NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JERMAINE FRANKLIN
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60163

PETITION FOR WRIT OF CERTIORARI

Michael L. Scott (MS Bar # 101320)
Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by enforcing the unconstitutional Waiver of Appeal provision in Petitioner Franklin's Plea Agreement.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On June 21 25, 2017, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Franklin with:

count 1: felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and

count 2: possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1).

The district court case number is 3:17cr74-CWR-LRA. Mr. Franklin accepted responsibility for his actions by pleading guilty to count 1, and the prosecution dismissed count 2.

The district court sentenced Mr. Franklin to serve 60 months in prison, even though the sentence range under the United States Sentencing Guidelines (hereinafter "Guidelines" or "Sentencing Guidelines") was only 37 to 46 months in prison. The court entered a Final Judgment reflecting this sentence on March 7, 2018. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Franklin filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on March 8, 2018. The Fifth Circuit case number is 18-60163. On appeal, he argued that the district court erred by ordering an unreasonable above-Guidelines sentence. Rather than address the merits of Mr. Franklin's arguments, the prosecution filed a Motion to Dismiss Appeal based on

the Waiver of Appeal provision in the Plea Agreement executed by the parties. The Fifth Circuit entered an Order granting the prosecution's Motion to Dismiss on July 3, 2018. A copy of the Fifth Circuit's Order is attached hereto as Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed its Order dismissing the appeal of this case on July 3, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be … deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V, Due Process Clause.

"No State shall … deny to any person within its jurisdiction the equal protection of the laws."[1] U.S. Const. amend. XIV, § 1, Equal Protection Clause.

[1]The Fourteenth Amendment applies to the states, and not to the federal government. The following case excerpt, however, explains the close relationship between federal equal protection rights under the Fifth Amendment, which does not have a specific equal protection clause, and state equal protection rights under the Fourteenth Amendment.

> "The Due Process Clause of the Fifth Amendment applies to the federal government a version of equal protection largely similar to that which governs the states under the Fourteenth Amendment." *Rodriguez-Silva v. INS,* 242 F.3d 243, 247 (5th Cir. 2001); *see also Hinson,* 70 F.3d at 417 ("We employ the same test to evaluate alleged equal protection violations under the Fifth Amendment as we do under the Fourteenth Amendment") (citing *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 215-17 (1995)(other citation omitted)). The Supreme Court has recognized that it's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2(1975) (citations omitted).

Thompson v. Crnkovich, No. 1:16-CV-055-BL, 2017 WL 5514519, at *4 (N.D. Tex. Nov. 16, 2017).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Franklin for felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Franklin arose from the laws of the United States of America.

B. Statement of material facts.

Mr. Franklin accepted responsibility for his actions by pleading guilty to the subject charge – felon in possession of a firearm. The guilty plea was under a written Plea Agreement executed by the parties. The Plea Agreement contains a provision that waives "the right to appeal the conviction and sentence imposed in this case[.]"

The district court and both parties agreed that the applicable sentencing range under the Sentencing Guidelines was 37 to 46 months in prison. At sentencing, the prosecutor recommended a sentence within the lower fifty percent of this range, which equates to a range from 37 to 41 months in prison. Defense counsel also asked for a sentence in the lower fifty percent of the Guidelines range.

The Probation Officer assigned to this case offered an opinion as to whether there are any indicators in this case that warrant ordering an above-Guidelines sentence. Part E of the Presentence Investigation Report is titled "Factors that May Warrant Departure." Verbiage under this heading states in its entirety: "The probation officer has not identified any factors that would warrant a departure from the applicable sentencing guideline range." Part F is titled "Variances that [May] be Considered in Imposing Sentence." Verbiage under this heading states in its entirety: "The probation officer has not identified any factors under 18 U.S.C. § 3553(a) that may warrant a variance and imposition of a non-guideline sentence."

Rather than follow the prosecutor's recommendation, the defense's request, and most important, the Probation Officer's advice, the district court ordered an above-Guidelines sentence. As stated above, the Guidelines range was 37 to 46 months in prison. The court ordered a 60-month prison term. The court based this significantly above-Guidelines sentence on Mr. Franklin's criminal history, which as defense counsel pointed out, was accounted for by the calculation under the Guidelines.

The defense objected to the above-Guidelines sentence as both substantively and procedurally unreasonable. The court implicitly overruled the objection. Aggrieved by the above-Guidelines sentence, Mr. Franklin appealed his case to the United States Court of Appeals for the Fifth Circuit.

