NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2019

RONALD DAMON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an appellate and post-conviction waiver in a plea agreement barring challenges to the "sentence imposed" precludes an appeal of the denial of a motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1)?

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Petitioner Ronald Damon respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 6, 2019 in the captioned matter.

OPINION BELOW

The decision of the United States Court of Appeals for the Third Circuit was memorialized in a published opinion: *United States v. Damon*, 933 F.3d 269 (3d Cir. 2019). The opinion is attached at Appendix 1-6 ("App.") The Third Circuit's order denying a panel rehearing and rehearing en banc is unpublished and attached at App. 7-8.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on June 22, 2018. App. 9-15. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and entered judgment on August 6, 2019. App. 1-6. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding, namely, Petitioner, Ronald Damon, and respondent, the United States.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be … deprived of life, liberty, or property, without due process of law ….

STATEMENT OF THE CASE

On August 6, 2019, a panel of the United States Court of Appeals for the Third Circuit issued a precedential opinion affirming the District Court's determination that Mr. Damon's motion for early termination of supervised release, pursuant to 18 U.S.C. § 3583(e)(1), was barred by the terms of the appellate and post-conviction waiver in his plea agreement. App. at 1-6. In reaching that determination, the Third Circuit concluded that a § 3583(e)(1) motion "challenges" the original sentence imposed "by seeking to shorten the term" of supervised release. *Id.* at 5. It rejected Damon's argument that a § 3583(e)(1) motion

constitutes a post-sentence modification, rather than a challenge to the original sentence imposed, holding that such a characterization was "unsupported by the text of the plea agreement and by any sound understanding of what is included in a sentence." *Id.*

The Third Circuit's construction of the appellate and post-conviction waiver in Damon's plea agreement was not only inconsistent with Third Circuit precedent, including *United States v. Davenport*, 775 F.3d 605, 609 (3d Cir. 2015) and *United States v. Nolan–Cooper,* 155 F.3d 221, 236 (3d Cir. 1998), but also with the Due Process Clause of the Fifth Amendment. The Due Process Clause ensures specific performance of the government's promises, and no waivers beyond those expressly agreed to, "*as reasonably understood by the defendant* ...." *Davenport*, 775 F.3d at 609 (emphasis added); *accord, United States v. Bogusz*, 43 F.3d 82, 94 (3d Cir. 1994). Plea agreements are not interpreted in a "rigid and literal" way, *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000), but rather in accordance with a defendant's reasonable understanding. *Nolan-Cooper*, 155 F.3d at 236.

In Mr. Damon's case, rather than evaluating the terms of Damon's plea agreement in accordance with his reasonable understanding, the Third Circuit instead construed the language of the plea agreement so literally that the purpose of the plea agreement was frustrated in violation of both the Fifth Amendment's Due Process Clause and circuit precedent.

1. Proceedings Below

a. Motion for Early Termination of Supervised Release

In June 2006, Petitioner Ronald Damon pled guilty to possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). His plea was pursuant to a negotiated plea agreement and contained an appeal and post-conviction waiver. The language of the waiver provided, in pertinent part, that Damon

> voluntarily waives[] the right to file any appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255, which challenges the sentence imposed by the sentencing court if that sentence falls within or below the Guidelines range that results from the agreed total Guidelines offense level of 33.

App. at 2.

At sentencing, Damon faced a Guidelines range of 262 to 327 months, based on a total offense level 34 and criminal history category VI. The district court departed from this range based on the government's motion under U.S.S.G. §5K1.1 for Damon's substantial assistance and imposed a sentence of 144 months imprisonment and 5 years (60 months) supervised release. Damon was released from Bureau of Prisons' custody and began his term of supervised release on May 22, 2015.

