

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ **Term, _____**

CHRISTIAN JAMES

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals opinion rejecting James's claim that the Government made an implied promise that any obstruction of justice enhancement must conform to the United States Sentencing Guidelines is a miscarriage of substantial justice?
2. Whether it was a miscarriage of substantial justice for the Fifth Circuit Court of Appeals' opinion to permit James's sentence to stand without James having obstructed the investigation, prosecution, or sentencing of the offense of his conviction?
3. Whether this Court should grant James's Writ of Certiorari to resolve a circuit split between the Fifth and Eighth Circuit regarding the application of obstruction of justice enhancement under U.S.S.G. §3C1.1?

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PETITION FOR WRIT OF CERTIORARI

Petitioner **CHRISTIAN JAMES** (hereinafter referred to as James or Petitioner) respectfully asks this Court to grant a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction and rejecting his challenges that the Government breached an

“implicit promise” in his plea agreement “that any enhancement sought by the [G]overnment would be made consistent with U.S.S.G. § 3C1.1.” James also asserted that the Government should be judicially estopped from relying upon the appellate waiver.

OPINIONS BELOW

The Government moved to dismiss the appeal on the grounds that James waived his right to appeal his sentence in his plea agreement. A panel of the Fifth Circuit carried the Government's motion with the appeal and ordered the parties to address whether the principle that a breach of an implicit plea agreement promise may be raised on appeal notwithstanding an appeal waiver including the promise alleged by James in this case in *United States v. Christian James*, No. 19-50282 (5th Cir. September 17, 2019) is attached as Appendix A.

The Fifth Circuit's opinion, *United States v. Christian James*, No. 19-50282 (5th Cir. April 10, 2020) is attached as Appendix B. The District Court's Judgment below is attached as Appendix C.

JURISDICTION

The Fifth Circuit entered judgment on April 10, 2020. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

James challenges his conviction sentence to 235 months imprisonment with credit for time served since July 28, 2017; 5 years supervised release; fine waived; \$100 special assessment; and denial of federal benefits for 10 years ending March 18, 2029. (ROA. 71,72,76,77)

James challenges the application of the 2-level enhancement for Obstructing or Impeding the Administration of Justice pursuant to U.S.S.G. § 3C1.1. (ROA. 275) He further objects to the denial of the 3-level reduction for his acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. (ROA. 277)

This case serves as the perfect vehicle to resolve a circuit split regarding the scope of obstruction of justice enhancement under U.S.S.G. §3C1.1.

STATEMENT OF THE CASE

On August 23, 2017, James was named in a two count indictment filed in the Del Rio Division of the Western District of Texas. (ROA.17-18) Both counts were alleged to have occurred on or about July 28, 2017. Count One charged James with Conspiracy to Possess With Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A) & 846.(ROA. 17) Count Two charged James with Conspiracy to Possess With Intent to Distribute a quantity of 1 kilogram or more of a mixture or substance containing a detectable amount of Heroin in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A) and 846. (ROA. 18)

On December 6, 2017, James was re-arraigned and pursuant to a plea agreement entered a plea of guilty to Count One of the Indictment. (ROA. 86-122) James participated in a debrief where he learned that the Texas Department of Public Safety (“DPS”) was conducting an investigation of certain people with whom James previously purportedly associated. (ROA. 284-285) After the debrief the jail recorded James' telephone calls to a girlfriend and another individual in which he provided information about the subject of the debriefing. (ROA. 28) The DPS believed these telephone calls lead to the subject of their investigation refusing to engage with them further. (ROA. 134)

DPS Agent Lucian Paul Ebrom testified at James' sentencing hearing that DPS was conducting a mainly methamphetamine trafficking investigation of certain individuals in San Antonio, Texas. (ROA. 128, 131) This investigation had begun prior to James' July 28, 2017 arrest and continued after his arrest. (ROA. 130,134) The government contended that James' connection with these individuals was that James was the source of the drugs. (ROA.131). This purported information was based upon a report of an unnamed individual being investigated. (ROA. 131). After James' arrest the DPS agent estimated that there were approximately two more controlled narcotics purchases from these individuals. (ROA. 130-131) The debrief with James occurred on either November 16th or 17th of 2017. (ROA. 130) During the debrief James was shown photographs. (ROA. 131) While the DPS agent testified that James said he did not know the individuals he was shown, the DPS agent testified he knew this was a lie since "one was an active visitor and a brother to one of our suspects." (ROA. 133) The DPS agent stated that shortly after the debrief they tried to do more controlled buys but "the guy did not want to communicate with us anymore." (ROA.134)

The DPS agent then obtained copies of James' jail telephone conversations. (ROA. 135) The DPS agent described the general nature of the telephone conversations James had with his girlfriend, Markell Patterson and a Hispanic

male as referencing individuals who had been the subject of the debrief such as “if they say they know me, then cut them off. Fall way back. Get out. You know, leave them alone.” (ROA. 135-136) In other calls the DPS agent said James said let certain other individuals know “they need to take the summer off, a season or two.” (ROA. 137) The DPS agent took this to mean “Stop dealing what they’re dealing because we’re probably being looked – or they’re probably being looked at.” (ROA. 137) The Government contended and the trial court found these conversations negatively affected an ongoing law enforcement investigation with individuals with whom James had previously associated. (ROA. 134,137)

