No. 19-611

IN THE

Supreme Court of the United States

RENE BOUCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

In its Brief in Response, the government acknowledges and concedes the following:

(a) The dispute between the Petitioner and Senator Paul had absolutely nothing to do with politics, political viewpoints, or the fact that Rand Paul is a United States Senator; rather, it was a dispute over a longstanding disagreement over a lawn maintenance issue. (Brief in Response, p. 2).

(b) The Petitioner was initially, and properly, charged in Kentucky state court with a misdemeanor, but the charge was dismissed after the federal government charged the Petitioner with assaulting a congressman. (Brief in Response, p. 2).

(c) In order to induce the Petitioner to proceed by an information and enter into a plea agreement, the offices of the United States Attorney expressly stated, in writing, that: "…[T]he government would recommend a sentence no higher than the low-end of a guideline range and you [the Petitioner and his counsel] *would be free to recommend any sentence authorized by the statute (0-10).*" (Brief in Response, p. 8)(Emphasis added). Based upon this written promise, the Petitioner did, in fact, proceed by an information, and he immediately pled guilty. (Brief in Response, p. 2). Further, the Presentence Investigation Report in this case confirmed that "…[t]he government… agrees not to oppose the defendant's request that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply…." (Brief in Response, pp. 3 & 8).

(d) The District Court sentenced the Petitioner to thirty days of imprisonment, together with a $10,000.00 fine, 100 hours of community service, and one year of probation. In its Brief in Response, the government acknowledges that this is a perfectly lawful sentence, and it also acknowledges that the Petitioner's sentence has now been absolutely and completely served. (Brief in Response, p. 6).

The government's opposition underscores why this Court should grant certiorari. First, the government acknowledges the split in the circuits on an important question of federal law. (Brief in Response, p. 5). That is, if the precedent of *United States vs. Guevera*, 941 F.2d. 1299 (1991), cert. denied, 503 U.S. 977 (1992), and *United States vs. Blick*, 408 F.3d 162 (4th Cir.2005)[1] were to be given precedential authority and value, then the government's appeal should have been dismissed as having been waived. Other circuits have held to the contrary. (Brief in Response, p. 10). Second, the government has acknowledged that it "cast its lot" with the trial court on the issue of the appropriateness of the sentence to be imposed—and then reneged on this promise by filing an appeal when the sentence was not harsh enough to suit the government. Third, the government acknowledges that the Petitioner has completely served each and every aspect of a perfectly lawful sentence (Brief in Response, p. 6); yet, the government somehow maintains that a

1. "To whatever extent appeal waivers can be considered "inequitable," we evened the playing field somewhat in *United States v. Guevara*, 941 F.2d 1299, 1299 (4th Cir.1991), where we held that when a defendant waives the right to appeal in a plea agreement, 'such a provision against appeals must also be enforced against the government.' "

resentencing at this juncture does not run afoul of the fundamental prohibitions against double jeopardy and protections of due process.

ARGUMENT

1. The Petitioner's claims of double jeopardy are ripe for review by this Court.

The government disingenuously argues at the outset of its Response that review should be denied at this juncture because this case is in an interlocutory posture. The Court has expressly rejected such an argument on numerous prior occasions.

The Constitution of the United States, in the Fifth Amendment, declares, "…nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb." Despite its explicit reference to punishment, "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy[.]" *Ball v. U.S.*, 163 U.S. 662, 669 (1896). The "twice put in jeopardy" language of the Constitution thus relates to a *potential*, i.e., the *risk* that an accused for a second time will be convicted of the "same offense" for which he was initially tried. *Price v. Georgia*, 398 U.S. 323, 326, 90 S.Ct. 1757, 1759, 26 L.Ed.2d 300 (1970). See also *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971); *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); *United States v. Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896). Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that he will not be forced to endure the personal strain, public

embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, supra, 355 U.S., at 187-188, 78 S.Ct. 221, 223.

The cases on this are longstanding and consistent. See, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Breed v. Jones*, 421 U.S. 519, 529-530, 95 S.Ct. 1779, 1785-1786, 44 L.Ed.2d 346 (1975); *Serfass v. United States*, 420 U.S. 377, 387-388, 95 S.Ct. 1055, 1061-1062, 43 L.Ed.2d 265 (1975); *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971).

Obviously, these aspects of the double jeopardy protections would be lost if the Petitioner herein is forced to "run the gauntlet" a second time before an appeal could be taken. Even if the trial court that initially passed sentence metes out the exact same punishment that it issued previously, the Petitioner will still have been forced to endure a resentencing that the Double Jeopardy Clause was designed to prohibit. Consequently, if he is to avoid the

risk of exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge must be reviewable at this time. In short, the government's threshold challenge to the granting of certiorari should be given no credence whatsoever.

2. The government waived its right to appeal the defendant's sentence when the offices of the United States Attorney expressly and unequivocally agreed that "… [T]he Government would recommend a sentence no higher than the low-end of a guideline range and you would be free to recommend any sentence authorized by the statute (0-10)…" and thereafter also agreed that the Petitioner was "… free to argue for any sentence he believes to be appropriate…"

The threshold issue for which certiorari is sought is whether or not this Court is willing to consider a review of an implicit waiver of the government's right to appeal under the facts that are presented. The government, in its Brief in Response, takes the position that the concepts of waiver and estoppel are absolutely inapplicable to its rights of appeal, and—in the absence of an express written waiver—the government retains its rights of appeal no matter what. This is not, and cannot, be the law, as it will allow the government to say one thing and do another without any consequences whatsoever. Accordingly, certiorari is warranted on this basis.

There is absolutely no doubt whatsoever that the government cast its lot with the trial court in its passing a sentence on the Petitioner in this case. Specifically, the government stated: "…[T]he government would

recommend a sentence no higher than the low-end of a guideline range and you [the Petitioner and his counsel] would be free to recommend any sentence authorized by the statute (0-10)." If these words have any meaning at all, then the government should be precluded from prosecuting an appeal of a sentence when it is not harsh enough to suit it.

When the government says to a defendant: "You are free to argue for any sentence within the range permitted by law, and we, the government will not object…", and the defendant receives a sentence within the range permitted by law, then the government should not be permitted to renege on its promise and thereafter appeal the sentence. Plain and simple.

This Court has consistently viewed the "controlling constitutional principle" to be the use of successive trials for the same offense as "a potent instrument of oppression." *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), and a second trial for a serious offense "an ordeal not to be viewed lightly," regardless of the ultimate outcome. *Price v. Georgia*, 398 U.S. 323, 331 (1970). As it said in its most recent case on the subject, "This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018).

If certiorari is not granted in this matter, criminal defendants will run the risk of exactly what has transpired in the matter *sub judice*. That is (a) the parties agree that they will cast their lots with the trial court and take

their respective chances on the passing of a sentence; (b) the trial court passes a sentence that is not to the government's liking; and (c) the government uses its power of appeal to treat the whole matter as a "dress rehearsal" until it is able to secure the punishment that it is seeking.

This begs the question: "If the Petitioner is resentenced, and the government is still dissatisfied with the harshness (or lack thereof) of the trial court's punishment, can the Petitioner be put through the whole process yet again? And again?

United States vs. Guevera, 941 F.2d. 1299 (1991), cert. denied, 503 U.S. 977 (1992) and *United States vs. Blick*, 408 F.3d 162 (4th Cir.2005)("To whatever extent appeal waivers can be considered "inequitable," we evened the playing field somewhat in *United States v. Guevara*, 941 F.2d 1299, 1299 (4th Cir.1991), where we held that when a defendant waives the right to appeal in a plea agreement, 'such a provision against appeals must also be enforced against the government.' ") stand for the proposition that the law recognizes an implicit waiver of the government's right to appeal a sentence.

The Petitioner submits that (1) when the government unconditionally casts its lot with the trial court; (2) expressly agrees that the criminal defendant and his counsel may argue, without governmental objection or reservation, for a sentence within the range permitted by law; and (3) the trial court imposes a sentence within the range permitted by law, then the government must be bound by the sentence and has waived its right to appeal. In that there is clearly a split of authority within the circuits on this issue, certiorari is justifiably warranted.

3. The Petitioner has completely served a lawful sentence, and a re-sentencing violates the Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution.

In its Brief in Response, the government contends that *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) holds that jeopardy does not attach in this case because the government timely filed an appeal. However, the government purposefully turns a blind eye to the fact that the Petitioner has also now completely served a perfectly legal sentence. This is the crux of the issue that is now presented, and this is exactly why certiorari should be granted.

To be right to the point, neither *DiFrancesco*, nor any other case from this Court, has addressed the application of double jeopardy principles to a defendant whose sentence has been fully served. In *DiFrancesco*, the Court makes clear that the initial imposition of sentence is not accorded the same inviolable finality as an acquittal, and, therefore, that a defendant, at that time, has no expectation of finality. 449 U.S. at 136-38, 101 S.Ct. at 437-38. Since *DiFrancesco*, various lower courts have focused on the reasonableness of the expectation of finality in a sentence when applying double jeopardy principles to sentence enhancements. These lower courts are clearly split on this issue, and this is exactly why the granting of certiorari is appropriate.

Some have found that a defendant has no reasonable expectation of finality at the time he begins to serve his sentence. See *United States v. Lundien*, 769 F.2d 981, 985

(4th Cir.1985) (double jeopardy not violated by sentence enhancement where defendant hadn't "fully served" his sentence); *United States v. Bello*, 767 F.2d 1065, 1070 (4th Cir.1985) (double jeopardy doesn't protect against greater sentence after appeal even if sentence begun).

This having been said, the Petitioner's petition for a writ in this case squarely presents the question of whether the Double Jeopardy Clause sets a temporal limit on the amendment of a perfectly lawful sentence that has been completely served. Several federal circuit courts have indicated that an expectation of finality arises after complete service of a lawful sentence. See, e.g., *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996); *United States v. Kinsey*, 994 F.2d 699, 702-03 (9th Cir. 1993); *United States v. Arrellano-Rios*, 799 F.2d 520, 523-24 (9th Cir. 1986); cf. *Oksanen v. United States*, 362 F.2d 74, 80 (8thCir. 1966). Several other courts have gone even further and deemed lawful sentences final at some earlier point in time. See *Snell v. State*, 723 So.2d 105, 108 (Ala. Crim. App. 1998) (lawful sentence final after imposition); *State v. Wheeler*, 498 P.2d 205, 208 (Ariz. 1972) (same); *United States v. Rosario*, 386 F.3d 166, 169-71 (2d Cir. 2004) (lawful sentence final after commencement); *United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (same); *Ethridge v. State*, 800 So.2d 1221, 1225 (Miss. App. 2001) (same); *State v. Ryan*, 429 A.2d 332, 337-38 (N.J. 1981) (same); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (lawful sentence final after release from custody); *State ex rel. Hill v. Parsons*, 461 S.E.2d 194, 198 (W. Va. 1995) (same); and *United States v. Jones*, 722 F.2d 632, 638-39 (11th Cir.1983) (unless statutory sentence modification available or defendant deceives sentencing judge, defendant has expectation of finality and jeopardy attaches when he begins serving sentence).

Here, in the matter now pending, no one has challenged the legality of the Petitioner's sentence. And, no one can argue that his sentence has not been completely served. The case of *United States v. Arrellana-Rios*, 799 F.2d 520 (9th Cir. 1986) draws the issue into a focus that is crystal clear:

> To be sure, the Double Jeopardy Clause protects against multiple punishments for the same offense. *DiFrancesco*, 449 U.S. at 129, 101 S.Ct. at 433 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). ***We need not decide at what point, in the service of a defendant's legal sentence, a reasonable expectation of finality arises. We are certain, however, that the expectation has arisen, and jeopardy has attached, upon its completion***. See *Lundien*, 769 F.2d at 985 (implying that jeopardy attaches when sentence "fully served"). This conclusion is supported by the fact that we find no cases holding that finality is not accorded to a fully served legal sentence. Accordingly, we reaffirm the rule that increasing a legal sentence after it has been fully served violates the Double Jeopardy Clause. Cf. *United States v. Woodward*, 726 F.2d 1320, 1328 (9th Cir.1983) (post-*DiFrancesco* case reaffirming *Edick* without discussing *DiFrancesco*), rev'd on other grounds, 469 U.S. 105, 105 S.Ct. 611, 83 L.Ed.2d 518 (1985). (Emphasis supplied).

The government is essentially saying that there should be a revolving door installed at the trial court

level, and that resentencing can legally occur no matter how many times that a criminal defendant is punished by the imposition—*and complete service*—of a perfectly legal sentence. Or, in the words of *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018), the government would argue for—and welcome—a format where sentencing hearings could be treated as "dress rehearsals" until it secures the punishments it seeks. Even after the sentence has been completely served, the show is completely over, and the curtain has come down, the government will be able to re-write the script and change the ending under the position advanced by the government.

CONCLUSION

The Petition for a Writ of Certiorari in this case should be granted. The government's position that this case is in an interlocutory posture does not preclude review, as the Double Jeopardy Clause of the Fifth Amendment is directly implicated. Longstanding precedent indicates that this matter is ripe for review.

Further, certiorari is warranted on the issue of the government's waiver of its right to appeal. First, it cast its lot with the trial court and agreed that the Petitioner "… would be free to recommend any sentence authorized by the statute (0-10)…." As the trial court imposed a perfectly legal sentence, which the Petitioner has completely served, the government should not be permitted to avail itself of a resentencing, and review is warranted on this basis. Moreover, the split of authority within the circuits on the implicit waiver issue also warrants review.

Finally, certiorari should be granted on the Petitioner's double jeopardy and due process claims. The Petitioner

has completely served each and every aspect of a perfectly legal sentence. Therefore, exposing him to a resentencing violates the fundamental protections afforded to him by the Fifth Amendment to the United States Constitution.

Respectfully submitted.

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