NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

ADAN REYES-MARTINEZ
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 19-60156

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by ruling that Mr. Reyes-Martinez waived the right to appeal his sentence because of the Waiver of Appeal provision in his Plea Agreement.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On July 25, 2018, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Reyes-Martinez with failing to leave the United States after entry of a deportation order, in violation of 8 U.S.C. § 1253(a)(1)(A). The district court case number is 3:18cr143-HTW-FKB. Mr. Reyes-Martinez accepted full responsibility for his actions by pleading guilty to the charge.

The district court sentenced Mr. Reyes-Martinez to serve a 48-month prison term, even though the recommended sentence under the United States Sentencing Guidelines was only one month to seven months in prison. The court entered a Final Judgment on March 11, 2019. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Reyes-Martinez filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on March 13, 2019. The Fifth Circuit case number is 19-60156. On appeal, Mr. Reyes-Martinez argued that the district court ordered an unreasonably high above-Guidelines prison sentence.

Rather than file an Appellee's Brief with the Fifth Circuit, the prosecution filed a Motion to Dismiss or, in the Alternative, for Summary Affirmance. The prosecution argued that Mr. Reyes-Martinez waived his right to appeal his sentence by signing the Waiver of Appeal provision in his Plea Agreement. The

Fifth Circuit agreed with the prosecution's argument and dismissed the case without considering the merits of the sentencing arguments. The court entered the dismissal Order on October 7, 2019, and entered a Judgment on the same day. The Order and the Judgment are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on October 7, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be … deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V, Due Process Clause.

"No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Equal Protection Clause.[1]

[1] "This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schweiker v. Wilson*, 450 U.S. 221, 227 n.6, 101 S. Ct. 1074, 1079 n.6 (1981) (citations omitted).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Reyes-Martinez for failing to leave the United States after entry of a deportation order, in violation of 8 U.S.C. § 1253(a)(1)(A). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Reyes-Martinez arose from the laws of the United States of America.

B. Statement of material facts.

1. Mr. Reyes-Martinez's background.

Mr. Reyes-Martinez is a hardworking man that is determined to support his family. He was born in Mexico. He moved to the United States several years ago because he could not make enough money in Mexico to support his family. He has family in Pearl, Mississippi and Houston, Texas.

As admitted by Mr. Reyes-Martinez, he had a problem with alcohol abuse at one time. This problem resulted in four DUI convictions, the last of which was several years ago in 2011. On the positive side, the undisputed evidence is that Mr. Reyes-Martinez achieved sobriety eight years ago, and has been sober ever since. Illegal drug use or abuse has never been a problem for him.

Mr. Reyes-Martinez has a steady work history in the United States. He worked in the construction business as an independent contractor. During part of his time in the United States, he had permission from the government to work here.

As stated above, Mr. Reyes-Martinez moved to the United States to work and make enough money to support his family. He helped send his sister to school. One of his children had to quit school after Mr. Reyes-Martinez's arrest because she no longer had money to support herself. Further complicating the matter, doctors diagnosed one of his children with cancer in December of 2018.

2. Facts about the admitted crime.

8 U.S.C. § 1253 makes it a crime for an alien to stay in the United States after he has been judicially ordered to leave. A United States Immigration Judge ordered Mr. Reyes-Martinez's removal from the United States. The removal order was final on September 12, 2017. He failed to abide by the order because, as described above, Mr. Reyes-Martinez was determined to support his family. Nevertheless, he knew what he did was against the law and he admitted his wrongdoing at the plea hearing.

The crime had no victims. Mr. Reyes-Martinez did nothing to obstruct justice in relation to the crime. Also, the probation officer assigned to the case opined that Mr. Reyes-Martinez fully accepted responsibility for his actions.

3. Facts about the sentencing hearing.

The recommended sentence calculated under the Sentencing Guidelines was one month to seven months in prison. The absolute maximum sentence that the court could order under the statute was four years in prison. And the district court ordered the statutory maximum sentence – four years in prison.