The case was referred to the United States Probation Office which on December 21, 2018 filed a pre-sentence report (“PSR”) which was disclosed to both the Government and James. *See* (ROA. 241-273) Thereafter James filed objections to the PSR on January 10, 2019. (ROA. 274-279) The Revised Pre-sentence Report (“PSR”) and Addendum was filed on January 23, 2019. (ROA. 280-296)

James objected to the application of the 2-level enhancement for obstructing or impeding the administration of justice pursuant to U.S.S.G. § 3C1.1.(ROA. 275) He further objected to the denial of the 3-level reduction for his acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. (ROA. 277) James asserted that the

information resulting in the enhancement and the subsequent denial of a reduction for acceptance of responsibility was not relevant to the instant offense of conviction and should not be taken into consideration in determining his total offense level. (ROA. 275, 277)

On March 22, 2019 James' sentencing hearing was held before Judge Alia Moses. (ROA. 123-209) On the motion of the Government, Judge Moses dismissed Count Two. (ROA 71) On Count One, James was sentenced to 235 months imprisonment with credit for time served since July 28, 2017; 5 years supervised release; fine waived; \$100 special assessment; and denial of federal benefits for 10 years ending March 18, 2029. (ROA 71,72,76,77)

The Judgement was signed by Judge Alia Moses on March 22, 2019 and entered on March 25, 2019. (ROA. 71) On March 29, 2019 a Notice of Appeal was filed on James's behalf. (ROA. 78)

On appeal James asserted that the Government breached an implied promise in the appeal waiver James relied on at the time he agreed to the plea agreement's terms that any enhancement sought by the Government would be made consistent with U.S.S.G. § 3C1.1. In the alternative, James' asserted his decision to waive the right to appeal was not knowingly and intelligently made.

James next asserted that his obstructive conduct was not purposefully calculated, and likely to thwart the investigation or prosecution of the offense of conviction. James further asserted that he did not (1) willfully obstruct or impede or attempt to obstruct or impede the administration of justice with respect to the investigation, prosecution, or sentencing of *his offense of conviction, and* (2) the alleged obstructive conduct *did not relate to* (a) his offense of conviction and *any relevant conduct*; or (b) *a closely related offense* as required by U.S.S.G. § 3C1.1. (ROA. 275-276)

James asserted that sentencing error in his case warranted reversal since it substantially increased James' recommended level of imprisonment. On appeal James asserted first, that the Government breached an implied promise in the appeal waiver James relied on at the time he agreed to the plea agreement's terms that any enhancement sought by the Government would be made consistent with U.S.S.G. § 3C1.1. In the alternative, James asserted his decision to waive the right to appeal was not knowingly and intelligently made.

James' obstructive conduct was not purposefully calculated and likely to thwart the investigation or prosecution of the offense of conviction. James did not (1) willfully obstruct or impede, or attempt to obstruct or impede the administration of justice with respect to the investigation, prosecution, or

sentencing of *his offense of conviction*, and (2) the alleged obstructive conduct *did not relate to* (a) his offense of conviction and *any relevant conduct*; or (b) *a closely related offense* as required by U.S.S.G. § 3C1.1. (ROA. 275-276).

James asserted that the sentencing errorwarranted reversal since it substantially increased James' recommended level of imprisonment by refusing to award him an offense-level reduction for acceptance of responsibility and by imposing an enhancement for obstruction of justice.

The Goverment moved to dismiss the appeal on the grounds that James waived his right to appeal his sentence in his plea agreement. A panel of the Fifth Circuit carried the Government's motion with the appeal and Ordered the parties to address whether the principle that a breach of a implicit plea agreement promise may be raised on appeal notwithstanding an appeal waiver including the promise alleged by James in this case in *United States v. Christian James*, No. 19-50282 (5th Cir. September 17, 2019).

A panel of the Fifth Circuit rejected James' arguments and affirmed his conviction in *United States v. Christian James*, No. 19-50282 (5th Cir. April 10, 2020). The panel found that James cited no ambiguity in the plea agreement

or other basis in the record supporting the existence of the implicit promise
he posits.

REASONS THE COURT SHOULD GRANT REVIEW

I. REJECTION OF JAMES' CLAIM THAT THE GOVERNMENT MADE AN AN IMPLIED PROMISE THAT ANY OBSTRUCTION OF JUSTICE ENHANCEMENT MUST CONFORM TO SENTENCING GUIDELINES IS A MISCARRIAGE OF SUBSTANTIAL JUSTICE

The Government's conduct in the District Court was inconsistent with James' reasonable understanding of the Plea Agreement. When analyzing a claim that a plea agreement has been breached, the Fifth Circuit's test is "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." *United States v. Lewis*, 476 F.3d 369,387-88 (5th Cir. 2007)

James' Plea Agreement provided an admonishment that the range of punishment he faced was imprisonment of not less than ten years up to life, a fine not to exceed \$10,000,000, a term of supervised release of at least five years, and a \$100 special assessment. (ROA.228) The Agreement also included the following potential sentence admonition:

