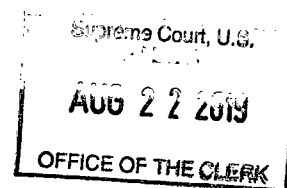


No. 19-5811

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Joe Edger — PETITIONER
(Your Name)



vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joe Edger
(Your Name)

U.S.P. - Terre Haute, P.O. Box 33
(Address)

Terre Haute, In. 47808
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Does the phrase "cited in the offense of conviction" mean "information used in a particular count of an indictment or information that initiates the criminal process," "the entire record of the criminal process, including material that may not have been disclosed to a defendant," or some other definition?
2. Because there is a conflict between the United States Probation Office and the United States District Court, along with the Eighth Circuit Court of Appeals, over the definition or interpretation of the phrase "cited in the offense of conviction," is that phrase ambiguous enough to incite the rule of lenity?
3. Is the government permitted to decide unilaterally when a defendant has breached or violated a provision of a plea agreement, which would allow the government to renege on a promise that induced the defendant to plead guilty and sign a plea agreement?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION.....	11

INDEX TO APPENDICES

APPENDIX A	Decision of the United States Court of Appeals For The Eighth Circuit
APPENDIX B	Decision of the United States Court of Appeals for the Eighth Circuit - Petition For Rehearing
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
United States v. Anzalone, 148 F.3d 940 (8th Cir. 1998).....	9
United States v. Brown, 801 F.2d 352 (8th Cir. 1986).....	9
United States v. Gomez, 271 F.3d 779 (8th Cir. 2001).....	9
United States v. Kelly, 18 F.3d 612 (8th Cir. 1994).....	9
United States v. Lazaro-Guadarrama, 71 F.3d 1419 (8th Cir. 1995).....	9
United States v. Yellow, 627 F.3d 706 (8th Cir. 2010).....	9

STATUTES AND RULES

Title 18 U.S.C. Section 922(g)	4.
Title 18 U.S.C. Section 924(o).....	4, 7
Title 18 U.S.C. Section 3553(e).....	5, 9

OTHER

U.S.S.G. Section 2K2.1(c)(1).....	4, 6, 7, 8
U.S.S.G. Section 2K2.1 Application Note 14(A), (E).....	8
U.S.S.G. Supplement to Appendix C, Amendment 784, Reason For Amendment.....	8
U.S.S.G. Section 5K1.1.....	5, 9

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 23, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 5, 2019, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. Section 2K2.1(c)(1): If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply -

U.S.S.G. Section 2K2.1 Application Note 14(A): In General. - Section (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating another felony offense or another offense respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

U.S.S.G. Section 2K2.1 Application Note 14(E): Relationship Between the Instant Offense and the Other Offense. - In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See Section 1B1.3(a)(1)-(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

U.S.S.G. Supplement to Appendix C, Amendment 784, Reason for Amendment. Specifically, the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common. Accordingly, the amendment revises the cross reference so that it applies only to the particular firearm or firearms cited in the offense of conviction.

STATEMENT OF THE CASE

On June 22, 2016, Petitioner pled guilty to a single count of a violation of Title 18 U.S.C. Section 922(g) in the United States District Court for the Eastern District of Missouri.

On August 8, 2016, Petitioner pled guilty to a single count of a violation of Title 18 U.S.C. Section 924(o) in the United States District Court for the Eastern District of Missouri.

The cases were consolidated and a sentencing hearing was held on March 9, 2018. Petitioner was sentenced to the statutory maximum of 120 months for the Section 922(g) violation and a consecutive sentence of 240 months for the Section 924(o) violation for a total of 360 months.

The sentencing guideline range specified in Petitioner's initial presentence investigation report (PSR) was 41-51 months. The United States Probation Office (U.S.P.O.) determined that the cross reference Section 2K2.1(c)(1) U.S.S.G. did not apply because there was no description of that particular firearm in Petitioner's indictment and the cross reference requires that the firearm be "cited in the offense of conviction."