In February 2018, after serving 32 months of his 60-month supervised release term, Damon moved for early termination of supervised release under 18 U.S.C. § 3583(e)(1). The government opposed Damon's motion, arguing Damon's appeal waiver barred his ability to file such a motion. In a Letter Order dated June

22, 2018, the district court denied Damon's motion on the basis of the appeal waiver. App. at 9-15.

b. The Opinion of the Third Circuit Court of Appeals

Mr. Damon appealed to the Third Circuit Court of Appeals. On appeal, the Third Circuit affirmed the District Court's determination that Damon's motion for early termination of supervised release was barred by the terms of the appellate and post-conviction waiver in his plea agreement. App. at 1-6. In reaching that determination, the Third Circuit concluded that a § 3583(e)(1) motion "challenges" the original sentence imposed "by seeking to shorten the term" of supervised release. *Id.* at 5. It rejected Damon's argument that a § 3583(e)(1) motion constitutes a post-sentence modification, rather than a challenge to the original sentence imposed, holding that such a characterization was "unsupported by the text of the plea agreement and by any sound understanding of what is included in a sentence." *Id.*

Damon made a subsequent motion for panel rehearing and rehearing en banc. This motion was summarily denied on September 5, 2019. App. at 7-8.

REASONS FOR GRANTING THE PETITION

I. An appellate and post-conviction waiver in a plea agreement barring challenges to the "sentence imposed" should not preclude an appeal of the denial of a motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1).

A waiver of appeal and post-conviction rights is enforceable only if the issues on appeal fall within the scope of the waiver, the defendant knowingly and voluntarily agreed to the waiver, and enforcing the waiver would not work a miscarriage of justice. *United States v. Mabry*, 536 F.3d 231, 237 (3d Cir. 2008); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001).

As a provision of the plea agreement, the appeal waiver must be strictly construed in favor of the defendant. *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989). Even if there were some question about the scope of the waiver's coverage, any doubt would have to be resolved in favor of the defendant, *United States v. Erwin*, 765 F.3d 219, 228–29 (3d Cir. 2014), whose reasonable interpretation must prevail. *See also United States v Williams*, 510 F.3d 416, 422 (3d Cir. 2007).

Moreover, Fifth Amendment due process ensures specific performance of the government's promises, and no waivers beyond those expressly agreed to, "*as reasonably understood by the defendant* ...." *Davenport*, 775 F.3d at 609 (emphasis added); *accord, Bogusz*, 43 F.3d at 94. Plea agreements are not interpreted in a "rigid and literal" way, *Baird*, 218 F.3d at 229, but rather in accordance with a defendant's reasonable understanding. *Nolan-Cooper*, 155 F.3d at 236.

As its first step in determining whether Damon's appeal and post-conviction waiver barred his motion for early termination of supervised release, the Third Circuit engaged in an extensive discussion of the meaning of the term "sentence," ultimately holding that "sentence" encompasses Damon's term of supervised release. App. at 4-5. Damon never contended otherwise. Indeed, in his Opening Brief, Damon explicitly agreed that his waiver barred an appeal of any component of punishment imposed at the original sentencing proceeding, including the terms and conditions of supervised release. *See United States v. Wilson*, 707 F.3d 412, 414 (3d Cir. 2013) (citing *United States v. Goodson*, 544 F.3d 529, 538 (3d Cir. 2008)).

The crux of Damon's appeal was whether his motion for early termination constituted a challenge to the sentence imposed, as the government contended, or whether it constituted a separate and distinct post-sentence modification. App. at 5. The Third Circuit concluded that a § 3583(e)(1) motion "challenges" the original sentence imposed "by seeking to shorten the term" of supervised release. *Id.* It rejected Damon's position that a § 3583(e)(1) motion constitutes a post-sentence modification, rather than a challenge to the original sentence imposed, holding that such a characterization was "unsupported by the text of the plea agreement and by any sound understanding of what is included in a sentence." *Id.*

While the Third Circuit considered the literal text of plea agreement and Damon's "understanding of what is included in a sentence," App. at 4-5, neither of which Damon disputed, it never considered Damon's reasonable understanding of whether the waiver prohibited a motion for early termination of supervised release

under § 3583(e)(1). Properly understood, the waiver applies only to challenges to the sentence as originally imposed, not to statutory remedies for amelioration of the sentence based on subsequent developments.

