

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

FABIAN DELGADO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Issue Presented

1. Whether principles of contract law require consideration (benefit to the defendant) to support a valid plea agreement.

Table of Contents

	Page
Issue Presented	ii
1. Whether principles of contract law require consideration (benefit to the defendant) to support a valid plea agreement.	
Table of Contents	iii-iv
Table of Authorities	v-vii
Citation to Opinion Below	1
Jurisdiction	1
Restatement (Second) of Contracts (1981)	2
Statement of the Case	3-7
First Reason for Granting the Writ: The Fifth Circuit's non-recognition of the doctrine that plea agreements in criminal cases should confer some benefit to the defendant is contrary to any reasoned understanding of due process.	7-9
Second Reason for Granting the Writ: The Fifth Circuit's non-recognition of the doctrine that plea agreements in criminal cases should confer some benefit to the defendant is in conflict with <i>Mabry Johnson</i> , 467 U.S. 504 (1984) and <i>Puckett v. United States</i> , 556 U.S. 129 (2009).	9
Third Reason for Granting the Writ: The Fifth Circuit's non-recognition of the doctrine that plea agreements in criminal cases should confer some benefit to the defendant appears to be in conflict with every other circuit that has considered the issue.	10-15

Conclusion	15
Certificate of Service	16
Appendix A: Opinion of Fifth Circuit Court of Appeals	

Table of Authorities

	Page(s)
Cases	
<i>Correale v. United States</i> , 479 F.2d 944 (1st Cir. 1973)	8
<i>Mabry v. Johnson</i> , 467 U.S. 504 (1984).....	8, 9
<i>Missouri v. Frye</i> , 566 U.S. 134 (2012).....	8
<i>Puckett v. United States</i> , 556 U.S. 129 (2009).....	8, 9
<i>Santobello v. New York</i> , 404 U.S. 257	8
<i>United States v. Aderholt</i> , 87 F.3d 740 (5th Cir. 1996).....	6, 7
<i>United States v. Barron</i> , 172 F.3d 1153 (9th Cir. 1999).....	8
<i>United States v. De La Fuente</i> , 8 F.3d 1333 (9th Cir. 1993).....	13
<i>United States v. DeFusco</i> , 949 F.2d 114 (4th Cir. 1991).....	11
<i>United States v. Granik</i> , 386 F.3d 404 (2d Cir. 2004)	8
<i>United States v. Gray</i> , 528 F.3d 1099 (8th Cir. 2008)	12

<i>United States v. Hammond,</i> 742 F.3d 880 (9th Cir. 2014)	13
<i>United States v. Hernandez,</i> 134 F.3d 1435 (10th Cir. 1998)	14
<i>United States v. Hunter,</i> 835 F.3d 1320 (11th Cir. 2016)	13
<i>United States v. Lutchman,</i> 910 F.3d 33 (2d Cir. 2018)	10, 11
<i>United States v. Novosel,</i> 481 F.3d 1288 (10th Cir. 2007)	15
<i>United States v. Outlaw,</i> 319 F.3d 701 (5th Cir. 2003)	5
<i>United States v. Randolph,</i> 230 F.3d 243 (6th Cir. 2000)	12
<i>United States v. Rivera-Cruz,</i> 878 F.3d 404 (1st Cir. 2017)	10
<i>United States v. Snelson,</i> 555 F.3d 681 (8th Cir. 2009)	12
<i>United States v. Stacey,</i> 531 F.3d 565 (8th Cir. 2008)	5
<i>United States v. Thomas,</i> 639 F.3d 786 (7th Cir. 2011)	14
<i>United States v. Thournout,</i> 100 F.3d 590 (8th Cir. 1996)	9
<i>United States v. Torres-Perez,</i> 777 F.3d 764 (5th Cir. 2015)	5

