

No. _____

**IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA**

October Term, 2019

VANCE EDWARD INGRAM, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS A DEFEDANT'S RIGHT TO DUE PROCESS OF LAW VIOLATED WHEN THE GOVERNMENT REQUIRES AN APPEAL WAIVER AS PART OF A PLEA AGREEMENT?

LIST OF PARTIES

All parties to this case appear in the caption of cases on the cover page.

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The Petitioner, Vance Edward Ingram, III, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit issued on September 25, 2019, dismissing Petitioner's appeal, finding that he had previously waived his right to appeal his sentence.

OPINIONS BELOW

A Panel of the Fourth Circuit Court of Appeals dismissed Petitioner's appeal by Order filed September 25, 2019, a copy of which appears as Appendix A.

JURISDICTION

This petition is filed within 90 days of the decision of the Court of Appeals and is therefore timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, no person in any criminal case shall be “deprived of life, liberty or property, without due process of law;...”

STATEMENT OF THE CASE

While Petitioner was on supervised release, his probation officer filed a petition for a warrant alleging a violation of his supervised release on October 23, 2017. On May 1, 2018, an amended petition was filed alleging yet a third violation of the terms of his supervised release. On May 29, 2018, in a separate case, Petitioner was indicted in a three-count indictment with each count alleging a violation of Title 21 U.S.C. § 841(a)(1) for distribution of a mixture and substance containing a detectable amount of cocaine base. Pursuant to a plea agreement, Petitioner entered a plea of guilty to count three of the indictment on August 7, 2018.

Petitioner’s presentence investigation report for the new charge set his guideline range at 30-37 months. The presentence report specifically indicated that the probation officer had not identified any factors that would warrant either a departure or a variance from the applicable sentencing guideline range. The supplement to the petition for the warrant for revocation of Petitioner’s supervised release set out that Petitioner’s original conviction was a Class A felony. Accordingly, he faced a statutory maximum of five years in prison for a violation of supervised release under 18 U.S.C. § 3583(e)(3). The supplement further indicated that the guideline range upon revocation was 51-63 months, reduced by the statutory maximum to 51-60 months. The supplement went on to recommend that the Petitioner’s supervised release be revoked and that he be sentenced to a 60-month term of incarceration.

On November 2, 2018, Petitioner filed a sentencing memorandum relating to the

supervised release violation case arguing that his original sentence would have been calculated as a Class C felony based on changes in the law occurring since Petitioner was originally prosecuted in 2001 and that such reclassification would limit Petitioner's exposure to a two-year maximum sentence of imprisonment rather than five.

Petitioner appeared for sentencing on the new charge and his supervised release violation hearing on November 29, 2018. At that time, the court expressed concerns regarding the issues in the case and directed the matter be continued until December 6, 2018. At the December 6 hearing, the court effectively agreed with Petitioner's position regarding his supervised release case and sentenced him to two years imprisonment for having violated his supervised release. The court then turned to the new case, found grounds for an upward variance and imposed a sentence of 63 months, significantly above the guideline range set out in his presentence report.

STATEMENT OF THE FACTS

In February 2018, the Greensboro DEA and the High Point Police Department initiated and investigation targeting Petitioner. The detectives interviewed a confidential informant who indicated that Petitioner sold crack cocaine in High Point, North Carolina. On February 20, 22, and 27, the officers used the confidential informant to make undercover purchases of crack cocaine from Petitioner in High Point at varying locations. On each of the three occasions, the informant purchased 3.4 grams, 14.65 grams and 4.04 grams of what they suspected was crack cocaine. Petitioner was paid for these transactions in the amounts of \$300.00, \$1,200.00 and \$300.00. On April 4, 2018, Petitioner was arrested on state charges of possession with intent to sale and deliver cocaine. Upon arrest, Petitioner made a statement admitting his involvement in the offenses.

These offenses occurred while the Petitioner was still on supervised release from his

January 4, 2002, conviction for possession with intent to distribute cocaine base. In October 2017, Petitioner's probation officer filed a petition for a warrant alleging a violation of a supervised release alleging two violations. The first violation alleged that Petitioner had tested positive for marijuana use on five occasions. The second violation alleged that Petitioner was unsuccessfully discharged from a drug treatment program due to continued marijuana use. On May 1, 2018, the petition for warrant alleging a violation of supervised release was amended, adding a third violation which related to the new criminal charges described above for Petitioner's sale of controlled substances in February 2018.

REASONS FOR GRANTING THE WRIT

As part of the plea agreement in this case, Petitioner was required to waive his appellate rights. While the appeal waiver allowed Petitioner to appeal on the basis of ineffective assistance of counsel or prosecutorial misconduct, the waiver specifically required Petitioner to waive his right to appeal the sentence imposed. He also waived his right to contest his conviction or sentence in post-conviction proceedings, including proceedings under Title 28 U.S.C. § 2255. While Petitioner's guideline range for his new charge was 30-37 months, the court varied upwards and imposed a 63-month sentence, well above his guideline range. Petitioner sought to challenge this sentence by right of appeal, arguing that the court's stated reason for the upward variance was pretextual, and that the actual reason was to compensate for the court's inability to punish Petitioner more severely for violating his supervised release. The government moved to dismiss Petitioner's appeal. That motion was allowed by the Fourth Circuit based on Petitioner's appeal waiver.

Petitioner asserts that appeal waivers violate his right to due process of law for a variety of reasons. When considering appeal waivers, other courts have found them to be problematic for

a variety of reasons. First, as noted in *U.S. v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring specially), an appeal waiver can never be knowingly and intelligently entered into.

As an initial matter, 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 is yet to be imposed at the time he or she enters into the plea agreement; such a “waiver” is inherently uninformed and unintelligent.

U.S. v. Melancon, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring specially).

Further, appeal waivers have been found to undermine the very purpose of the sentencing guidelines:

The very purpose of the Sentencing Guidelines was to assume more uniformity in criminal sentencing. That was the intent of Congress and the intent of the Guidelines. See 28 U.S.C. §§ 991(b)(1)(B), 994(f); United States Sentencing Commission, Guidelines Manual, Chapter One – Introduction, Part A at 2 (Nov. 1997); S. Rep. No. 225 at 150-51 (1984), reprinted in U.S.C.C.A.N. 3182, 3334; *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996). What the government seeks to do through the appeal waiver provision is inconsistent with the goals and intent of Congress and the goals and intent of the Sentencing Commission. It will insulate from appellate review erroneous factual findings, interpretations and applications of the Guidelines by trial judges and thus, ultimately, it will undermine uniformity. The integrity of the system depends on the ability of appellate courts to correct sentencing errors, but the waiver provision at issue here inevitably will undermine the important role of the courts of appeals to correct errors in sentencing, a role that Congress has specifically set out for them.

U.S. v. Raynor, 989 F. Supp. 43, 48 (D.D.C. 1997).

Additionally, other courts have found that the power of the government to extract appeal waivers in the plea bargain process is inherently unfair to defendants and results in an unconstitutional shift of the power to the prosecutor’s side.

Finally, the Court is unwilling to accept the specific waiver of appeal rights provision offered to the defendant because the same plea agreement does not limit the government’s right to appeal a sentence. This glaring inequality strengthens the conclusion that this kind of plea agreement is a

contract of adhesion. As a practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought and thus the ultimate sentence to be imposed under the guidelines scheme – is up to the prosecution. See *United States v. Roberts*, 726 F. Supp. at 1363. To vest in the prosecutor also the power to require the waiver of appeal rights is to add that much more constitutional weight to the prosecutor’s side of the balance.

U.S. v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997).

As in *Johnson*, the appeal waiver in this case only limits Petitioner’s right to appeal and not the government’s right to appeal. Accordingly, Petitioner contends that the plea agreement he entered into was a contract of adhesion. Petitioner asserts that when defendants enter into plea agreements that amount to contracts of adhesion, which cannot by definition be knowingly and intelligently entered into, it necessarily violates the defendants’ due process rights as guaranteed by the Fifth Amendment to the United States Constitution.

This Court should use this case as a vehicle to address the government’s inherently unfair use of appeal waivers as part of the plea negotiation process. Appeal waivers have become commonplace in various jurisdictions across the country. The time has come for this Court to determine the constitutionality of appeal waivers.

CONCLUSION

For reasons set forth above, Petitioner requests this Court grant a writ of certiorari to review the United States Court of Appeals for the Fourth Circuit judgment below to answer these important questions of federal law.

Respectfully submitted this the 17th day of December 2019.

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APPENDIX A

Fourth Circuit Court of Appeals Order filed on September 25, 2019, Dismissing Petitioner's Appeal