

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

SAMUEL GREGG ALLEN
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. 17-60780

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 Allen'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 February 22, 2017, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Allen with assault with a dangerous weapon in violation of 18 U.S.C. §§ 113(a)(3) and 1153. The Indictment stated two other charges, both of which were dismissed on the motion of the prosecutor. The district court case number is 3:17cr23-DPJ-LRA. Mr. Allen accepted responsibility for his actions by pleading guilty to the charge.

The district court sentenced Mr. Allen to serve 94 months in prison. The court entered a Final Judgment on November 14, 2017. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Allen filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on November 17, 2017. The Fifth Circuit case number is 17-60780.

On appeal, Mr. Allen argued that the district court erred by applying an upward sentencing departure based on his criminal history in Choctaw Tribal Court. 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. Allen's arguments, the Fifth Circuit entered an Order granting the prosecution's Motion to Dismiss on November 16, 2018. It filed a

Judgment on the same day. A copy of the Fifth Circuit's Order and its Judgment are attached hereto as composite Appendix 2.

The Order was not designated for publication, but it appears in the Federal Appendix at 742 Fed. App'x 859. A copy of the Opinion as it appears in the Federal Appendix is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on November 16, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, 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. Peña*, 515 U.S. 200, 215-17 (1995)(other citation omitted)). The Supreme Court has recognized that it’s [sic] “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. Allen for assault in violation of 18 U.S.C. §§ 113(a)(3) and 1153. 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. Allen arose from the laws of the United States of America.²

B. Statement of material facts.

Facts pertinent to the issue on appeal pertain to Mr. Allen's plea and his sentencing. Mr. Allen admitted his wrongdoing by pleading guilty to assault. The plea was under a Plea Agreement and a Plea Supplement executed by the parties. The Plea Agreement contained a "Waivers" paragraph stating that Mr. Allen waived "the right to appeal the conviction and sentence imposed in this case ... on any ground whatsoever[.]" The Plea Supplement contained a paragraph titled "Government's Obligations." This paragraph required the prosecutor to "recommend that the Court impose a sentence within the lower 50% of the applicable range under the United States Sentencing Guidelines[.]"

² Mr. Allen is a Native American member of the Choctaw Indian Tribe. 18 U.S.C. § 1153(a) provides federal jurisdiction for assault charges asserted against Native Americans if the assault occurred in "Indian country." In common terms, "Indian country" refers to lands designated as Native American reservations.

It is undisputed that the Presentence Investigation Report (hereinafter “PSR”) stated the prosecutor’s obligation to recommend a sentence in the lower 50% of the Guidelines range. But more important than that, the prosecutor never made the recommendation at the sentencing hearing. After opting to depart upward from the Guidelines range calculation stated in the PSR, the court ordered a 94-month prison sentence.

On appeal to the Fifth Circuit, the prosecution filed a Motion to Dismiss. It argued that the appeal should be dismissed based on the waiver of appeal provision in the Plea Agreement. In response, the defense argued that the prosecutor breached the Plea Agreement by failing to recommend a sentence within the lower fifty percent of the Guidelines range.

The Fifth Circuit ruled that the prosecutor had no obligation to affirmatively recommend a sentence within the lower fifty percent of the Guidelines range during the sentencing hearing since the recommendation was in the PSR. After rejecting the defense’s argument, the Fifth Circuit dismissed the case without reaching the merits of Mr. Allen’s arguments. This Petition for Writ of Certiorari followed.

V. ARGUMENT

A. Introduction.

The underlying issue on appeal is whether the district court erred by applying an upward sentencing departure based on Mr. Allen's criminal history in Choctaw Tribal Court. 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. Allen 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. Allen'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. Allen'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.

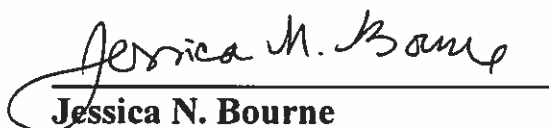
For the reasons stated in *Melancon*'s concurring opinion, this Court should grant certiorari to address whether due process and equal protection bar enforcement of waiver of appeal provisions like the provision in Mr. Allen's case, because they unconstitutionally infringe on a defendant's statutory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

In addition to the constitutional concerns addressed above, the prosecutor's failure to abide by the terms of the Plea Agreement provide another compelling reason to grant certiorari. The prosecutor was obligated to recommend a sentence in the lower fifty percent of the Guidelines range, and he failed to do so at the sentencing hearing. In *Santobello v. New York*, this Court held, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. 257, 262 (1971). The prosecution's failure to abide by the promise it made to Mr. Allen provides another compelling reason to grant certiorari.

The facts of Mr. Allen's case are especially egregious since the prosecutor arguable breached the Plea Agreement containing the waiver of appeal provision. This provides another reason to grant certiorari.

VI. CONCLUSION

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

A handwritten signature in cursive script, reading "Jessica N. Bourne", is written over a horizontal line.

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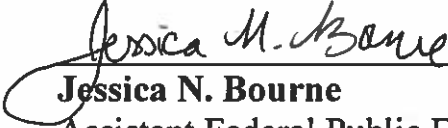
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CERTIFICATE OF SERVICE

I, Jessica N. Bourne, appointed under the Criminal Justice Act, certify that today, February 13, 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. 7744 5210 1580, 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
Assistant Federal Public Defender