

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.

APPENDIX TO THE PETITION
FOR A WRIT OF CERTIORARI TO

SHERYL JOYCE LOWENTHAL
Attorney for David Anthony Gordon
Email: sjlowenthal@appeals.net
Florida Bar No. 163475
9130 S Dadeland Blvd. Suite 1511
Miami, Florida 33156-7851
Ph:305-670-3360 Fax: 305-670-1314

APPENDIX TO THE PETITION

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10002
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20192-DPG-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID ANTHONY GORDON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 5, 2019)

Before MARTIN, BRANCH, and JULIE CARNES, Circuit Judges.

PER CURIAM:

David Gordon appeals his 120-month sentence for conspiring to import five or more kilograms of cocaine in violation of 21 U.S.C. §§ 960(a)(1), (b)(1)(B)(i), & 963. Gordon advances several arguments on appeal. He says the district court erred in granting the government's motion to transfer his sentencing to a different district court judge; the government breached his plea agreement; and the sentence appeal waiver in his plea agreement is unenforceable. Each of these arguments fails. Gordon also lodges two challenges to his sentence, both of which are barred by the sentence appeal waiver. On this record, we affirm in part and dismiss in part.

I.

A grand jury returned a three-count indictment against Gordon and Brianna Byrd for their involvement in a cocaine importation and distribution conspiracy. Gordon later debriefed law enforcement on the facts underlying these charges. In that debriefing, Gordon admitted he would receive cocaine imported from Suriname by way of human couriers. Gordon, sometimes accompanied by a co-conspirator, would then retrieve the cocaine from the couriers at a hotel. On the day he and Byrd were arrested, Gordon picked up Byrd in his car and drove her to the hotel. En route, Gordon told Byrd she would pick up a package for him from a man at the hotel, who, unbeknownst to Gordon and Byrd, was working as a confidential source. Via his cell phone, Gordon told his contact in Suriname,

Brille,¹ what Byrd looked like, and Brille sent Gordon a photo of the courier. Upon arriving at the hotel, Gordon dropped off Byrd, told her she would be meeting this man in the lobby, and gave her his cell phone so he could guide her. Once inside the hotel, Byrd called Gordon and said she didn't see the man. Gordon told her to go to the front desk. Shortly thereafter, Gordon and Byrd were arrested. Gordon maintained Byrd didn't know what the package was or that drugs were involved.

Gordon's case was initially assigned to District Judge Darrin P. Gayles. While the case was with Judge Gayles, Gordon entered into a written plea agreement with the government. In that document, Gordon agreed to plead guilty to one count of conspiracy to import five or more kilograms of cocaine and waive his right to appeal his sentence, unless it exceeded the statutory maximum, was the product of an upward departure or variance "from the advisory guideline range that the Court establishes at sentencing," or if the government appealed. In exchange, the government agreed to dismiss the remaining charges, as well as to recommend safety valve relief and a reduction for acceptance of responsibility. See United States Sentencing Guidelines §§ 3E1.1, 5C1.2. The safety valve recommendation was conditioned on Gordon providing "a written statement truthfully setting forth all information and evidence [he] ha[d] concerning the offense or offenses that

¹ Gordon told the government in his debriefing that he previously met Brille in person.

were part of the same course of conduct or of a common scheme or plan as charged in the indictment.” The acceptance of responsibility recommendation was conditioned on Gordon not “commit[ting] any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense . . . or making false statements or misrepresentations to any governmental entity or official.” The plea agreement specifically noted that district court was not bound by any of its recommendations. Gordon pled guilty pursuant to that agreement.

Before Gordon’s sentencing, he testified at Byrd’s trial as her witness. District Judge Patricia A. Seitz presided over Byrd’s trial. The thrust of Gordon’s testimony was that Byrd did not know she was picking up a package of cocaine.

Believing his testimony to have been untruthful in various respects, the government filed a sentencing memorandum arguing Gordon was no longer eligible for an acceptance of responsibility reduction or safety valve relief. To the contrary, the government argued that Gordon should get a longer sentence, because he obstructed justice. See USSG § 3C1.1. Gordon, the government said, was no longer eligible for safety valve relief because the contradictions between his trial testimony and his debriefing “cast[] serious doubt on the veracity of much, if not all, of the information that [Gordon] provided during his safety valve debrief[ing].” And he wasn’t eligible for an acceptance of responsibility reduction because, given his untruthful testimony, “it is impossible to know which, if any, account of [his]

criminal conduct is accurate.” In the government’s view, Gordon “perjured himself in an attempt to assist Byrd in her defense that she did not know she was picking up cocaine when she went to meet the drug courier at the [hotel].”

