No.

In the

Supreme Court of the United States

JOSE ANTONIO GARCIA, Petitioner

v.

UNITED STATES, Respondent

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

Petition for Writ of Certiorari

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Question Presented For Review

I. Whether Mr. Garcia's admission to a violation of supervised release in this matter violated due process where the district court failed to clearly inform Mr. Garcia that it was rejecting his disposition agreement with the Government and to give him the opportunity to withdraw his admission and simply stated, "I don't buy that. Can't handle that. We don't do that. Still want to go forward?"

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United States v. Jose Antonio Garcia, No. 19-10268 (9th Cir. April 14, 2020) (unpublished).

Statement of the Basis for Jurisdiction

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal was entered on April 14, 2020. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Rule 29.4, service has been made on the Solicitor General.

Constitutional and Federal Provisions Involved

U.S. CONST. amend. 5 provides in pertinent part: "… nor shall any person be … deprived of life, liberty, or property, without due process of law …"

Statement of the Case

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with a federal crime. The Ninth Circuit Court of Appeals had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district

court on August 5, 2019. This direct appeal followed an admission of a violation of conditions of supervised release and sentence of incarceration with further supervision in the district court.

Mr. Garcia admitted this violation of supervised release pursuant to an agreement with the Government. The District Court accepted his admission and then sentenced him, without telling him, in terms that anyone in the courtroom understood, that the Court was rejecting the disposition agreement and without telling him that he could withdraw his admission and ask for a hearing on the violation instead.

At this point, Mr. Garcia has completed his sentence of incarceration. He cannot conceivably be returned to the status quo. Specific performance is the only viable remedy. It would be unjust to simply vacate the admission since since Mr. Garcia has already performed his side of the bargain. Due Process and fundamental fairness demand that the Government be compelled to adhere to the agreement as well.

Argument

On June 24, 2019, in exchange for his admission to allegation A(1) in the Petition to Revoke (unlawful use of a controlled substance), Mr. Garcia entered into a revocation disposition agreement with the Government that provided for a sentencing range of 5-8 months incarceration with no

additional term of supervised release. (EOR 7.) On July 11, 2019, the district court accepted Mr. Garcia's admission. (CR 108; EOR 48.)

On August 5, 2019, however, and without rejecting the disposition agreement in terms that anyone apparently understood as such, the district court ordered Mr. Garcia incarcerated for a term of six months with a term of 36 months of supervised release to follow.

At the August 5, 2019, disposition hearing, the district court stated:

> THE COURT: You have an agreement with the Government?
> THE DEFENDANT: Excuse me?
>
> THE COURT: You have an agreement with the Government?
> THE DEFENDANT: Yes.
>
> THE COURT: That agreement says no further supervised release to follow.
> THE DEFENDANT: Correct.
>
> THE COURT: I don't buy that. Can't handle that. We don't do that. Still want to go forward?
> MR. SAGAR: If I could have a moment, Your Honor?
> THE COURT: Sure.
>
> (A discussion was had off the record between defense counsel and the defendant.)
>
> MR. SAGAR: We're going to go forward, Your Honor.
> THE COURT: Is that correct, Mr. Garcia?
> THE DEFENDANT: Yes.
>
> THE COURT: Your attorney probably told you that changing your mind today wouldn't make any difference; right?
> THE DEFENDANT: No.

> THE COURT: You're still in the same place you are either way.
> THE DEFENDANT: Right.
>
> THE COURT: You admitted to being in violation of yours upervised release?
> THE DEFENDANT: Correct.
>
> THE COURT: You've talked to your attorney; he's answered your questions. Correct?
> THE DEFENDANT: Yes.

(RT August 5, 2019, pp.2-3; EOR 21-22.) That exchange might have been clear to the district court, but it was not clear to anybody else. By the end of the hearing, however, the Government, and apparently defense counsel, thought that the agreement had instead been modified:

> THE COURT: Mr. Jette?
> MR. JETTE: Yes, Your Honor.
> Since we've modified the agreement, the Government is going to be okay with a five- or six-month term. I agree with Mr. Sagar that, since we modified, I was going to ask for eight months because there was no follow-up supervised release conditions to follow, but since we are, the Government's okay with a five- to six-month range, Your Honor.