<i>United States v. Williams,</i> 510 F.3d 416 (3d Cir. 2007)	14
--	----

<i>United States v. Williamson,</i> 598 F.3d 227 (5th Cir. 2010)	5
---	---

Statutes and Sentencing Guidelines

18 U.S.C. § 3231	3
------------------------	---

28 U.S.C. § 1254(1)	1
---------------------------	---

U.S.S.G. § 3E1.1	4
------------------------	---

U.S.S.G. § 3E1.1(a)	5
---------------------------	---

U.S.S.G. § 3E1.1(b)	5
---------------------------	---

U.S.S.G. § 5K1.1	6, 7
------------------------	------

Other Authorities

Restatement (Second) of Contracts (1981)	2, 5
--	------

Sup. Ct. R. 10(a)	7, 10
-------------------------	-------

PETITION FOR WRIT OF CERTIORARI

Petitioner Fabian Delgado (“Delgado”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming Torres’ conviction and sentence is styled: *United States v. Delgado*, ___ F. App’x ___, 2019 U.S. App. LEXIS 13195 (5th Cir. 2019).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the Petitioner’s conviction and sentence was announced on May 1, 2019 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court’s jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Restatement (Second) of Contracts (1981)

§ 71 Requirement of Exchange; Types of Exchange

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

§ 75 Exchange of Promise for Promise

Except as stated in §§ 76 and 77, a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.

Statement of the Case

Delgado pled guilty to conspiring to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. As part of his plea agreement, he purportedly waived the right to appeal. The district court sentenced him to 262 months in prison, five years of supervised release, and no fine. The jurisdiction of the federal district court was invoked pursuant to Title 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”). Delgado was granted an out-of-time appeal by the district court and his subsequent notice of appeal to the Fifth Circuit was timely.

On appeal, Delgado argued that the waiver of appeal provision should not bar him from arguing that his sentence was substantively unreasonable because he received no benefit (consideration) in return for pleading guilty. The purported consideration to be received by Delgado in the plea agreement was twofold: (1) the Government would move for a third level acceptance of responsibility reduction if Delgado otherwise

qualified, and (2) the possibility that the Government would move for a downward departure.

(i) Benefit #1: Government request for one-level acceptance of responsibility reduction

Section 3E1.1 of the sentencing guidelines provides in relevant part as follows:

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), . . . upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

U.S.S.G. § 3E1.1 (2016).

Under the law of contracts:

To constitute consideration, a performance or a return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

Restatement (Second) of Contracts § 71 (1981). The Government cannot give as consideration something it does not possess. The determination of whether or not a defendant is entitled to a 2-level acceptance of responsibility reduction under § 3E1.1(a) is made by the district court. U.S.S.G. § 3E1.1(a). In the Fifth Circuit, the district court has independent authority to determine whether § 3E1.1(b) has been satisfied. *United States v. Williamson*, 598 F.3d 227, 229 (5th Cir. 2010). If a defendant satisfies subsections (a) and (b), “a district court lacks discretion to deny the additional one-level reduction under subsection (b)[.]” *United States v. Outlaw*, 319 F.3d 701, 705-06 (5th Cir. 2003). Therefore, if Delgado satisfied the requirements of subsections (a) and (b), it would have been reversible error for the Government to refuse to move for the third level of reduction. *See United States v. Torres-Perez*, 777 F.3d 764, 768 (5th Cir. 2015). By agreeing to move for a third level acceptance of responsibility reduction if Delgado otherwise qualified for the reduction, the Government was not “giving” Delgado anything. *See United States v. Stacey*, 531 F.3d 565, 567 (8th Cir. 2008) (“A defendant

who has received the two-level reduction is entitled to the third level if the plea was sufficiently timely.”).

(ii) Benefit #2: Possible downward departure

The downward departure language in the plea agreement did not bind the Government in any way to move for a downward departure; the Government conceded nothing. Instead, the Government retained “sole and exclusive judgment.” ROA.241. In *United States v. Aderholt*, 87 F.3d 740 (5th Cir. 1996), the defendant pled guilty pursuant to a plea agreement that granted the Government “sole discretion” as to whether or not to file a § 5K1.1 motion (which the Government chose not to do). *Id.* at 742. In response to the appellant’s argument that the Government’s retention of sole discretion violated his right to due process because it constituted an inducement which required him to give up constitutional rights, the Fifth Circuit held that there was no inducement:

[T]he implication of the principle of just return for giving up constitutional rights requires the existence of a plea bargain in which the Government bargains away its discretion. *There can be no inducement when the Government retains sole*

discretion. Appellant's due process challenge is without merit. (emphasis added)

Id. at 743. Therefore, in the Fifth Circuit, when the Government retains sole discretion to determine whether or not to file a § 5K1.1 motion, it has not given anything that amounts to consideration.