The government objected to the U.S.P.O.'s determination that the cross reference Section 2K2.1(c)(1) U.S.S.G. does not apply and on May 18, 2017, the district court sustained that objection. The district court instructed the U.S.P.O. to revise Petitioner's PSR in compliance with the objection, upon the government's request.

The U.S.P.O. changed Petitioner's sentencing guideline range from 41-51 months to 360 months in the revised PSR, however, the U.S.P.O. added in the addendum that they still believed that Section 2K2.1(c)(1) U.S.S.G. does not apply because the government did not cite the

firearm in the offense of conviction, as the U.S.P.O. believes the government is required to provide some characteristic or description of the firearm in the count of the indictment so that the cross reference will apply only to that particular firearm in that count of the indictment.

The government promised to file a downward departure motion pursuant to Section 5K1.1 U.S.S.C. and Title 18 U.S.C. Section 3553(c) in the plea agreement for substantial assistance that petitioner already provided. The government did not file those motions and the district court did not conduct an evidentiary hearing to determine why the government breached the plea agreement.

REASONS FOR GRANTING THE PETITION

Section 2K2.1(c)(1) U.S.S.G. requires that the firearm be "cited in the offense of conviction." There is a conflict over the phrase "cited in the offense of conviction" in Section 2K2.1(c)(1) U.S.S.G. between the United States Probation Office (U.S.P.O.) and the Eighth Circuit Court of Appeals along with the United States District Court for the Eastern District of Missouri. The U.S.P.O. believes that the indictment should have identified some characteristic of the firearm, whether it be make, model, caliber, serial number, etc., to identify that specific firearm for the purpose of the cross reference sentencing enhancement Section 2K2.1(c)(1) U.S.S.G. The U.S.P.O. made that determination in Petitioner's initial presentence investigation report (PSR).

The determination of the U.S.P.O. coincides with the intent of the United States Sentencing Commission when it added the phrase "cited in the offense of conviction" to Section 2K2.1(c)(1) U.S.S.G. in 2015. Supplement to Appendix C, Amendment 784, Reason for Amendment. The cross reference is only to apply to the particular firearm cited in the offense of conviction.

The government objected to the U.S.P.O.'s determination not to apply Section 2K2.1(c)(1) U.S.S.G. The government did not present an alternate definition or meaning of the phrase "cited in the offense of conviction" at the oral argument held for the objection on April 25, 2017. However, the district court concluded in its Memorandum and Order, dated May 18, 2017, for that objection hearing, that the government's interpretation is correct. The district court erred for 2 reasons.

The district court erred in that the government did not present an interpretation of the phrase "cited in the offense of conviction" for the district court to agree with.

The district court erred because if there is more than one

interpretation to the ambiguous phrase "cited in the offense of conviction," then the rule of lenity applies and Petitioner would be given the benefit of the interpretation that would result in a shorter sentence. United States v. Lazaro-Guadarrama, 71 F.3d 1419, 1421 (8th Cir. 1995). "The rule of lenity applies to ambiguous provisions of the Sentencing Guidelines." Lazaro-Guadarrama, 71 F.3d, at 1421.

The Eighth Circuit then went on to conclude that the phrase "offense of conviction" means the record as a whole. The Eighth Circuit did not provide an interpretation or definition of the entire phrase "cited in the offense of conviction." The Eighth Circuit's conclusion is in conflict with the interpretation made by the U.S.P.O. The Eighth Circuit's definition is overbroad, vague, and extends beyond the intent of the United States Sentencing Commission. The phrase "offense of conviction" is defined as "offense conduct charged in the indictment or information of which the defendant was convicted." Glossary of Federal Sentencing Related Terms by the United States Sentencing Commission. The "plea agreement" is not the "offense of conviction."

The Eighth Circuit wrongly presumed that Petitioner was provided a copy of the entire record as a whole. Petitioner was convicted based on a plea agreement, and not a trial, so the government did not produce or disclose the entire record to Petitioner, or anything close to the entire record, before or after he pled guilty. The United States Sentencing Commission did not add the phrase "cited in the offense of conviction" to encompass such a broad view. The charge for a violation of Title 18 U.S.C. Section 924(o) may not require the description of a specific firearm for a conviction, but Section 2K2.1(c)(1) requires that for it to apply.