The court's four-year statutory maximum prison sentence was against the recommendation of the prosecutor that was tasked to bring Mr. Reyes-Martinez to justice. The prosecution recommended a sentence within the lower fifty percent of the Guidelines range, which would be four months or less in prison. This recommendation was in accordance with the Plea Agreement entered between the prosecution and the defense.

The district court was apparently dissatisfied with the prosecutor's recommendation. It aggressively questioned the prosecutor about why she was standing behind the recommendation, even though she was contractually obligated to make the recommendation under the Plea Agreement. For example, the court questioned whether the prosecutor did a thorough enough investigation of the case before signing the Plea Agreement.[2]

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[2] In an unrelated case, another district judge in Southern District of Mississippi characterized similar questioning by the judge in this case as "cross examination." *See United States v. Donald Ray Quinn*, Criminal No. 3:92cr121-DPJ-FKB, in the United States District Court for the Southern District of Mississippi. The other judge stated:

After refusing to back down from her recommendation, the court stated, "what I'm concluding here is in view of your lockdown on your office's position, which excludes aggravating circumstances that are discovered after your plea agreement or could have been discovered even before, then the court then need not hear from you on these points." In other words, if the prosecutor was not going to recommend a non-Guidelines sentence, then the court was not interested in hearing any more from her.

Next, the court questioned the law enforcement case agent assigned to the case. The court asked, "do you or your office feel free to disagree with the plea offer?" The agent responded that he had authority to disagree if the circumstances warrant disagreement. Then he said, "I usually stand behind and agree with … my prosecutor and support their decisions." The case agent never suggested that the court should deviate from the Guidelines in this case.

> I do want to say for the record – I meant to say it early on – that I obviously read the order of recusal and, Ms. Stewart, your motion to try to get some context of what was going on.
>
> I started to read the first transcript. And as *I sort of got into what sounded like a cross-examination*, I decided to stop reading it. And this may be overly cautious, but I didn't want – *I didn't want there to be any suggestion that any bias for recusal by the prior judge might taint my review of the case so I elected not to read that*, I guess it was a 95-page transcript. I read your motion, but I tried to separate my thought process from that of the original judge. I did want to put that on the record.

Hearing Transcript, pp. 21-22 (emphasis added). The hearing transcript is available for this Court's review under docket entry number 31 in *Quinn*, Case No. 3:92cr121, in the Southern District of Mississippi.

The probation officer also offered an opinion about whether the court should order a non-Guidelines sentence. He stated: "The probation officer has not identified any factors that would warrant a departure from the applicable sentencing guideline range." He also stated: "The probation officer has not identified any factors under 18 U.S.C. § 3553(a) that may warrant a variance and imposition of a non-guidelines sentence."

At sentencing, the court offered only two reasons for ordering the significantly above-Guidelines sentence. First, it stated, "the court feels that that is a matter of aggravation here, that this defendant comes into this courtroom and lies about his abilities to speak English." Second, it stated, "the court feels that the circumstances of his prior record are understated[.]" Interestingly, in regard to the second reason, the court previously found that his criminal history "was taken into account, I'm sure, in the presentence investigation report and in the guidelines computation."

4. Facts about the Plea Agreement and the appeal to the Fifth Circuit.

Before accepting responsibility for his actions by pleading guilty to the subject charge, Mr. Reyes-Martinez and the prosecutor signed a Plea Agreement. The Plea Agreement contained a Waiver of Appeal provision that stated he waived

> the right to appeal the conviction and sentence imposed in this case, or the manner in which the sentence was imposed, on the grounds set forth in Title

> 18, United States Code, Section 3742, or on any grounds whatsoever, (except the defendant reserves the right to claim ineffective assistance of counsel).

Plea agreement, p. 5, ¶ 7.a.

The prosecution invoked the Waiver of Appeal provision when Mr. Reyes-Martinez filed his appeal to the Fifth Circuit. Agreeing with the prosecution's argument, the Fifth Circuit dismissed the appeal without considering the merits of Mr. Reyes-Martinez arguments. This Petition for Writ of Certiorari followed.

V. ARGUMENT

A. Introduction.

As described in detail in the previous subsection of this Petition, the Fifth Circuit never reached the merits of Mr. Reyes-Martinez's sentencing arguments because it ruled that they are barred from consideration by the Waiver of Appeal provision in the Plea Agreement. Because the Fifth Circuit never addressed the merits of Mr. Reyes-Martinez's arguments, the only issue presented in this Petition is whether the Fifth Circuit erred in its analyses and conclusions regarding the waiver of appeal issue.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." The Constitutional issue in Mr. Reyes-Martinez's case presents a compelling reason for this Court to grant certiorari.

The concurrence opinion in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992) emphasizes the unjust error that results when a defendant waives the right to appeal a sentence before the sentence is handed down. *Melancon* involved the same issue before the Court in Mr. Reyes-Martinez's case – whether a waiver of appeal provision in a plea agreement is enforceable. 972 F.2d at 567. On the prosecution's motion to dismiss the appeal, the *Melancon* Court held "that a

defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *Id.* at 568. Accordingly, the Court granted the prosecution's motion to dismiss Melancon's appeal. *Id.*

Judge Parker authored a lengthy and well-reasoned concurring opinion in *Melancon*. 972 F.2d at 570-80. He began by stating, "I concur specially because I cannot dissent. This panel is bound by the unpublished, *per curiam* opinion, *United States v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)]." *Id.* at 570. He went on to state "I write separately to express why I think the rule embraced by this Circuit in *Sierra* is illogical and mischievous – and to urge the full Court to examine the '*Sierra* rule,' and to reject it." *Id.*

Judge Parker reasoned that "[t]he rule articulated in *Sierra* is clearly unacceptable, even unconstitutional policy: the '*Sierra* rule' manipulates the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law." *Melancon*, 972 F.2d at 571. "I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent." *Id.*

Judge Parker acknowledged that waivers can be valid in a number of scenarios in criminal cases. However,

> [i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (citations omitted). But, "[t]he situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence." *Id.* at 572. "*This right cannot come into existence until after the judge pronounces sentence*; it is only then that the defendant knows what errors the district court has made – i.e., what errors exist to be appealed, or waived." *Id.* (emphasis added; citation omitted).

For the reasons thoughtfully articulated by Judge Parker, this Court should find that Mr. Reyes-Martinez's waiver of the right to appeal was made unknowingly.

Judge Parker's attack on the majority's opinion also extends to constitutional concerns. He opines that the rule adopted by the majority "reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty." *Melancon*, 972 F.2d at 577.

> Unconstitutional conditions occur "when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from governmental interference. The

> 'exchange' thus has two components: the conditioned government *benefit* on the one hand and the affected constitutional *right* on the other."

Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.R. 1415, 1421-1422 (1989) (emphasis in original)). "With a '*Sierra* Waiver,' the government grants to the criminal defendant the *benefit* of a plea agreement only on the *condition* that the defendant accept the boot-strapped abdication of his or her right to appeal." *Melancon*, 972 F.2d at 578 (emphasis in original). This is at least unacceptable, even if the government may withhold the benefit (i.e., the plea agreement) altogether." *Id.* (citation omitted).

Judge Parker recognized that in order to create the constitutional issue described in the previous paragraph of this Brief, there must be a constitutional right. "The right to appeal is a statutory right, not a constitutional right." *Melancon*, 972 F.2d at 577 (citation omitted). However,

> [e]ven if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.

Id. (citing *Griffin v. Illinois*, 351 U.S. 12, (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is established, due process and equal protection bar the government from infringing on the right in an improper manner.

For the reasons stated in *Melancon*'s concurring opinion, this Court should grant certiorari and find that under the Due Process and Equal Protection Clauses of the United States Constitution, the subject waiver of appeal provision unconstitutionally infringes on Mr. Reyes-Martinez's statutory right to appeal his sentence.

VI. CONCLUSION

Based on the arguments presented above, Mr. Reyes-Martinez asks the Court to grant his Petition for Writ of Certiorari in this case.

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CERTIFICATE OF SERVICE

I, Thomas C. Turner, appointed under the Criminal Justice Act, certify that today, December 19, 2020, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 7772 9594 7111, addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.

Thomas C. Turner

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