(RT August 5, 2019, p.8; EOR 27.) The court, however, thought that the agreement had been rejected:

> THE COURT: Since I rejected the plea agreement, he has a right to appeal. You must do so within 14 days. If you can't afford an attorney or a transcript, we'll provide them for you free of charge. Thank you.
> THE DEFENDANT: Thank you. Have a good day.

(RT August 5, 2019, p.10; EOR 29.)

Ordinarily, when a district court is contemplating rejecting an agreement, the court will so inform the parties and give both parties a chance to explain to the court why it should accept the agreement. Maybe there were some good points to be made in support of the agreement that the parties had worked out.

And, ordinarily, when a district court rejects an agreement, it tells the defendant that it is rejecting the agreement and it tells the defendant that they may withdraw their admission. In this case, however, the district court just told Mr. Garcia that it was going to violate the agreement and that Mr. Garcia had the choice of going forward or not. The District Court's shorthand explanation might have made sense to an attorney, although neither attorney present characterized the proceeding as a rejection of the agreement. But there is no reason that the District Court's shorthand explanation would have been comprehensible to Mr. Garcia as either rejecting what was an otherwise valid contractual offer or as giving Mr. Garcia any other option than either going forward or staying right where he was.

Mr. Garcia made an admission pursuant to an agreement and has performed his side of the proposed bargain. There is no way to return Mr. Garcia to his original position. See, *Brown v. Poole*, 337 F.3d 1155 (9th Cir. 2003).

> "Brown's due process rights conferred by the federal constitution allow her to enforce the terms of the plea agreement.
>
> . . .
>
> "Brown cannot conceivably be returned to the status quo ante. That leaves specific performance as the only viable remedy. *See United States ex rel. Baker v. Finkbeiner*, 551 F.2d 180, 184 (7th Cir. 1977) (finding 'under circumstances of this case it would be unjust to simply vacate the guilty plea, which theoretically would allow the state to reindict [defendant]. Since he has already performed his side of the bargain, fundamental fairness demands that the state be compelled to adhere to the agreement as well. [Citing *Santobello*.] Accordingly, [defendant] should be released from custody.'); *United States ex rel. Ferris v. Finkbeiner*, 551 F.2d 185, 187 (7th Cir. 1977) (*cert. denied*, 435 U.S. 932, 55 L. Ed. 2d 530, 98 S. Ct. 1508 (1978)) (finding since defendant "has substantially begun performing his side of the bargain, it would not be fair to vacate the plea and require him to go through the procedure anew. Fundamental fairness can be had by limiting his term of custody to that portion of the sentence which comports with the bargain made.")."

Brown v. Poole, 337 F.3d 1155, 1159-62 (9th Cir. 2003). See also, *Cuero v. Cate*, 827 F.3d 879, 891 (9th Cir. 2016) ("Moreover, that the state court permitted Cuero to withdraw his plea did not 'repair the harm' caused by the prosecutor's breach. To the contrary: It exposed Cuero to the risk of going to trial and receiving an indeterminate 64 years to life sentence."); *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.")

Mr. Garcia has fulfilled his side of the bargain by serving time in prison that can never be returned to him. Specific performance is the only just and meaningful remedy. *Cuero v. Cate*, 827 F.3d 879, 890 (9th Cir. 2016) ("The Superior Court also unreasonably applied clearly established federal law by failing to order specific performance of Cuero's plea agreement."); *Geisser v. United States*, 513 F.2d 862, 871 (5th Cir. 1975) ("an opportunity to replead seems superficial and unrealistic in view of her long confinement."); *United States v. Finkbeiner*, 551 F.2d 180, 184 (7th Cir. 1977) ("Under the circumstances of this case it would be unjust to simply vacate the guilty plea, which theoretically would allow the state to reindict Baker. Since he has already performed his side of the bargain, fundamental fairness demands that the state be compelled to adhere to the agreement as well."); *United States v. Duff*, 551 F.2d 185, 187 (7th Cir. 1977) ("Since Ferris has substantially begun performing his side of the bargain, it would not be fair to vacate the plea and require him to go through the procedure anew. Fundamental fairness can be had by limiting his term of custody to that portion of the sentence which comports with the bargain made."); *Palermo v. Warden*, 545 F.2d 286, 297 (2d Cir. 1976) ("Where appropriate, the courts have not hesitated to mandate specific performance of the agreement. *Correale v. United States*, supra; *Harris v. Superintendent, Va. State Penitentiary*, supra. We cannot conclude that the district court erred in