The Third Circuit ignored the fact that Damon's early termination motion relied on subsequent factual developments and did not seek to alter or challenge either the conviction or the sentence itself. Damon's waiver, properly understood, applied only to challenges to the conviction or original sentence of the sort that could otherwise be presented by a direct appeal or § 2255 motion. In other words, a post-sentence motion would be barred by the agreement only if it relied on the record at it existed at the time of sentencing and/or if it sought to challenge the legality of the supervised release condition itself. Damon's motion did neither.

A. The Third Circuit's rigidly literal construction of the appellate and post-conviction waiver in Petitioner's plea agreement was inconsistent with the Fifth Amendment Due Process Clause and circuit precedent.

A motion to terminate supervision does not propose a change in or correction of the sentence; it seeks to trigger a *feature* of the sentence as originally imposed. The post-incarceration supervision in this case would continue for five years *unless earlier terminated* pursuant to 18 U.S.C. § 3583(e), just as the term of imprisonment would run for 144 months *unless*, for example, shortened as a reward for successful completion of drug treatment under 18 U.S.C. § 3621(e), or on account of the defendant's good conduct in prison under 18 U.S.C. § 3624(b). A motion suggesting early termination is thus not an appeal or collateral attack on the sentence any more than would be a request for the benefit of § 3621(e) or § 3624(b),

when earned by post-sentencing behavior.

By the same token, even where defendants enter into agreements that include appellate and collateral attack waivers, they remain eligible to receive the benefit of sentence reductions due to retroactive changes in the guidelines pursuant to 18 U.S.C. § 3582(c)(2). *See United States v. Isaacs*, 301 Fed.Appx. 183, 186–87 (3d Cir. 2008) (not precedential); *accord, United States v. Williams*, 536 Fed.Appx. 169, 172 n.3 (3d Cir. 2013) (not precedential) (general appeal and collateral attack waiver "would probably not bar the filing of (and an appeal of the denial of) a § 3582(c)(2) motion") (citing cases).

Similarly, no one would argue that a defendant who pleads guilty under an agreement that includes appellate and collateral attack waivers may not later file a motion for reduction in sentence based on "extraordinary circumstances" (commonly called "compassionate release") under 18 U.S.C. § 3583(c)(1)(A), if subsequent developments were to warrant that filing. A properly filed, post-incarceration motion under § 3583(e)(1) to terminate supervised release, based on post-judgment facts about the defendant's personal situation and the course of supervision, and relying on the AO policy encouraging early termination under such circumstances, is likewise outside the scope of the defendant's appellate waiver.

For this simple reason, neither Damon's motion for early termination nor the appeal of the district court's denial of that motion constituted a challenge to the conviction or sentence imposed, as barred Damon's plea agreement. Even less did those filings come within a reasonable understanding of the waiver as explained by

the court during the guilty plea hearing. *See e.g., United States v. Saferstein*, 673 F.3d 237, 242–43 (3d Cir. 2012). The proceedings below were not an attack on a sentence imposed simply because Damon was unhappy with it, nor did they constitute a habeas corpus petition, under 28 U.S.C. § 2255, raising fundamental issues about the legality of the conviction or sentence.

The appellate waiver would, of course, have barred Damon from challenging either the initial duration of the term of supervised release (complaining that the judge imposed a five-year term rather than three, for example) or the court's exercise of discretion to impose any of the terms of supervision that were not facially illegal. *United States v. Goodson*, 544 F.3d 529, 537–38 (3d Cir. 2008) ("[T]he duration, as well as the conditions of supervised release are components of a sentence. By waiving his right to take a direct appeal of his sentence, Goodson waived his right to challenge the conditions of his supervised release, which were by definition a part of his sentence."). In *Goodson*, the defendant appealed directly from the judgment of sentence, seeking to challenge one of the terms of supervision that the court had imposed. Such a challenge would fall within the reasonable understanding of an "appeal" of the "sentence." *Goodson*, 529 F.3d at 538.