After Mr. Franklin briefed the sentencing issue in the Fifth Circuit, the prosecution filed a Motion to Dismiss Appeal. It argued that the court should dismiss the appeal under the Waiver of Appeal provision of the Plea Agreement. The Fifth Circuit agreed with the prosecution's argument, and dismissed Mr. Franklin's appeal without considering the merits of his argument. His case then moved to this Court.

V. ARGUMENT:

A. Introduction.

The underlying issue on appeal is whether the district court ordered an unreasonable above-Guidelines sentence. However, that is not the issue presented in this Petition. The sentencing issue is not ripe for consideration before this Court because the Fifth Circuit never reached the merits of the issue. Instead, the Fifth Circuit dismissed the appeal based on the Waiver of Appeal Provision in the subject Plea Agreement, which states that Mr. Franklin waives "the right to appeal the conviction and sentence imposed in this case[.]"

Based on the procedural posture of the case, the issue before this Court is limited to whether the Fifth Circuit erred by dismissing Mr. Franklin's appeal. Stated another way, the issue is whether the Waiver of Appeal is unenforceable under the constitutional principles of due process and equal protection.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." The concurrence opinion in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992) demonstrates the constitutional importance of the issue now before this Court, and provides a compelling reason to grant certiorari.

Melancon involved the same issue before the Court in Mr. Franklin's case – whether a waiver of appeal provision in a plea agreement is enforceable. 972 F.2d at 567. On the prosecution's motion to dismiss the appeal, the *Melancon* Court held "that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *Id.* at 568. Accordingly, the Court granted the prosecution's motion to dismiss Melancon's appeal. *Id.*

Judge Parker authored a lengthy and well-reasoned concurring opinion in *Melancon*. 972 F.2d at 570-80. He began by stating, "I concur specially because I cannot dissent. This panel is bound by the unpublished, *per curiam* opinion, *United States v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)]." *Id.* at 570. He went on to state "I write separately to express why I think the rule embraced by this Circuit in *Sierra* is illogical and mischievous – and to urge the full Court to examine the '*Sierra* rule,' and to reject it." *Id.*

Judge Parker reasoned that "[t]he rule articulated in *Sierra* is clearly unacceptable, even unconstitutional policy: the '*Sierra* rule' manipulates the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law." *Melancon*, 972 F.2d at 571. "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 has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent." *Id.*

Judge Parker acknowledged that waivers can be valid in a number of scenarios in criminal cases. However,

> [i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (citations omitted). But "[t]he situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence." *Id.* at 572. "**This right cannot come into existence until after the judge pronounces sentence**; it is only then that the defendant knows what errors the district court has made – i.e., what errors exist to be appealed, or waived." *Id.* (emphasis added; citation omitted).

Judge Parker's attack on the majority's opinion addresses constitutional concerns. He opines that the rule adopted by the majority "reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty." *Melancon*, 972 F.2d at 577.

> Unconstitutional conditions occur "when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from governmental interference. The 'exchange' thus has two components: the conditioned government **benefit** on the one hand and the affected constitutional **right** on the other."

Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.R. 1415, 1421-1422 (1989) (emphasis in original)). "With a '*Sierra* Waiver,' the government grants to the criminal defendant the **benefit** of a plea agreement only on the **condition** that the defendant accept the boot-strapped abdication of his or her right to appeal." *Melancon*, 972 F.2d at 578 (emphasis in original). This is at least unacceptable, even if the government may withhold the benefit (i.e., the plea agreement) altogether." *Id.* (citation omitted).

Judge Parker recognized that in order to create the constitutional issue described in the previous paragraph of this Brief, there must be a constitutional right. "The right to appeal is a statutory right, not a constitutional right." *Melancon*, 972 F.2d at 577 (citation omitted). However,

> [e]ven if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.

Id. (citing *Griffin v. Illinois*, 351 U.S. 12, (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is

established, due process and equal protection bar the government from infringing on the right in an improper manner.

For the reasons stated in *Melancon*'s concurring opinion, this Court should grant certiorari to address whether due process and equal protection bar enforcement of waiver of appeal provisions like the provision in Mr. Franklin's case, because they unconstitutionally infringe on a defendant's statutory right to appeal a sentence.

VI. CONCLUSION

Based on the arguments presented above, Mr. Franklin asks the Court to grant his Petition for Writ of Certiorari in this case.

s/Michael L. Scott
Michael L. Scott
Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner