

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2018

Eleventh Circuit Court of Appeals No. 18-10002
Southern District of Florida No. 17-CR-20192-DPG

DAVID ANTHONY GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
With Incorporated Appendix

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Questions Presented

Whether, in reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that:

- (1) The Eleventh Circuit erroneously dismissed portions of the appeal based upon the appeal waiver in Gordon's plea agreement, even though the waiver was invalid and unenforceable because Gordon did not knowingly and voluntarily enter into the plea agreement?
- (2) The Eleventh Circuit erroneously affirmed even though the Government breached the terms of the plea agreement including refusing to apply the "safety valve," and refusing to allow a three-point reduction for acceptance of responsibility, rendering the entire plea agreement including the appeal waiver, null and void, and rendering the mandatory minimum sentence that was imposed, an unreasonable sentence?
- (3) The Eleventh Circuit erroneously affirmed the district court's abuse of discretion in granting the Government 's motion to transfer the sentencing of David Gordon from the judge to whom this matter was randomly assigned by the Clerk of Court, to the judge who presided over the co-defendant's trial?

(4) The Eleventh Circuit erroneously affirmed even though the non-assigned district judge abused her discretion and reversibly erred when she sentenced Gordon to prison for a minimum mandatory term of ten years for Count One, where the plea agreement provided that Gordon would receive sentencing benefits for entering a plea that would have resulted in application of the “safety valve,” releasing him from the minimum mandatory, and warranting the imposition of a reasonable, lower sentence within the advisory guidelines range?

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In reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that the Eleventh Circuit erroneously dismissed aspects of the appeal based upon the appeal waiver in Gordon's plea agreement, even though the waiver was

invalid and unenforceable because Gordon did not knowingly and voluntarily enter into the plea agreement. 14

Reason Two

In reaching in reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that the Eleventh Circuit erroneously affirmed the sentence even though the Government breached the terms of the plea agreement including refusing to apply the "safety valve," and refusing to allow a three-point reduction for acceptance of responsibility, rendering the entire plea agreement including the appeal waiver, null and void, and rendering the mandatory minimum sentence that was imposed, an illegal, unfair, and unreasonable sentence. 19

Reason Three

In reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that the Eleventh Circuit erroneously affirmed even though the Government breached the terms of the plea agreement including refusing to apply the "safety valve," and refusing to allow a three-point reduction for acceptance of responsibility, rendering the entire plea agreement including the appeal waiver, null and void, and rendering the mandatory minimum sentence that was imposed, an illegal, unfair, and unreasonable sentence. 25

Reason Four

In reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court’s supervisory powers in that the Eleventh Circuit erroneously affirmed even though the non-assigned district judge abused her discretion and reversibly erred when she sentenced Gordon to prison for a minimum mandatory term of ten years for Count One, where the plea agreement provided that Gordon would receive sentencing benefits for entering a plea that would have resulted in application of the “safety valve,” releasing him from the minimum mandatory, and warranting the imposition of a reasonable, lower sentence within the advisory guidelines range. 31

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PARTIES TO THE PROCEEDINGS

Petitioner David Anthony Gordon was the defendant in the Southern District of Florida, Case No. 17-CR-20192-DPG. The respondent, the United States of America was the prosecution/plaintiff. Mr. Gordon was the appellant in the United States Court of Appeals, Eleventh Circuit in Appeal No. 18-10002, and the United States of America was the appellee.

There was one codefendant in the district court, Brianna Byrd. Ms. Byrd was not a party to the appeal in the Eleventh Circuit, and she is not a party to the present proceedings before this Court.

OPINION BELOW

This Petition is addressed to the 12-page non-published decision entered by the Eleventh Circuit Court of Appeals in *United States v. Gordon*, Appeal No. 18-10002-DPG, on July 5, 2019, affirming in part and dismissing in part. A copy of the Eleventh Circuit decision is in the Appendix to this Petition at App. 1-12.

The appeal was taken from a final judgment of conviction and sentence entered by the Southern District of Florida, in Case No. 17-CR-20192, on December 21, 2017, adjudicating David Anthony Gordon guilty of conspiracy to import cocaine, and sentencing him to a mandatory minimum term of ten years (120 months) in prison. The judgment is in the Appendix at pages 13-17.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on July 5, 2019. See App. 1-14.

This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND RELEVANT FACTS

Petitioner David Gordon is incarcerated by the United States Bureau of Prisons in the Federal Correctional Institution Low, Coleman, Florida. According to the Bureau of Prisons Website, his presumptive release is scheduled for November 2025. Mr. Gordon has been continuously incarcerated since his arrest in this case on March 1, 2017.

David Anthony Gordon was sentenced to a mandatory term of 120 months in prison, after pleading guilty to Count One, conspiracy to import cocaine, the first of three cocaine-related offenses charged. Gordon entered into a written plea agreement that contained an appeal waiver. He pleaded guilty and was sentenced. His appeal was complicated by the appeal waiver in the plea agreement.