The intent of the United States Sentencing Commission is to apply the cross reference Section 2K2.1(c)(1) U.S.S.G. to a particular firearm "cited in the offense of conviction." See Supplement to Appendix C, Amendment 784, Reason for Amendment U.S.S.G.

The basis of Petitioner's argument is the meaning or interpretation of the phrase "cited in the offense of conviction," and whether it's ambiguous enough to incite the rule of lenity.

The U.S.P.O. reversed Petitioner's PSR and changed Petitioner's initial sentencing guideline range of 41-51 months to 360 months upon the government's request and in compliance with the district court's instructions, even though the maximum penalty for a violation of Title 18 U.S.C. Section 924(b) is 240 months. The U.S.P.O. stated in the addendum to the revised PSR that they still believed that Section 2K2.1(c)(1) U.S.S.G. does not apply because the indictment did not describe any characteristic of the firearm as required by Section 2K2.1(c)(1) and its commentary. See Section 2K2.1(c)(1) U.S.S.G. Application Note 14(A) and 14(E). U.S.S.G. Supplement to Appendix C, Amendment 784, Reason for Amendment states that "the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common," and that "the amendment reverses the cross reference so that it applies only to the particular firearm or firearms cited in the offense of conviction."

Petitioner requests that this Court decide whether the phrase "cited in the offense of conviction" is ambiguous enough to invoke the rule of lenity, and if it isn't, what does the phrase "cited in the offense of conviction" mean with the intent of the United States Sentencing Commission. It should not be overlooked that the record as a whole contained 2 firearms.

The government included a promise to file a motion for a downward departure pursuant to Section 5K1.1 U.S.S.G. and Title 18 U.S.C. Section 3553(e) in Petitioner's plea agreement and then breached the plea agreement by deciding unilaterally not to fulfill that promise. The government stated at Petitioner's sentencing hearing that it would not be filing said promised motions because they believed Petitioner violated a provision of the plea agreement that relieved it of such obligation. A breach of a plea agreement is an issue for the court to decide and not the government. United States v. Brown, 801 F.2d 352, 355 (8th Cir. 1986). Petitioner is entitled to an evidentiary hearing, as required by due process, to determine if he violated or breached a provision of the plea agreement. United States v. Yellow, 627 F.3d 706, 709 (8th Cir. 2010).

Even if Petitioner did violate a provision of the plea agreement, the government's choice of remedy is inappropriate. The government should have moved to withdraw from the agreement rather than breach the agreement at sentencing. United States v. Gomez, 271 F.3d 779, 782 (8th Cir. 2001). The government should have still made the downward departure motions, but advise the sentencing court of unrelated factors, such as Petitioner's alleged post plea-agreement conduct or violation and that the court should preclude or severely restrict any downward departure relief. United States v. Anzalone, 148 F.3d 940, 941-942 (8th Cir. 1998).

The government's express promise in the plea agreement to file the downward departure motions is binding. United States v. Kelly, 18 F.3d 612, 616 (8th Cir. 1994). The downward departure motions were based on substantial assistance that Petitioner provided prior to the plea agreement.

It was a promise, and not discretionary language. It should be noted that the alleged evidence was not only never authenticated, but it was

disclosed at a hearing for a motion that Petitioner's counsel filed to withdraw as counsel. It was not an adversarial or evidentiary hearing. Petitioner's counsel filed a motion to withdraw as counsel and the district court abused its discretion by requesting the government to produce copies of phone calls and letters that the court alleged would aid in its determination on counsel's motion to withdraw. The phone calls and letters had nothing to do with Petitioner's counsel and because Petitioner's counsel was requesting to withdraw from the proceeding, that counsel did not subject the alleged evidence, or its production and authenticity, to adversarial testing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joe Edger

Date: On August 21, 2019