determining that specific performance was the proper remedy in this case. Palermo had already been incarcerated for the entire promised prison sentence and parole term. Remand for withdrawal of the guilty plea would indeed have been meaningless, as the court below found."); *Karger v. United States*, 388 F. Supp. 595, 599 (D. Mass. 1975) ("To vacate Karger's guilty plea, after he has already served more than four years, would be an empty gesture. Karger is entitled to the benefit of his bargain, no more and no less.").

Plea agreements are generally contractual in nature, with additional constitutional protections. *United States v. Torres*, 828 F.3d 1113, 1124-25 (9th Cir. 2016) ("The analogy between plea agreements and private contracts is imperfect, however, because the Constitution imposes a floor below which a defendant's plea, conviction, and sentencing may not fall.").

> "[A]s the government acknowledges its reliance on contract law is by analogy, and the analogy is not perfect. *United States v. Partida-Parra*, 859 F.2d 629, 634 (9th Cir. 1988). A plea bargain is not a commercial exchange. It is an instrument for the enforcement of the criminal law. What is at stake for the defendant is his liberty. On rescission of the agreement, the prisoner can never be returned to his 'original position': he has served time by reason of his guilty plea and his surrender of basic constitutional rights; the time he has spent in prison can never be restored, nor can his cooperation in his punishment. What is at stake for the government is its interest in securing just punishment for violation of the law and its interest that an innocent act not be punished at all. The interests at stake and the judicial context in which they are weighed require that something more than contract law be applied.")."

United States v. Barron, 172 F.3d 1153, 1158 (9th Cir. 1999).

In contract terms, the District Court accepted Mr. Garcia's admission, accepted Mr. Garcia's change in position to Mr. Garcia's detriment, and benefitted from Mr. Garcia's admission by gaining the ability to sentence Mr. Garcia without holding a revocation hearing. If the District Court wanted to reject Mr. Garcia's agreement, it needed to say so in terms that everybody would understand. *Local Joint Exec. Bd., Culinary Workers Union, Local 226 v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir. 1987) ("Acceptance by silence is an integral part of the objective theory of contracts. See A. Corbin, *Corbin on Contracts* § 75A (Supp. 1984). The objective theory of contracts is based upon an analogy to estoppel. See, e.g., 1 S. Williston, *A Treatise on the Law of Contracts* § 98 (3d ed. 1957)."); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 609 (9th Cir. 1980) ("Implied ratification can be by affirmative acts or by omission to act, but ratification by silence or acquiescence requires knowledge, and acceptance of the benefits from the contract or prejudicial reliance by the other party.").

Nor does it matter whether Mr. Garcia would ultimately have prevailed at a revocation hearing on the underlying petition to revoke supervised release. Harmless error does not apply to the law of contractual

plea agreements." *United States v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000); *United States v. Myers*, 32 F.3d 411, 413 (9th Cir. 1994).

This decision of U.S. Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power. Because Mr. Garcia cannot be returned to his original position, because Mr. Garcia's agreement with the Government was breached without it being rejected, and because Mr. Garcia has fulfilled his side of the agreement, Mr. Garcia requests that this matter be remanded for specific performance of the agreement by resentencing before a different judge. See *Santobello v. New York*, 404 U.S. 257, 263 (1971); *United States v. Camper*, 66 F.3d 229, 233 (9th Cir. 1995); *United States v. Alcala-Sanchez*, 666 F.3d 571, 577 (9th Cir. 2012) ("Here, the government breached the plea agreement, so we must vacate Alcala's sentence and give Alcala the benefit of his bargain, specific performance of the plea agreement. We remand for resentencing before a different district judge to eliminate impact

of the government's prior mistake and breach. *See Santobello*, 404 U.S. at 263; *Mondragon*, 228 F.3d at 981.").

Dated May 12, 2020.

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