Petitioner Gordon advises that he did not enter the plea knowingly and voluntarily, which rendered the appeal waver invalid and unenforceable, and he appealed his ten-year mandatory sentence. The record shows that over defense objection, Gordons's case was wrongfully transferred for sentencing from the assigned judge to the judge who presided over codefendant Brianna Byrd's jury trial; and that the Government breached the written plea agreement, resulting in the imposition of the lengthy mandatory term. The plea agreement specified that Gordon should receive a third point for acceptance of responsibility; that he should

be eligible for the “safety valve” and for a sentence below the minimum mandatory but within the advisory guidelines range. Neither the Government nor the sentencing court complied with those provisions of the plea agreement.

A month after pleading guilty Gordon testified as a defense witness in Brianna Byrd’s jury trial. The jury found Brianna Byrd ***not guilty*** on Count One, but ***guilty as to Counts Two and Three***, conspiracy to possess, and attempt to possess cocaine.

We are reminded of the old adage attributed to Clare Booth Luce: “***no good deed goes unpunished.***” As demonstrated below Gordon testified that when Byrd accompanied him to pick up a package, she had no knowledge that the package contained cocaine. Nonetheless the jury found Byrd guilty on two of the three counts.

After trial and prior to sentencing Byrd said that she knew that the package contained contraband. She was sentenced to 33 months in prison. Gordon was sentenced to ten years. No good deed goes unpunished.

The case was randomly assigned by the Clerk of Court to United States District Judge Darrin P. Gayles, hence the initials DPG in the district court case number. Byrd’s trial was held before Senior United States District Judge Patricia Seitz. Before Byrd’s sentencing by Judge Seitz, the Government moved to trans-

fer Gordon's sentencing to Judge Seitz. The defense objected. Judge Gayles granted the motion to transfer over objection. Judge Seitz sentenced Gordon to ten years, and Bryanna Byrd to prison for 33 months.

***Course of Proceedings and Disposition
In the District Court with Relevant Facts***

In March 2017 a three-count indictment was returned in the Southern District of Florida charging David Anthony Gordon and Brianna Louise Byrd, with (1) conspiracy to import cocaine in violation of 21 U.S.C. §963, (2) conspiracy to possess cocaine with intent to distribute, and (3) attempt to possess cocaine with intent to distribute. Conspiracy to possess and attempt to possess cocaine are both violations of 21 U.S.C. §846 (DE-9). The matter was randomly assigned by the Clerk of Court to United States District Judge Darrin Gayles.

On March 17, 2017, trial was set for April 17, 2017, for Gordon and Byrd, before Judge Gayles. Judge Gayles granted a continuance of trial until June 26, 2017, and another continuance until August 21, 2017. In June 2017, Gordon decided to plead guilty. Judge Gayles referred the change of plea to Magistrate Judge Alicia Otazo-Reyes. On July 14, 2017, Gordon appeared before the Magistrate Judge, and pursuant to a written plea agreement and factual proffer, pleaded guilty to Count One, conspiracy to import cocaine. The

Magistrate Judge entered a Report recommending that the plea be accepted. Subsequently, Gordon submitted a written statement of acceptance of responsibility.

Brianna Byrd went to a jury trial. At a status conference, Senior United States District Judge Seitz advised the parties that she would be “assisting Judge Gayles.” Brianna Byrd filed a writ of *habeas corpus ad testificandum* for David Gordon’s testimony at her trial. The writ was issued by Judge Seitz on August 22nd. On that same day Judge Gayles entered (1) an order adopting the change of plea report and recommendation, and (2) an order setting Gordon’s sentencing for October 27, 2017, before Judge Gayles.

On August 23, 2017, Byrd’s jury selection/voir dire began before Judge Seitz. Trial continued on August 28th and 29th. On August 30th the jury returned a verdict finding Byrd ***not guilty*** of conspiracy to import charged in Count One, but ***guilty as to Counts Two and Three***, conspiracy to possess and attempt to possess cocaine with intent to distribute.

Gordon filed a sentencing memorandum and objections to his presentence investigation report. When filed in the Southern District of Florida, pursuant to Court rules, and in the normal course of proceedings, this case was randomly assigned by the Clerk of Court to Judge Gayles. Nonetheless, after Gordon’s pre-

sentence investigation report was prepared and Gordon filed objections and a sentencing memorandum, the Government moved to transfer Gordon's sentencing to Judge Seitz who presided over Byrd's trial.

Over defense objection Judge Gayles granted the motion. Gordon was sentenced by Judge Seitz. The joint sentencing hearing was lengthy and hard-fought. Brianna Byrd was sentenced to prison for 33 months, and Gordon to a mandatory minimum ten years. Gordon took an appeal. Undersigned was appointed for purposes of appeal.