In response to these arguments, the Fifth Circuit panel held: “[W]e have never expressly held that consideration is required to support a valid plea agreement.” *Delgado*, 2019 U.S. App. LEXIS 13195, at *1-2 (5th Cir. May 1, 2019).

First Reason for Granting the Writ

Review on a writ of certiorari should be granted pursuant to Rule 10(a) of the Supreme Court Rules when a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power. Sup. Ct. R. 10(a). The apparent perspective of the Fifth Circuit; i.e., that it is okay for the Government to draft and rely upon a plea agreement

that confers benefits to the Government but none to the defendant, is contrary to any reasoned understanding of due process.

The conditions for a valid plea presuppose fairness in securing agreement between an accused and a prosecutor. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984). Plea bargaining is not some adjunct to the criminal justice system; “it is the criminal justice system.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012). Disposition of charges after plea discussions is an essential part of the process in criminal cases. *Santobello v. New York*, 404 U.S. 257. 261 (1971). Trust between defendants and prosecutors in plea bargaining is “essential” and “highly necessary” in the criminal process. *Puckett v. United States*, 556 U.S. 129, 141 (2009). “A plea bargain is not a commercial exchange. . . . What is at stake for the defendant is his liberty.” *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999). Because plea agreements are unique contracts, ordinary contract principles are to be tempered with special due process concerns for fairness. *United States v. Granik*, 386 F.3d 404, 413 (2d Cir. 2004). In the plea bargaining process, prosecutors are to be held to “the most meticulous standard of both promise and performance.” *Correale v.*

United States, 479 F.2d 944, 977 (1st Cir. 1973). This is to ensure a defendant receives the performance he is due. *United States v. Thournout*, 100 F.3d 590, 594 (8th Cir. 1996).

Second Reason for Granting the Writ

The Fifth Circuit's non-recognition of the need for some benefit to the defendant in a plea bargain is in conflict with U.S. Supreme Court precedent. In *Mabry Johnson*, 467 U.S. 504 (1984), the Court noted "plea agreements are consistent with the requirements of voluntariness and intelligence -- because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions[.]" *Id.* at 508. "It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty[.]" *Id.* at 508 n. 8. In *Puckett v. United States*, 556 U.S. 129 (2009), the Court stated: "[P]lea bargains are essentially contracts. . . . When the consideration for a contract fails . . . we say that the contract was broken." *Id.* at 137.

Third Reason for Granting the Writ

Review on a writ of certiorari should be granted pursuant to Rule 10(a) of the Supreme Court Rules when a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter. Sup. Ct. R. 10(a). The First, Second, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits have specifically held that for a plea agreement to be valid, it must be supported by consideration; i.e., some benefit to the defendant.

First Circuit

As Rivera-Cruz correctly points out, we have recognized that [internal quotes omitted] a plea agreement is a contract under which both parties give and receive consideration. . . . Specifically, the government obtains a conviction that it otherwise might not have and the defendant, correspondingly, receives less, or a chance at less, than he otherwise might have.

United States v. Rivera-Cruz, 878 F.3d 404, 408 (1st Cir. 2017).

Second Circuit

In *United States v. Lutchman*, 910 F.3d 33 (2d Cir. 2018), the Second Circuit declined to enforce an appeal waiver because the plea agreement was not supported by consideration:

Lutchman's waiver of the right to appeal his sentence was unsupported by consideration. . . . Lutchman . . . received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement. . . . The plea agreement here provided Lutchman with no increment of [internal quotes omitted] certainty as to the extent of his liability and punishment . . . and it provided him no chance at a reduced sentence Because the agreement offered nothing to Lutchman that affected the likelihood he would receive a sentence below the statutory maximum, the appellate waiver was unsupported by consideration, and we will not enforce it to bar this appeal.

Id. at 37-38.

Fourth Circuit

A plea agreement by its very nature is a bargain in which the defendant properly obtains some consideration for his agreement to plead guilty. In most, if not all, cases the defendant chooses to plead guilty because of the consideration he will receive for his agreement. Plea agreements are consistent with requirements of voluntariness because each side obtains advantages when the guilty plea is exchanged for government concessions.

