

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

CHRISTOPHER E. LEMON
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. 17-60834

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by enforcing the unconstitutional Waiver of Appeal provision in Petitioner Lemon'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 September 20, 2016, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Lemon with second degree murder within the special territorial jurisdiction of the United States, in violation of 18 U.S.C. §§ 1111 and 7. The Indictment stated four other counts, all of which were dismissed on the motion of the prosecutor. The district court case number is 3:16cr78-CWR-FKB. Mr. Lemon accepted responsibility for his actions by pleading guilty to the charge.

The district court sentenced Mr. Lemon to serve 480 months in prison. The court entered a Final Judgment reflecting this sentence on December 6, 2017. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Lemon filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on December 14, 2017. The Fifth Circuit case number is 17-60834.

On appeal, he argued that the district court erred by denying a reduction of his offense level under the Sentencing Guidelines for acceptance of responsibility. The prosecution filed a Motion to Dismiss Appeal based on the Waiver of Appeal provision in the Plea Agreement executed by the parties. Without addressing the merits of Mr. Lemon's arguments, the Fifth Circuit entered an Order granting the

prosecution's Motion to Dismiss on October 24, 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 October 24, 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.

¹The 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. Lemon for second degree murder within the special territorial jurisdiction of the United States, in violation of 18 U.S.C. §§ 1111 and 7. 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 charge levied against Mr. Lemon arose from the laws of the United States of America.

B. Statement of material facts.

Facts pertinent to the issue on appeal pertain to Mr. Lemon’s plea and his sentencing. Mr. Lemon admitted his wrongdoing by pleading guilty to murdering Courtney Cook on the Natchez Trace Parkway in 2014. However, the Presentence Investigation Report (hereinafter “PSR”) did not contain a reduction of his offense level for acceptance of responsibility.

In regard to the acceptance of responsibility factor under the Guidelines, Mr. Lemon’s trial counsel stated at the sentencing hearing, “[a]t this time, my client – with regard to Mr. Lemon’s acceptance of responsibility, he would like to make a statement to the court at this time.” Mr. Lemon then stated, “I’m sorry for all of my action[s]. I was in a struggle. But at some point I had the gun in my hand, and I pulled the trigger and shot her several times. I take full responsibility. I wish I

could take it back. I shouldn't have never grabbed that gun." He went on to state, "I apologize to the court and the family, her mother, father, sister, brother, and most of all her child, and everyone that knew her. I apologize to my own family that I let down and people that had high expectations of me. I'm sorry."

Later in the sentencing hearing, the court asked Mr. Lemon, "certainly you don't believe it was an accident, do you?" He unequivocally answered, "[n]o, sir." After additional questions by the court, Mr. Lemon stated, "I shot her, Your Honor. I shot her. I shot her." After making this statement, the prosecutor stated that Mr. Lemon "admitted what he did[.]"

Finally, during allocution Mr. Lemon stated:

I just want to say I'm sorry to everyone that I hurt, and don't a day go past that I do not think about what happened that night. And if I could take it back, I would. I'm sorry to her family. I'm – I want to say I'm sorry to my family. I just want y'all to forgive me for what I did that night, and I know it's going to be hard for y'all to do that, but try to find it in your heart. And if you can't I understand, I'm sorry.

Notwithstanding these admissions of guilt and the prosecutor's statement that Mr. Lemon "admitted what he did," the district court found that his offense level should not be reduced for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b). At an offense level of 38 and a criminal history category of VI, Mr. Lemon's Guidelines sentencing range was 360 months to life in prison. The court sentenced him to serve 480 months in prison. Aggrieved by the district

court's failure to award him an offense level reduction for acceptance of responsibility, Mr. Lemon filed the subject appeal.

On appeal to the United States Court of Appeals for the Fifth Circuit, the prosecution filed a Motion to Dismiss based on the Waiver of Appeal provision in the Plea Agreement executed by the parties. The Plea Agreement states that Mr. Lemon waived "the right to appeal the conviction and sentence imposed in this case, or the manner in which the sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any grounds whatsoever[.]" Based on this language in the Plea Agreement, the Fifth Circuit dismissed Mr. Lemon's appeal. This Petition for Writ of Certiorari followed.

V. ARGUMENT:

A. Introduction.

The underlying issue on appeal is whether the district court erred by denying Mr. Lemon credit on his Guidelines calculation for acceptance of responsibility. 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. Lemon waived “the right to appeal the conviction and sentence imposed in this case[.]”

Based on the procedural posture of the case, the overall issue before this Court is limited to whether the Fifth Circuit erred by dismissing Mr. Lemon’s appeal. The specific legal issue is whether the Waiver of Appeal provision 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. Lemon'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.

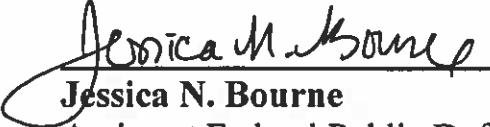
Id. (citing *Griffin v. Illinois*, 351 U.S. 12, (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is

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. Lemon'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. Lemon asks the Court to grant his Petition for Writ of Certiorari in this case.


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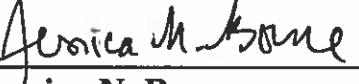
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CERTIFICATE OF SERVICE

I, Jessica N. Bourne, appointed under the Criminal Justice Act, certify that today, January 11, 2019, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 7741 7413 9064, addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.


Jessica N. Bourne
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