The Change of Plea

During the plea colloquy Magistrate-Judge Otazo-Reyes elicited that Gordon knew that he had the right to enter his plea before District Judge Darrin Gayles, and that he had voluntarily agreed...:

...to proceed with the change of plea before me, ***the Magistrate Judge who assists Judge Gayles in these matters.*** [emphasis added]

Defense counsel responded "yes" and added that Gordon also had signed an agreement to so proceed. In response to the Court's inquiries Gordon stated that he was in his mid-50's, had finished high school in Jamaica, was a citizen of Jamaica and a resident of the United States, and was self-employed in a clothing

business. Gordon responded that he had consulted with counsel regarding the charges and the decision to enter a guilty plea. The Court explained the advisory sentencing guidelines and told Gordon that the sentence ultimately imposed could be greater or lower than the advisory range.

Gordon said that he agreed with the plea agreement and the factual statement (facts are set out below on p. 9). The plea agreement provided, among other things, the Government would dismiss Counts Two and Three at the time of sentencing and would recommend a two-level guideline reduction for acceptance of responsibility. If the offense level were 16 or greater, they also would recommend a third level downward for timely pleading guilty. The Government *agreed that Gordon was eligible for “safety valve” sentencing*; and agreed to no more than one criminal history point in the guidelines calculations. The agreed quantity of cocaine was between 5 and 15 kilograms.

The Court apprised Gordon of the rights that he had waived by entering a guilty plea. Gordon also agreed to not contest the forfeiture of property or assets obtained from the offense. The Court found that Gordon was competent and understood his rights, that from the factual proffer all elements of the offense would be proved, and that the decision to plead guilty was freely, voluntarily, knowingly, and intelligently made. Magistrate Judge Otazo-Reyes announced:

The date of sentencing will be announced by the District Judge, Judge Gayles. [emphasis added]

The plea agreement has an appeal waiver in Paragraph 16: the defendant is aware that he has the right to appeal the sentence imposed. Acknowledging this, in exchange for the United States' undertakings in the plea agreement ... the Defendant hereby waives all rights conferred by Sections 18 U.S.C. §3742 and 21 U.S.C. §1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, *unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing* (emphasis added). According to its language of the waiver, this is an appeal waiver with exceptions.

During the plea colloquy the Magistrate Judge addressed the appeal waiver, explaining that the waiver is effective *unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure or upward variance, or unless the Government takes an appeal*; and Gordon responded “Yes, Your Honor.”

The Factual Proffer

The parties agreed that the following facts would be proved beyond a reasonable doubt: In May 2016 Gordon received cocaine in the United States for Suriname-based cocaine importers. Internal carriers were paid to swallow cocaine pellets in Suriname and take commercial flights to Miami International Airport (MIA). David Gordon picked up the carriers at MIA and took them to a hotel, or they went to the hotel by taxi, where they stayed until the pellets were expelled. Gordon (sometimes others) would go to the hotel to pick up the pellets. Gordon paid the couriers thousands of dollars, sometimes “bulk cash” to take to coconspirators in Suriname. Gordon received more than five kilograms of cocaine in Miami during the course of the conspiracy.

On October 8, 2016, Customs and Border Protection (CBP) arrested five people arriving at MIA from Suriname. Three were internally carrying 3.08 kilograms of cocaine, and two were escorts to ensure that the cocaine reached its destination. The escorts told CBP that the cocaine would be delivered to David Gordon. They described Gordon’s car, provided his cell phone number, and identified him from a photo lineup. The escorts told the agents that they delivered cocaine to Gordon multiple times going back to May 2016, and received tens of thousands of dollars from Gordon for the cocaine that they brought.

In November 2016 a confidential source (CS-1) was arrested at MIA attempting to smuggle cocaine from Suriname. CS-1 had swallowed 1.245 kilograms of cocaine in pellets to deliver to Gordon. He gave Gordon's cell phone number to the authorities and identified Gordon in a photo lineup as the person to whom he delivered cocaine three times in 2016 (May, August, and September).

In January 2017 CBP arrested a female confidential source (CS-2) at MIA. She had swallowed 1.035 kilograms of cocaine, identified Gordon by name and in a photo lineup as the person to whom she intended to deliver the cocaine; and as the person to whom she had delivered cocaine in October 2016.

In February 2017, another internal carrier from Suriname (CS-3) was arrested at MIA. He swallowed 1.55 kilograms of cocaine. He cooperated with law enforcement. He said that he was hired in Suriname by a person named "Brille" to smuggle cocaine into the United States. CS-3 made monitored telephone calls and WhatsApp conversations in which Brille told CS-3 to go to a Miami Ramada Inn and wait there to pass the pellets (DE-46: 3).

On March 1, 2017 Brille told CS-3 that a man named David would send a woman into the hotel to pick up the cocaine; the same woman who previously picked up cocaine that CS-3 smuggled into the United States in November 2016. Brille told CS-3 that David and the woman would arrive at the hotel shortly. Brille

gave CS-3 David's telephone number so they could coordinate a meeting at the Ramada Inn. Brille told CS-3 that the woman would knock on the hotel room door, and provided instructions to schedule the meeting.

On the afternoon of March 1st agents observed Gordon and Brianna Byrd drive up to the Ramada Inn. Byrd went inside while Gordon stayed in the car with Byrd's child. Brianna Byrd went to CS-3's hotel room. She and Gordon were arrested. Gordon had about \$3,000 cash on his person. The factual proffer concluded with a statement that no death or serious bodily injury occurred and there were no credible threats of violence in the commission of the offense.

David Gordon Testified at Brianna Byrd's Trial

After entering his guilty plea, before sentencing, and pursuant to a petition for writ of *habeas corpus ad testificandum*, Gordon testified at Byrd's jury trial. He said that he had two businesses, a clothing store, and also dealing in cocaine. On March 1, 2017, he planned to pick up drugs at a hotel near the Miami airport from someone arriving from Suriname. The cocaine supplier in Suriname was "Brille." Gordon was supposed to bring Brille's female friend to the hotel to retrieve the pellets from the carrier. Gordon texted Brille that the female was unavailable because she had to go to school. The carrier had been instructed to give the package to a woman, so Gordon said he would bring another female.

Brianna Byrd was a customer at the clothing store, and she and Gordon also had a social relationship. He never told Byrd that he was involved with drugs.

That day he offered to take Byrd for lunch. She brought her small child with her and said she had to be back by 2:00 to pick up her son from school. Gordon drove to the Ramada Inn. He asked Byrd to go to a room in the hotel and get a package from the man in the room.

The gist of Gordon's testimony was that Byrd did not know that Gordon was a cocaine dealer, did not know she was picking up drugs, was never knowingly involved in the drug business; and Gordon regretted getting her involved. After trial but before sentencing, Byrd said that she knew she was picking up contraband, and then received credit for acceptance of responsibility.

According to Gordon's presentence investigation report, the Government took the position that his testimony was untruthful, and refused to recommend a "safety valve" sentence. The Government argued that Gordon was not eligible for a three-level or even a two-level reduction for acceptance of responsibility; and then sought a two-level enhancement for obstruction-of-justice.

Without a third point for acceptance of responsibility or "safety valve," and with the enhancement for obstruction Gordon was sentenced at offense level 30, criminal history category I, a range of 120-121 months. The actual range was 97 to

121, but the minimum mandatory was 120 months. Calculating guidelines without two levels upward for obstruction of justice, and three levels downward for acceptance of responsibility, and with a “safety valve sentence” within the advisory guidelines range for offense level 27, criminal history category I, the range would have been 87-108 months.

Gordon is adamant that he testified truthfully, and that Brianna Byrd lied when she said that she knew about the contraband. She said it only to receive credit for acceptance of responsibility, and a 33 month sentence.

REASONS FOR GRANTING THE WRIT

Reason One

In reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court’s supervisory powers because the Eleventh Circuit erroneously dismissed aspects of the appeal based upon the appeal waiver in Gordon’s plea agreement, even though the waiver was invalid and unenforceable because Gordon did not knowingly and voluntarily enter into the plea agreement.

Gordon was denied Fifth and Sixth Amendment due process. The appeal waiver in his plea agreement is invalid and unenforceable because Gordon did not knowingly and voluntarily enter into the plea agreement.

The appeal waiver was invalid and Gordon should have been permitted to fully litigate his appeal on the merits. The Eleventh Circuit erroneously dismissed portions of Gordon's appeal. Gordon entered into the plea agreement with the Government in good faith on advice of "a certified bar member," and therefore had the right to a reasonable expectation of the outcome anticipated in the plea agreement. In violation of the terms of the agreement the Government did not fulfill its obligations regarding "safety valve" sentencing or the third point for acceptance of responsibility; and it sought an obstruction of justice enhancement. Also the Court also deviated from the agreement without prior notice as provided by Federal Rule of Criminal Procedure 11(c)(1)(C).

Gordon cooperated with authorities early on and timely pleaded guilty, fully and reasonably expecting the Government to uphold the terms of the written plea agreement. Had the Government kept its word, Gordon would have been sentenced at offense level 27, criminal history category I, an advisory guidelines range of 87-108 months. Even at the high end of that range, the sentence would be less than the minimum mandatory.

Appeal waivers are binding on defendants if they are knowingly and voluntarily entered. Here the Government failed to abide by the terms of the plea agreement. Gordon would have been eligible for "safety valve" sentencing accor-

ding to Sentencing Guidelines Section 5C1.2(a), that would have allowed a sentence below the mandatory minimum that ultimately was imposed. Gordon met all criteria for a safety valve sentence: (1) He did not have more than one criminal history point; (2) did not use violence or threats; (3) there was no death or serious bodily injury; (4) he was not an organizer or leader; and (5) he continually cooperated with the Government and provided truthful testimony. The terms of the plea agreement should have been honored and the safety valve should have been applied.

The Government argued in its sentencing memorandum and objections to the presentence investigation report that Gordon perjured himself by attempting to help Byrd by saying that she did not know she was picking up cocaine at the Ramada Inn. The Government argued that Gordon's trial testimony contradicted prior statements in debriefing and in documentary evidence. The defense argued that Gordon's statements were consistent throughout from the beginning.

At sentencing Gordon became emotional and told the Court that he was very sorry. He apologized to the Court, to the Government, to his lawyer, and to his family, especially his children, and begged the Court for leniency. Byrd was asked by the judge if she knew that there were drugs and said yes, she knew. Judge Seitz believed Byrd and gave her a safety valve sentence that would be enhanced two

levels for obstruction of justice for calling Gordon as a witness knowing what his testimony would be.

Judge Seitz said that she did not believe Gordon's testimony that he never told Byrd she would be picking up drugs. She believed that he so testified in order to protect Byrd. The probation officer stated that with a two-point reduction for safety valve, at offense level 28 and criminal history category 1, Gordon's advisory range was 78-97 months. Adding two points for obstruction of justice, the offense level went to 30 with an advisory range of 97 to 121 months. Judge Seitz knew that she had discretion to impose a sentence below the mandatory minimum, but said, "That's not going to happen."

Following a brief conference with the probation officer Judge Seitz decided not to give Gordon safety valve relief because she believed that he was not truthful. She overruled the defense objections to the failure to grant a third point for acceptance of responsibility, and to the obstruction of justice enhancement, and sentenced Gordon to the mandatory minimum term of 120 months (within the higher advisory guidelines range).

As a general rule, a waiver of the right to appeal that is knowing and voluntary will be enforced if the Government demonstrates that either (1) the district court specifically questioned the defendant about the waiver during the plea

colloquy, or (2) the record clearly shows that the defendant otherwise understood the full significance of the waiver. *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005).

The Magistrate-Judge discussed the appeal waiver during the plea colloquy. Gordon believed that the terms were clear and would be enforced. The breach by the Government and then the refusal of the non-assigned judge to impose a sentence according to the terms and conditions of the plea agreement, all render the appeal waiver invalid. Gordon entered into the plea agreement in good faith and with advice of counsel. He had the right to a reasonable expectation of the outcome set forth in, and anticipated by, the plea agreement. In violation of the terms of the agreement however, the Government did not fulfill its agreement as to “safety valve” sentencing or the third point for acceptance of responsibility, and sought upward enhancement for obstruction of justice. The appeal waiver was invalid. The appeal should not have been dismissed, but should have proceeded on the merits with sentencing relief granted. The writ should issue.

Reason Two

In reaching in reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that the Eleventh Circuit erroneously affirmed the sentence even though the Government breached the terms of the plea agreement including refusing to apply the "safety valve," refusing to allow a three-point reduction for acceptance of responsibility, rendering the entire plea agreement including the appeal waiver, null and void, and rendering the mandatory minimum sentence that was imposed, an illegal, unfair, and unreasonable sentence.

The Government 's failure to comply with the plea agreement, and the Court's refusal to enforce it rendered the plea agreement, including the appeal waiver, null and void and the mandatory ten year sentence illegal. The Eleventh Circuit reversibly erred in affirming the sentence. The Government agreed that Gordon would be eligible for the "safety valve" relieving the Court of the requirement of minimum mandatory sentencing, agreed to three points for acceptance of responsibility, and to eligibility for "safety valve" sentencing. Gordon understands that a sentencing court has discretion and that plea agreements provide that the ultimate sentence will be left for the judge to decide. Although true, it does not necessarily comport with notions of justice and fair play. The plea agreement stated that Gordon was eligible for the "safety valve," and that the Court would make the ultimate sentencing decision. Guilty pleas are crucial in the fede-

ral criminal justice system.

A plea agreement is a contract. Each party gains a benefit in exchange for consideration. There is an obligation to be met by both sides. When one party fails to meet its obligation, the agreement is breached and may not be enforced against the other. If a defendant is cheated out of the benefit of his bargain under the terms of a plea agreement, then other defendants will become less likely to enter into agreements with the Government. When that happens, the Courts may expect to be deluged with jury trials, and that in turn likely could overwhelm the system. It inures to the benefit of all parties for plea agreements to be upheld by all parties and courts. The Government is expected to comply with the agreement. The court likewise should give deference to the recommendation of a prosecutor who knows better than anyone else, the strengths and weaknesses of his/her case. Once breached, Gordon's plea agreement was unenforceable.

Gordon did not receive benefit of the safety valve at sentencing even though it was provided in his plea agreement. He met all of the criteria. He did not receive three points downward for acceptance of responsibility, which also was in the terms of the plea agreement. He received a two level upward enhancement for obstruction of justice that was not in the plea agreement. Instead he was sentenced to the minimum mandatory, all in violation of the terms, conditions, understanding,

spirit and intent of the plea agreement into which he entered in good faith believing that he could rely on the Government to uphold their part of the bargain.

A plea agreement must be construed in light of the fact that it constitutes a waiver of substantial constitutional rights requiring that the defendant be adequately warned of the consequences of the plea. *United States v. Jeffries*, 908 F.2d 1520, 1523 (11th Cir. 1990). A material promise by the Government inducing a defendant to plead guilty binds the Government to that promise. *United States v. Thomas*, 487 F.3d 1358, 1360 (11th Cir. 2007) (*per curiam*), citing *Santobello v. New York*, 505 U.S. 257, 252, 92 S.Ct. 495, 499 (1971). The Government will be found to have breached a plea agreement when it fails to perform the promises on which the plea was based.

Whether the Government violated the agreement will be judged according to the defendant's reasonable understanding at the time he entered his plea. *United States v. Boatner*, 966 F.2d 1575, 1578 (11th Cir. 1992). There is an objective standard to determine whether the Government's actions are inconsistent with the defendant's understanding of the plea agreement, rather than reading the agreement in a hyper-technical or rigidly literal manner. *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992).

In the present case, in exchange for Gordon's promise to plead guilty to three of four charges in the indictment the Government promised to recommend a three-level reduction for acceptance of responsibility. The Government did not request the third point and argued against Gordon receiving the reduction. The Government broke its promise to seek "safety valve" sentencing, and sought a two level upward adjustment for obstruction of justice based upon Gordon's testimony at Byrd's trial.

The Government got everything, and Gordon was denied all of the benefits he bargained for in exchange for timely pleading guilty, and received an enhancement for obstruction of justice and a minimum mandatory sentence. Objectively, the Government's actions were inconsistent with what Gordon reasonably understood when he entered his guilty plea. *See, United States v. Copeland*, 381 F.3d 1101, 1104 (11th Cir. 2004), and *United States v. Keresztury*, 293 F.3d 750, 756 (5th Cir. 2002), where the Fifth Circuit held that it was inconsistent with a defendant's reasonable understanding of a promise not to contest a reduction for acceptance of responsibility, for the Government to argue in support of a recommendation that the defendant not receive the reduction. The same may be said for the safety valve in Gordon's case.

Clearly Gordon reasonably believed the Government would recommend the three-point acceptance of responsibility reduction at sentencing. Sentencing concessions were indeed a significant inducement for Gordon to plead guilty. He waived his substantial right to have the Government prove the charges beyond a reasonable doubt before a jury as part of the consideration for the Government's promise to recommend the third point for acceptance of responsibility as well as a safety valve sentence. The Government's failure to recommend those sentencing benefits violated the plea agreement. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499 (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).

The Government argued that Gordon committed perjury when he testified as a witness for Byrd, and therefore, that the Government was released from its obligation to recommend any sentence reductions. At sentencing defense counsel objected to all sentencing decisions in contravention to the plea agreement, and renewed all objections at the end of the proceedings. Thus, there having been breaches of the plea agreement, and timely objections raised and preserved, a reversal was required, and yet the Eleventh Circuit affirmed. *See, for example, United States v. Hunter*, 835 F.3d 1320, 1328-29 (11th Cir. 2016), Wilson, J.

The writ should issue because Gordon is entitled to a remedy for breach of the plea agreement: the decision should be vacated and the cause remanded to the Eleventh Circuit to either remand for resentencing according to the terms of the plea agreement and before a different judge, or to remand for the withdrawal of the guilty plea.

The plea clearly was induced by the Government 's sentencing promises. The Government is bound to their promises, and Gordon is entitled to specific performance of the terms of the agreement that he reasonably understood at the time of his plea.

Reason Three

In reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that the Eleventh Circuit erroneously affirmed even though the Government breached the terms of the plea agreement including refusing to apply the "safety valve," and refusing to allow a three-point reduction for acceptance of responsibility, rendering the entire plea agreement including the appeal waiver, null and void, and rendering the mandatory minimum sentence that was imposed, an illegal, unfair, and unreasonable sentence.

The district court erred and abused its discretion in granting the Government's motion to transfer Gordon's sentencing from Judge Gayles to whom this matter was randomly assigned by the Clerk of Court, to Judge Seitz who presided over the codefendant's trial. The defense objected. The Government argued that the Southern District of Florida Local Rules provide that any district judge may transfer a case to any other district judge who is willing to accept the case.

That rule is arbitrary in that it permits the Government to engage in forum shopping. When Gordon appeared before the Magistrate-Judge for the plea colloquy, there was a requirement that he and his counsel agree in advance to that procedure. Magistrate-Judge Otazo Reyes stated on the record that she was assisting Judge Gayles by entertaining the plea colloquy and making a recommendation that it be accepted and adopted by Judge Gayles. She also stated specifically

ly that Gordon *would be sentenced by Judge Gayles*. Judge Seitz “assisted” Judge Gayles by conducting the codefendant’s jury trial, but she was never involved in Gordon’s plea. If Judge Gayles had a busy calendar and was unable to preside over Byrd’s jury trial, surely he was not too busy to sentence Gordon after the guilty plea. The Government wanted the sentencing transferred to Judge Seitz because she presided over the trial at which Gordon testified. Judge Gayles erred in granting that request, and the Eleventh Circuit reversibly erred in affirming on those grounds. Judge Gayles should have kept Gordon’s sentencing on his calendar.

Cases are assigned randomly for good reason. The Government has enormous power in determining a sentence from the outset of a prosecution by its charging decisions, and has absolute power in setting terms and conditions of plea agreements. The Eleventh Circuit departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court as to call for the exercise of this Court’s supervisory powers when it failed to find that the Government should not be allowed to choose its preferred judge for sentencing.

At initial filing this case was assigned to Judge Gayles. Months later codefendant Byrd’s jury trial was held before Senior Judge Seitz. Gordon testified at Byrd’s trial. He already had entered his guilty plea but had not yet been sen-

tenced. After Byrd was found guilty on two of the three charged offenses, the Government moved to have Gordon's sentencing transferred to Judge Seitz.

The defense filed a response in opposition stating that the transfer apparently was requested because Judge Seitz presided at the codefendant's trial and was present for Gordon's testimony, but the request was improper. There was no authority to transfer Gordon's sentencing to a judge other than the assigned judge. Counsel for Gordon noted that he was not present for Gordon's entire trial testimony, whereas the prosecutor was present for Byrd's entire trial, leaving defense counsel at a distinct disadvantage.

The defense further argued in its response that assignment of judges in the Southern District of Florida occurs at the initiation of a new case, and is completely random pursuant to Internal Operating Procedure 2.05: "The Clerk of Court will randomly select the cases to be transferred in consideration of the new judge's divisional location..." Further, the Federal Rules of Criminal Procedure do not explicitly sanction the transfer of judges (on a whim). Federal Rule of Criminal Procedure 21 provides for *transfer of venue*, but only upon motion of the defense. There was no suggestion of conflict or recusal of record. The Government's motion was alleged to be an attempt at forum shopping without basis in case law, rule, or public policy.

The Government replied to the objections arguing that Southern District of Florida Operating Procedure 2.07.00 provides that a district judge may transfer a case to another district judge so long as the receiving judge consents and notice is provided to the parties. Further, Judge Seitz was the right judge to sentence Gordon because the sentencing judge must evaluate whether Gordon committed perjury at Byrd's trial, or whether his inaccurate responses were the result of confusion or language difficulties. According to the Government the judge who presided over Byrd's trial and heard all of the testimony would be in the best position to make that determination.

Internal Operating Procedures of the Southern District of Florida contains an entire chapter on “RANDOM ASSIGNMENT OF NEW CASES.” IOP 2.00.00. The first section is IOP 2.01.00 explaining consolidation of the civil and criminal assignment wheels in order to ensure equitable distribution of cases among the judges. IOP 2.01.01 provides in section (a) that all cases shall be assigned on a blind random basis, and (b) that ***the clerk shall not have any power or discretion in determining the Judge to whom any action or proceeding is assigned.***

IOP 2.07.00 (cited in the Government's reply in the district court), entitled “miscellaneous transfers and reassignments,” addresses such matters as recusal, temporary assignment, or emergency. That section provides as follows:

Judges may confer and directly transfer all or any part of a case on the judge's docket to any consenting judge. Notice shall be provided to all parties.

This seems to run afoul of the other sections of this IOP that require random, blind case assignment. It totally ignores and flies in the face of all of rules for reassignment of cases due to recusal, temporary assignment, or emergency, which specifically provide that such reassessments shall be *similar to the blind filing assignment* for newly-filed cases and shall be administered in a manner approved by the Court *so as to assure fair and equitable distribution* of all such matters throughout the District.

(d) The Clerk of the Court shall not have any discretion in determining the Judge to whom any such matter is assigned...

Yet under the section cited by the Government one judge simply may ask another to accept a case. If the second judge consents, then he or she will take over the case and the parties will be notified. This defies all notions of common sense, and renders null the reasons and rationale for blind, random filing in the first instance.

There are literally pages of numerous IOP sections that carefully delineate how each new case is to be blindly assigned. There are careful, specific rules describing how a case may be reassigned in the event of an emergency, a recusal, or a temporary assignment. And then there is this “free-for-all” section permitting any judge to transfer a case to any other consenting judge, for any reason or for no

reason, and without any of the restrictions on assigning cases that otherwise are required by the IOP.

This perplexing inconsistency in the Southern District's Internal Operating Procedures should have been carefully reviewed and analyzed by the Eleventh Circuit. A remand for corrective action should have been ordered, along with vacating Gordon's sentence that followed an unjustified transfer of the case from the assigned judge to a different judge. That transfer was based upon a rogue section of the Internal Operating Procedures that is inconsistent with other provisions of the Internal Operating Procedures concerning the assignment of cases in the Southern District of Florida. The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for the exercise of this Court's supervisory powers. Gordon is entitled to relief on this record. The Eleventh Circuit reversibly erred when it affirmed and dismissed.

Reason Four

In reaching the decision to affirm in part and to dismiss in part, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that the Eleventh Circuit erroneously affirmed even though the non-assigned district judge abused her discretion and reversibly erred when she sentenced Gordon to prison for a minimum mandatory term of ten years for Count One, where the plea agreement provided that Gordon would receive sentencing benefits for entering a plea that would have resulted in application of the "safety valve," releasing him from the minimum mandatory, and warranting the imposition of a reasonable, lower sentence within the correct advisory guidelines range.

The writ should issue because the Eleventh Circuit affirmed on the record showing that a non-assigned district judge reversibly erred and abused her discretion when she sentenced Gordon to prison on Count One, for a minimum mandatory term of ten years. The plea agreement provided that Gordon was entitled to benefits for entering into the plea, specifically credit for acceptance of responsibility and eligibility for the "safety valve" to avoid a mandatory minimum term, and warranting the imposition of a reasonable, lower sentence within the advisory guidelines range. The Government did not fulfill its agreement to request the "safety-valve" for a sentence within the advisory guidelines range; and expressed no objection to the imposition of the ten year mandatory sentence. Because this sentence falls within the exceptions to the

appeal waiver in the plea agreement, the writ should be granted, the opinion vacated and the proceedings remanded to the Eleventh Circuit with instructions to vacate and remand to the district court for imposition of a new sentence (1) before Judge Gayles and (2) within the advisory guidelines range.

The Court deviated from the written plea agreement without prior notice as provided by Rule 11(c)(1)(C), Federal Rules of Criminal Procedure. As a result the appeal waiver was invalid. Gordon cooperated and assisted the Government from the outset of this case. Rule 11 of the Federal Rules of Appellate Procedure entitled “PLEAS” provides in Section 11(c)(1)(C), that:

In general. An attorney for the Government and the defendant’s attorney... may discuss and reach a plea agreement. The court must not participate in those discussions. If the defendant pleads guilty ... to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the Government will:

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

A sentence is to be reviewed for reasonableness under the deferential abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586,

591 (2007). First the Court must ensure that the district court made no significant procedural error, and then examine whether the sentence was substantively reasonable in light of the totality of the circumstances. *Id.* at 51, 128 S.Ct. 597; *see also United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008). It is, of course, the appellant's burden to demonstrate that the sentence was unreasonable in light of the record and the 18 U.S.C. §3553(a) factors. *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010). A sentence may be reversed when an appellate court is left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors by arriving at a sentence outside the range of reasonable sentences dictated by the facts of the case. *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (*en banc*).

It appears that Gordon received a two level-downward adjustment for acceptance of responsibility, but not the third; and then his offense level was enhanced by two levels for obstruction of justice due to the Court's determination that his testimony was not truthful either at trial or at the sentencing hearing. At sentencing he testified that Byrd did not know, and he did not tell her that she would be picking up drugs.

During sentencing Byrd was removed from the courtroom during Gordon's testimony and was returned to the courtroom when he was finished. In response to a question from the Court, Byrd said that ***she did know that there would be drugs.*** The Court believed Byrd and did not believe Gordon. With the two-level enhancement for obstruction of justice, Gordon's advisory guidelines range was 97 to 121 months. The Court imposed a sentence of the mandatory minimum 120 months, which happened to be within that advisory guidelines range.

However the application of the obstruction of justice enhancement was an abuse of discretion on this record. The 120-month sentence falls within the exceptions to the appeal waiver, as an upward variance from the correct advisory guidelines range. The ten year minimum mandatory sentence was unreasonable. First, the guidelines range used to determine the sentence was incorrect. Second, the terms of the plea agreement clearly anticipated that based upon Gordon's cooperation with the Government from early on in the proceedings, and his timely plea of guilty, he was entitled to consideration for a sentence below the mandatory minimum, and to a third point reduction for acceptance of responsibility. Not only did the Government not enforce its recommendations in the plea agreement, it argued against giving Gordon those benefits. In contravention to Rule 11(c)(1)(C) the court failed to abide by the terms of the agreement specified in Rule 11.

The sentencing judge erroneously failed to follow the terms of the plea agreement that was originally accepted by the Magistrate Judge, and then adopted and approved by the assigned district judge. The judge erred in refusing to sentence according to the terms of the plea agreement. The Government wrongfully failed to fulfill its promises under the plea agreement. The advisory guidelines range was erroneously calculated. It should have been three-levels lower and a sentence within that correct range would certainly be lower than the minimum mandatory term.

The contention that Gordon lied at Brianna Byrd's trial is belied by the record. As Gordon's lawyer argued below, Gordon's statements were consistent throughout the proceedings. If anyone lied under oath it was Brianna Byrd who untruthfully stated that she knew the package contained contraband in order to receive safety valve consideration, and the sentence of 33 months in prison.

The writ should issue and ultimately Gordon's sentence should be vacated and the cause remanded for resentencing before a different judge.

CONCLUSION

Based upon the foregoing arguments and authorities Petitioner respectfully prays that this Honorable Court will grant the writ, vacate the decision of the Eleventh Circuit, and remand for further proceedings with such instructions as the court may deem appropriate.

Respectfully submitted,

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COMPLIANCE WITH TYPE STYLE & WORD COUNT

The foregoing petition is typed in Word for Windows using Times New Roman 14 Point. According to the Word program on which it is prepared, the petition contains no more than 7,801 words.

Electronically filed on August 10, 2019