United States v. DeFusco, 949 F.2d 114, 119-20 (4th Cir. 1991).

Sixth Circuit

The plea agreement Randolph entered into in Texas was a contract without benefit or advantage to him--indeed, as we shall explain, it could only bring him detriment--and as such was offensive both to the fundamental common law canons of contract construction and to the constitutional guarantee of due process.

United States v. Randolph, 230 F.3d 243, 249 (6th Cir. 2000).

[T]he effect of the Texas agreement is that the government could bargain with Randolph, extract a benefit from the bargain, and then treat its own promise as illusory. . . . A defendant in Randolph's position is entitled to presume that a plea agreement would confer some benefit to him.

Id. at 250.

Eighth Circuit

The government's promise to drop some charges in exchange for a guilty plea provides the consideration necessary to support the bargain contained in the plea agreement.

United States v. Snelson, 555 F.3d 681, 685 (8th Cir. 2009).

Moreover, the plea agreement was supported by consideration, given the government's agreement to drop two other charges[.] . . . [internal quotes omitted] Plea agreements are contractual in nature and should be interpreted according to general contract principles.

United States v. Gray, 528 F.3d 1099, 1102 (8th Cir. 2008).

Ninth Circuit

To be sure, the idea behind a plea agreement is that each side waives certain rights to obtain some benefit. . . . [T]he Hammonds negotiated for favorable recommendations from the government and the dismissal of charges. Such benefits are consideration enough to support a plea agreement.

United States v. Hammond, 742 F.3d 880, 883-84 (9th Cir. 2014).

[H]ad the parties reasonably understood the plea agreement to mean what the government now urges, no consideration would have supported De la Fuente's promise to cooperate in the investigation of his cousin. . . . If the government's proffered interpretation of the disputed agreement provision is correct, the government promised *nothing* to De la Fuente for his agreement to cooperate. We are unwilling to impute to the government the level of cynicism and bad faith implicit in negotiating an agreement under which it persuaded a defendant to help convict his relative by offering what appeared to be a reduced sentence but in fact offered him no benefit. . . . De la Fuente could not have reasonably understood the terms of the plea agreement to offer nothing in exchange for his cooperation; neither, we hope, could the government have entertained such an understanding. (emphasis in original)

United States v. De La Fuente, 8 F.3d 1333, 1340 (9th Cir. 1993).

Eleventh Circuit

If, at the time it offered the plea agreement, the government was aware of facts that would allow it to employ the exceptions and avoid its promise therein, then it would be extending an illusory promise. The plea agreement—which is a contract between the parties—would fail from the outset due to a lack of valid consideration.

United States v. Hunter, 835 F.3d 1320, 1326 (11th Cir. 2016).

Opinions from the Third, Seventh and Tenth Circuits have at least suggested that the defendant should receive some benefit from a plea bargain in order for it to be enforceable.

Third Circuit

It is an important consideration in reviewing a plea agreement that a defendant generally reaps benefits by entering into such an agreement.

United States v. Williams, 510 F.3d 416, 423 (3d Cir. 2007).

Seventh Circuit

While Thomas cites no case holding that lack of consideration renders waiver of appeal in a plea agreement unenforceable, some support for his theory exists. . . . We need not decide whether to accept Thomas's consideration argument because the government did give consideration for Thomas's waiver in the form of two promises[.]

United States v. Thomas, 639 F.3d 786, 788 (7th Cir. 2011).

Tenth Circuit

We do agree that traditional contract principles have, on occasion, been applied to plea agreements in criminal proceedings, although our attention has not been drawn to any case where the court evaluated the consideration underlying a plea agreement.

United States v. Hernandez, 134 F.3d 1435, 1437 (10th Cir. 1998).

The Second Circuit has recognized that a plea agreement can be challenged for lack of consideration, . . . and this court has assumed so for the sake of argument[.]

United States v. Novosel, 481 F.3d 1288, 1291 (10th Cir. 2007).

Apparently, the Fifth Circuit is alone in not requiring that the defendant receive some benefit from entering into a plea bargain with the Government.

Conclusion

For the foregoing reasons, Petitioner Delgado respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

SIGNED this 24th day of July, 2019.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
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