The proceedings below, by contrast, were not a challenge of the sentence in that ordinary sense. Rather, the proceedings were more akin to the appeal that the Third Circuit held in *Wilson*, 707 F.3d at 414-416, not to be barred by an appellate waiver. In that case, the defendant appealed from an order entered, as here, *after* his release from prison and during the term of supervision, adding a *new* special

condition (mental health). The Third Circuit rejected the government's argument for dismissal and held the appeal allowable. *Id.* The key to the appeal's being permissible here, as in *Wilson*, notwithstanding the appellate waiver in the plea agreement, was that it relied on new, post-judgment facts. *See also United States v. Salazar*, 693 Fed.Appx. 565, 566 (9th Cir. 2017) (declining to enforce appeal waiver in plea agreement to bar defendant's appeal of denial of motion for early termination of supervised release); *cf. United States v. Stine*, 646 F.2d 839 (3d Cir. 1981) (failure of defendant to challenge condition of probation on direct appeal waives question of validity of that originally imposed condition as defense to later revocation proceeding).

The Sixth Circuit drew the correct distinction when determining whether a district court had the discretionary authority to terminate a term of supervised release after the completion of one year, under § 3583(e)(1), where the defendant was sentenced to a mandatory term of three years' supervised release under 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 3583(a). *See United States v. Spinelle*, 41 F.3d 1056, 1060 (6th Cir. 1994). The court rejected the government's attempts to conflate the sentencing and post-sentencing modification phases into a single phase, finding that "[i]n the mind of Congress," the two phases were different and distinct. *Id.* 1059–60. So viewed, "even though the district court had to sentence [the defendant initially] to a three-year term of supervised release, it still had the subsequent discretionary authority to terminate the term and discharge [the defendant] after one year of [supervision]." *Id.* at 1060.

The Third Circuit's decision in denying Damon's appeal and enforcing the waiver perpetuates the same misapplication of *Goodson* by a different panel of the Third Circuit in *United States v. Laine*, 404 Fed. Appx. 571 (3d Cir. 2010) (*per curiam*). The *Laine* panel also incorrectly applied *Goodson* to bar a defendant's statutorily-authorized, post-incarceration motion for early termination of supervised release after concluding that the appeal was a challenge to the duration of the defendant's term of supervised release. *Id.* at 573.

The Third Circuit also cited with favor the Fifth Circuit's *per curiam* decision in *United States v. Scallon*, 683 F.3d 680 (5th Cir. 2012)[1]. App. at 5. But the *Scallon* decision is inapposite because the defendant in *Scallon* was appealing the denial of a motion to modify the terms of his supervision, under § 3583(e)(2), before he had even begun his term of supervision. *Id.* at 683-84. Scallon's appeal directly challenged the conditions of supervised release as imposed at the time of his original judgment. He relied on no subsequent developments and no new facts in challenging these conditions, but merely rehashed the same arguments made when the conditions were originally imposed. *Id.*

As Damon illustrated above, however, his appeal did not challenge the duration of his supervised release or any of the conditions, as originally imposed, on a basis that could have been advanced in a direct appeal (had such an appeal not be waived). Instead, he challenged the later administration of that term of supervision.

[1] The Third Circuit's opinion cites *Scallon* as a Sixth Circuit opinion, but it is actually a Fifth Circuit opinion originating from the Eastern District of Texas.

The simple fact is that Damon's motion did not challenge his sentence as it was imposed at the time of the original judgment. Nor did he seek to advance an appeal of the length of the sentence chosen by the district court. These challenges would have been barred by the appellate waiver. Instead, he accepted the sentence imposed, served it as imposed, and only years later sought to exercise an option that was always available at a later time under the sentence as imposed. That is, he exercised the statutory right to request early termination of supervision that was no longer serving the purposes of sentencing, exactly as intended by Congress and recommended by the AO. As in *Wilson*, 707 F.3d at 416, such appeals arising from proceedings in the subsequent administration of the term of supervised release are not barred by an appellate waiver.

