of appellate rights. That provision stated "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.

Thus, the government's claim that Petitioner asks the Court to imply a term is incorrect. Petitioner asks the Court to provide guidance as to how a provision reserving to the government a specific limited appellate right should be construed and enforced. Precedent suggests that the provision should be construed strictly against the government as drafter of the agreement. *Santobello v. New York*, 404 U.S. 257, 260-61 (1971). Such a construction would serve the policy goal of furthering "the trust between defendants and prosecutors that is necessary to sustain plea bargaining" *Puckett v. United States*, 556 U.S. 129, 141 (2009) (quoting *Santobello*, 404 U.S. at 261-62), by protecting the premise that underlies our criminal justice system of plea bargains−"fairness in securing agreement between an accused and a prosecutor." *Santobello*, 404 U.S. at 261.

It would seem apparent that failing to give effect to a restriction on the government that the government itself wrote into its plea agreement runs contrary to this

[1] The government seeks to have the issue both ways. It also claims that review is inappropriate if the dispute is about a specific term in Petitioner's plea agreement. See BIO 15-16. This is incorrect because the presence of the specific reservation of a limited right allows the Court to provide guidance on the proper interpretation of such reservations for future cases.

fundamental premise. *Cf. Santobello,* 404 U.S. at 261. The Fifth Circuit held otherwise. It declined to find that the reserved right in the plea agreement, *see* EROA.166, meant that the government had waived its general right to appeal the sentence: "we do not agree that the government's specific reservation of its right to support the district court's judgment led either party to reasonably believe that the government could not itself appeal the district court's judgment." *Sealed Appellee v. United States*, 887 F.3d 707, 710 n.1 (5th Cir. 2018). This case squarely presents the issue how a provision reserving only a specific, limited government right of appeal should be construed. The case provides a good vehicle for considering that question and an excellent opportunity for the Court to provide guidance to counsel involved in the plea-bargaining process and to the circuit courts.

In showing the importance of the question presented, Petitioner contrasts the Fifth Circuit's declination to construe specific terms limiting the government's rights with the position of the Fourth Circuit in *United States v. Guevara*, 941 F.2d 1299, 1299-1300 (4th Cir. 1991). The *Guevara* court determined that, when a plea agreement contained a provision waiving the defendant's sentence-appeal rights, the government should be held to have also waived its sentence-appeal rights. Petitioner does not seek, contrary to the government's assertion, BIO 11-13, a rule that every sentence-appeal waiver by a defendant requires the courts to imply a reciprocal waiver by the government. He uses *Guevara* to show how far the Fourth and Fifth Circuits have diverged from each other on sentence-appeal waiver provisions. That divergence demonstrates the need for this Court's guidance.

Indeed, the government's response helps to show why guidance is needed. The government favors a rule that only when it expressly states that it waives all its appeal rights should those rights be held to be limited in any way. BIO 11-16. Such a rule has the effect of protecting the government from its own promises and its own drafting. In this case, such a rule would read the provision that "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, out of the agreement entirely, allowing the government to obtain an appeal right it did not reserve for itself when it drafted the agreement. The government placed the language outlining the specific right it was retaining in the most logical place—following the language waiving Petitioner's right to appeal his sentence. Under the ordinary rules of contract construction, the words and their placement mean that the government was reserving only a limited appeal right. The express-waiver rule the government seeks to apply vitiates *Santobello*'s direction that plea agreements be construed against the drafter. It also deprives defendants of the "fairness in securing agreement between an accused and a prosecutor" that underlies our plea-bargaining system because it allows the government to include language and then disavow it. 404 U.S. at 261.

This concern is not alleviated by the fact that the government appealed the sentence as an illegal one. See BIO 16. When the government, the drafter of plea agreements, the party that possesses the power to charge and to bring increased sentences, limits its own right to appeal through its own language, it has chosen to take a risk on the result of sentencing, just as the defendant risks that a district court will

misapply the guidelines in sentencing him. That the government found itself unhappy with the sentence imposed is neither reason to excuse it from the bargain it drafted nor reason for the Court not to grant certiorari in this case. The government does not suffer from an improper sentence the way that an individual does. *Cf. Glover v. United States,* 531 U.S. 198 (2001) (any additional imprisonment is prejudicial to defendant).

Petitioner lost the benefit of his bargain in this case, and the Fifth Circuit's deviation from the command of *Santobello* threatens to deprive other defendants of the bargains they thought they had reached. At a time when plea bargaining "*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)), the Court should grant certiorari in this case to reinforce the teachings of *Santobello* and to ensure the fundamental fairness that due process requires of our plea-bargaining system.

II. THE FAILURE TO FILE A MOTION UNDER 18 U.S.C § 3553(e) THWARTED PETITIONER'S EXERCISE OF HIS DUE PROCESS RIGHTS.

The Court should also grant certiorari on the second issue presented by Petitioner. The Court's precedent teaches that, as with other prosecutorial decisions, the filing of a motion to reduce sentence under 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). The district court in this case concluded that the prosecutor's declination to file a § 3553(e) motion resulted from "an arbitrary distinction which would violate the Due Process Clause of the Fifth Amendment." EROA.282. The district court identified the due process error as the failure of the government to fully consider, "in exercising its

discretion and limiting the scope of its motion," ROA.280, the facts of Petitioner's substantial assistance 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.

The government, in opposing certiorari, asserts that Petitioner has failed to show that the government's refusal to file a § 3553(e) motion "was not rationally related to any legitimate Government end[,]"BIO 18 (citing *Wade,* 504 U.S. at 186). This is not so. The district court concluded, and Petitioner argues, see Petition 15-16, that the failure to make the § 3553(e) motion denied him his right to due process because it denied him the opportunity to have the relevant sentencing facts fully considered, disclosed, and addressed by the government and the sentencing court. Under *Wade* and *Wayte v. United States,* 470 U.S. 598 (1985) a defendant is entitled to challenge a prosecutor's discretionary declination to file a § 3553(e) motion, if the prosecutor refused to file because of the defendant's exercise of a constitutional right. *Wade,* 504 U.S. 185-86; *Wayte*, 470 U.S. at 608-09. Petitioner had a right to have his sentence, including the propriety of a below-minimum sentence, determined on the full information available to the government, and a full and fair consideration of that information by the district court.

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)). The government withheld relevant information by declining to file a § 3553(e) motion, and, as the district court found, by declining to give full and fair consideration to the relevant information. Because prosecutorial decisions may not be "'deliberately based upon an unjustifiable

standard such as the exercise of protected statutory and constitutional rights," the district court had the authority to look beyond the government's declination to file. *Cf. Wayte*, 470 U.S. at 608. The existence of, and need for such authority, is further shown by the fact that the possibility of a § 3553(e) reduction was a part of the inducement to Petitioner to enter a plea agreement. Allowing the courts to determine whether the government gave full and fair consideration to all the relevant information thus helps to protect the fundamental fairness premise that our plea-bargaining system rests on. *Cf. Santobello*, 404 U.S. at 261-62; *Puckett*, 556 U.S. at 141. The Court should grant certiorari to make clear that § 3553(e) does not deprive the trial courts of the authority and duty to ensure that due process rights are protected during.

CONCLUSION

FOR THESE REASONS, as well as those in his petition, 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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January 14, 2019