In support, the government highlighted a number of contradictions between Gordon’s testimony at Byrd’s trial and documentary evidence. The government also pointed to contradictions between Gordon’s testimony and his debriefing. For instance, at Byrd’s trial, Gordon claimed that, while he was in the car with Byrd on the way to the pick-up location, he did not speak with Brille over the phone. His call log indicated otherwise. Neither did Gordon change his testimony after the government confronted him with the log. Gordon testified he sent Brille a text message asking what Byrd was wearing, when documentation of those text messages made clear that Brille had sent them. Additionally, Gordon testified he had never met Brille. But, in his debriefing, Gordon “reported being introduced in person to ‘Brille’ . . . while out partying together” months before the events underlying his and Byrd’s arrests.

The government filed a motion to transfer Gordon’s sentencing to Judge Seitz, because Judge Seitz presided over Byrd’s trial and thus observed Gordon testify untruthfully. Gordon opposed the motion, arguing there was no authority for the government’s request, so it was therefore “a blatant attempt at forum shopping.” Judge Gayles granted the government’s motion.

At sentencing, Gordon reiterated his objection to the transfer to Judge Seitz, but he couldn't identify how he had been prejudiced. The government and Gordon rehashed the arguments made in their memoranda regarding acceptance of responsibility and safety valve relief. Then, after hearing testimony from Gordon and Byrd, Judge Seitz found that Gordon "obstructed justice by his testimony during the course of the trial" and added the two-level obstruction-of-justice enhancement to Gordon's offense level. See USSG 3C1.1. Judge Seitz also denied him an acceptance of responsibility reduction and safety valve relief. Judge Seitz calculated Gordon's guidelines range as 120 months, the mandatory minimum, and sentenced him to the 120 months.

This is Gordon's appeal.

II.

Gordon says the district court erred by granting the government's motion to transfer his sentencing from Judge Gayles to Judge Seitz. He is mistaken. "District Judges have the inherent power to transfer cases from one to another for the expeditious administration of justice." United States v. Stone, 411 F.2d 597, 599 (5th Cir. 1969).² They "may by rule, order or consent transfer cases between themselves." Id. at 598; see also S.D. Fla. I.O.P. 2.07.00 ("Judges may

² In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

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.”).

Both parties agree we should review this issue for abuse of discretion. We believe this is the correct standard of review. The power to transfer is expressly provided by local rule. S.D. Fla. I.O.P. 2.07.00. And we review a district court's application of local rules for an abuse of discretion. Reese v. Herbert, 527 F.3d 1253, 1267 n.22 (11th Cir. 2008). “The abuse of discretion standard . . . allow[s] a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.” United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989).

Granting the government's motion to transfer was not a clear error of judgment. Judge Seitz presided over Byrd's trial and, therefore, observed Gordon's testimony. As the government's sentencing memorandum made clear, that testimony would be a focus of its arguments at sentencing. Judge Seitz's observation of Gordon's testimony made her well-suited to find facts relevant to issues that would arise at sentencing, such as whether an obstruction-of-justice enhancement was warranted. Cf. United States v. Arango, 853 F.2d 818, 823 (11th Cir. 1988) (noting that we review a trial court's credibility determinations for clear error because “[t]he trial court had the opportunity to hear and observe the witnesses”). Thus, Judge Gayles could have reasonably determined that

transferring the sentencing to Judge Seitz would further “the expeditious administration of justice.” Stone, 411 F.2d at 599.

III.

Gordon says the government breached his plea agreement by failing to recommend the acceptance of responsibility reduction and safety valve relief. He is again mistaken.

We review de novo whether the government has breached a plea agreement. United States v. Horsfall, 552 F.3d 1275, 1281 (11th Cir. 2008) (per curiam). “[W]hen 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.” Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971); see also United States v. Taylor, 77 F.3d 368, 370 (11th Cir. 1996) (“The government is bound by any material promises it makes to a defendant as part of a plea agreement that induces the defendant to plead guilty.”). “Whether the government violated the agreement is 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).

Gordon says he reasonably understood the government would recommend safety valve relief and an acceptance of responsibility reduction, and that, in failing to do so, the government breached the plea agreement. This would be true if the

government's agreement was not expressly limited by conditions that Gordon failed to fulfill.

Gordon should have known that testifying in a manner that contradicted his debriefing, and that was inconsistent with documentary evidence would jeopardize his eligibility for the government's recommendations. Indeed, the government's agreement to recommend an acceptance of responsibility reduction was conditioned on Gordon not "making false statements or misrepresentations to any governmental entity or official." Beyond that, a reasonable person in Gordon's position would have understood that his conflicting testimony would cast doubt on the truthfulness of his debriefing. And a completely forthright debriefing is what the plea agreement demanded of Gordon in order to trigger the government's obligation to recommend safety valve relief.

IV.

Gordon also offers three arguments challenging the validity of the sentence appeal waiver in his plea agreement. None succeed.

We review de novo the validity of a sentence appeal waiver. United States v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008).

First, Gordon argues that the government's breach of the plea agreement invalidated the sentence appeal waiver. This argument fails, because the government did not breach the plea agreement.

Second, Gordon argues that the district court's failure to sentence him in accord with the plea agreement invalidated the sentence appeal waiver. Not so. The district court was neither a party to nor bound by the plea agreement. The agreement's plain terms and Federal Rule of Criminal Procedure 11 make that clear. See Fed. R. Crim. P. 11(c)(1)(B) (specifically noting that a plea agreement "may specify that an attorney for the government will . . . recommend . . . that a particular provision of the Sentencing Guidelines . . . does or does not apply," and observing that "such a recommendation or request does not bind the court").

Third, Gordon says that the sentence appeal waiver was invalidated when the district court deviated from the plea agreement without prior notice in violation of Federal Rule of Criminal Procedure 11(c)(1)(C). Even if Rule 11(c)(1)(C) does require prior notice, the rule does not apply here. Rule 11(c)(1)(C) provides that a plea agreement "may specify that an attorney for the government will . . . 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" and that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). But, in the plea agreement, the government said only that it would recommend safety valve relief and an acceptance of responsibility reduction—it did not thereby "agree that a specific

sentence or sentencing range is the appropriate disposition” or that “a particular provision of the Sentencing Guidelines . . . does . . . apply.” *Id.*

V.

Finally, Gordon levels two challenges to his sentence. Both are barred by the sentence appeal waiver. Therefore, these components of Gordon’s appeal are due to be dismissed. See, e.g., United States v. Buchanan, 131 F.3d 1005, 1008–09 (11th Cir. 1997) (per curiam).

First, Gordon says that his 120-month sentence qualifies “as an upward variance from the correct guidelines range” and therefore falls within the sentence appeal waiver’s exception for upward departures or variances. But the appeal waiver permitted no exception for upward departures or variances from the “correct guidelines range.” Instead, it allowed an appeal when the district court departed or varied upwardly “from the advisory guideline range that the Court establishes at sentencing.” The district court did not deviate from the guideline range it established. Thus, Gordon’s argument is barred by the appeal waiver.

Second, Gordon says that his sentence was unreasonable. But the appeal waiver did not include an exception for reasonableness challenges. Thus, this argument is also barred by the appeal waiver.

DISMISSED IN PART, AFFIRMED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 05, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10002-FF
Case Style: USA v. David Gordon
District Court Docket No: 1:17-cr-20192-DPG-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Mohler, FF at (404) 335-6178.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number - 1:113C 17-20192-CR-SEITZ-01

DAVID ANTHONY GORDON

USM Number: 14579-104

Counsel For Defendant: David S. Seltzer, LLC
 Counsel For The United States: Daniel Marcet, AUSA
 Court Reporter: Tammy Nestor

The defendant pleaded guilty to Count One of the Indictment.
 The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. § 963	Conspiracy to Import Five Kilograms or more of Cocaine	March 1, 2017	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The remaining Counts in the Indictment are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
 December 19, 2017


 PATRICIA A. SEITZ
 United States District Judge

December 21, 2017

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DEFENDANT: DAVID ANTHONY GORDON
CASE NUMBER: 1:113C 17-20192-CR-SEITZ-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **120** months. The defendant shall receive credit for time served as applicable by statute.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a facility close to Atlanta, Georgia.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

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DEFENDANT: DAVID ANTHONY GORDON
CASE NUMBER: 1:113C 17-20192-CR-SEITZ-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer **within seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DAVID ANTHONY GORDON
CASE NUMBER: 1:113C 17-20192-CR-SEITZ-01

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Unpaid Restitution , Fines or Special Assessment - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the Probation Officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Required Child Support - The defendant shall comply with the terms and conditions ordered by Miami Dade County, for the State of Florida, in docket number 12-00016327-FC requiring payments for the support and maintenance of the Daijah Sanaa Gordon and Jeanetta Marie Smith with whom the child is living.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

DEFENDANT: DAVID ANTHONY GORDON
CASE NUMBER: 1:113C 17-20192-CR-SEITZ-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.