B. The Third Circuit's interpretation of "sentence imposed" creates a circuit split with the Fourth Circuit.

The Third Circuit's decision in Mr. Damon's case produced a circuit split with the Fourth Circuit because it conflated two distinct phases of a criminal proceeding: the sentencing phase and the post-sentencing modification stage. *See United States v. Spinelle*, 41 F.3d 1056 (6th Cir. 1994). In *Spinelle*, the Sixth Circuit clearly drew the distinction when determining whether a district court had the discretionary authority to terminate a term of supervised release after the completion of one year, under § 3583(e)(1), where the defendant was sentenced to a mandatory term of 3 years supervised release under 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 3583(a). *Id.* at 1060. The court rejected the government's attempts to conflate the sentencing and post-sentencing modification phases into a single phase, finding that "[i]n the

mind of Congress," the two phases were different and distinct. *Id.* at 1059-60. So viewed, "even though the district court had to sentence [the defendant] to a three-year term of supervised release, it still had the subsequent discretionary authority to terminate the term and discharge [the defendant] after one year of completion." *Id.* at 1060.

A strong analogy can also be drawn between motions for early termination of supervised release and sentence reduction motions under 18 U.S.C. § 3582(c)(2). Numerous court have held that a waiver of the right to "appeal any aspect of the sentence" does not encompass the right to appeal the denial of a § 3582(c)(2) motion. *See United States v. Tercero*, 734 F.3d 979, 981 (9th Cir. 2013); *see also United States v. Cooley*, 590 F.3d 293, 296-97 (5th Cir. 2009) (concluding that a general appeal waiver did not prevent a defendant from seeking § 3582(c)(2) sentence reduction); *United States v. Woods*, 581 F.3d 531, 536 (7th Cir. 2009) (same). A § 3582(c)(2) motion does not contest the sentence imposed, but rather, brings a post-judgment change in the Guidelines to the court's attention that could allow for a sentence reduction. *Cooley*, 590 F.3d at 297. Thus, "a motion for sentence modification under 18 U.S.C. § 3582(c)(2) is not properly considered an 'appeal' or 'collateral proceeding' under the terms of a general waiver of appeal...." Id.

Like a sentence reduction motion under § 3582(c)(2), a motion for early termination does not contest the sentence imposed, but rather, brings post-judgment information to the court's attention that could allow for a reduction in the term of supervision. Early termination requires one year served on supervised

release and a finding that termination serves the interests of justice. *See* 18 U.S.C. § 3583(e)(1). Damon moved for early termination of supervised release nearly three years into his term of supervision, when he had a stable family, stable employment, and had successfully transitioned into pro-social community life. The judiciary has formulated and reformulated specific guidance on early termination motions as part of a sound probation policy. Since Damon was sentenced in 2006, he had never moved to challenge his term of supervised release. His 2018 motion was not subterfuge to improperly have his sentence modified. It was not part of the sentencing phase, but rather the beginning of a separate and distinct chronological phase of post-sentence modification. *See Spinelle*, 41 F.3d at 1060 (sentencing phase is different than post-sentence modification phase). The Third Circuit's ruling to the contrary creates a split between it and the Fourth Circuit on this issue.

C. The question presented is important, and this case presents an ideal vehicle to resolve it.

Whether an appellate and post-conviction waiver in a plea agreement barring challenges to the "sentence imposed" precludes an appeal of the denial of a motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1) is an important question that implicates due process concerns. The issue was fully briefed at both the district court and appellate level. Accordingly, Damon's case presents an excellent vehicle for this Court to resolve this important question.

CONCLUSION

For the foregoing reasons, Petitioner Ronald Damon respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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