4. Defendant is aware that the Court has not yet determined his sentence. The sentence will be determined in accordance with the United States Sentencing Guidelines (the "Sentencing Guidelines") based on information the Government and Defendant provide to the Court. Defendant understands that the Court must consider any and

all applicable provisions of the Sentencing Guidelines, as well as any other sentencing factors and goals as reflected in the Sentencing Reform Act, Title 18, United States Code § 3553(a)(1)-(7) (e.g., gravity of the offense, promoting respect for the law, providing just punishment, providing adequate deterrence, and protecting the public). Defendant understands the Sentencing Guidelines are advisory and the Court may take other sentencing factors into account, which could result in a greater or lesser sentence than the sentencing range calculated under the Sentencing Guidelines. Defendant is aware that a sentence of imprisonment imposed does not provide for parole. Defendant is also aware that any estimates under estimate of the range of punishments under the Sentencing Guidelines that he may have received from Defendant's counsel, the United States, or the probation office, is a prediction, not a promise, and is not binding on the United States or the Court. In the event the Court declines to follow any recommendation by the Government, makes factual requests concerning imposition of sentence, the Government reserves the right to advocate any position on appeal. Further, Defendant shall not be permitted to withdraw his guilty plea because the sentencing court rejected the Government's recommendation or Defendant's requests.

(ROA.229-231)

In exchange for James's plea, the Government made multiple promises including but not limited to an agreement not to contest any recommended findings in the presentence report that the applicable guideline offense levels be adjusted to reflect his acceptance of responsibility under U.S.S.G. § 3E1.1(a)

& (b) (ROA.231). The agreement expressly stated that:

. . . the Defendant will not qualify for a decrease of the offense level under U.S.S.G. § 3E1.1(a) or (b) if the Defendant: (1) engages in any conduct which may support an upward adjustment under U.S.S.G. § 3C1.1, Obstruction of Justice; (2) violates any terms or conditions of pretrial release or of any cooperation agreement with law enforcement; (3) provides false or misleading statements to the Court, the Probation Office, the Pretrial Services Office, the U.S. Attorney's Office or any other law enforcement entity; and/or (4) does not voluntarily assist the United States in the recovery of the fruits and instrumentalities of the offense, the forfeiture of assets and/or the identification of and recovery of assets to pay restitution as contemplated by the terms of this Plea Agreement . . .

(ROA.231-232)

As set forth above, James' plea agreement explicitly advised him about the operation of U.S.S.G. § 3C1.1 and that a finding of obstruction of justice would preclude a reduction for acceptance of responsibility. It was reasonable for James to believe that the Government would advocate for an obstruction of justice and/o acceptance of responsibility preclusion only for his behavior and on grounds that were consistent with the Sentencing Guidelines' expression of preclusive behavior. The Sentencing Guidelines expressly set forth such preclusive behavior as follows:

“§3C1.1 - Obstructing or Impeding the Administration of Justice provides: If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of *the instant*

offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels." (Emphasis added).

II. IT WAS A MISCARRIAGE OF SUBSTANTIAL JUSTICE FOR THE FIFTH CIRCUIT COURT OF APPEALS' OPINION TO PERMIT JAMES' SENTENCE TO STAND WITHOUT JAMES HAVING OBSTRUCTED THE INVESTIGATION, PROSECUTION, OR SENTENCING OF THE OFFENSE OF HIS CONVICTION

At James' sentencing the Government advocated for a sentencing enhancement and a corollary denial of acceptance of responsibility contrary to the Sentencing Guidelines requirement that obstructive conduct must be with respect to the offense of conviction.¹ The Government called Texas DPS Agent Lucian Ebrom to testify as to the obstruction allegation. (ROA.127) Agent Ebrom testified that he obtained James' jailhouse phone records which showed that, after James' debrief, James had been warning his compatriots that the Government was conducting a narcotics investigation. (ROA.135-136) After Agent Ebrom's testimony concluded, the Government played recordings of two of James'

¹ Absent extraordinary circumstances, obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." (quoting U.S.S.G. § 3E1.1 cmt. n.4). The Government's argument for the obstruction of justice enhancement was synonymous with a request for a denial of acceptance of responsibility.

jailhouse telephone calls where James discussed information regarding his debrief. (ROA.160) (GX 5-A)

Judicial estoppel should be applied to the Government in this case to "prevent[] a party from asserting a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding". *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (emphasis added) The Government's novel advocacy in James' case was "plainly inconsistent with [its] prior position"; second, the party must have convinced "a court [to] accept[] the prior position"; third, that the party must not have "act[ed] inadvertently". *Trinity Marine Prods., Inc. v. United State*, 812 F.3d 481, 490 (5th Cir. 2016) (preventing "assert[ion of] contradictory positions for tactical gain"); and fourth, the Government in asserting "..... an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped". *Zedner v. United States* , 547 U.S. 489, 504, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006).

The Government advocated a position at James' sentencing that was contrary to *United States v. Alexander*, 602 F.3d 639 (5th Cir. 2010) where the Fifth Circuit found that the § 3C1.1's application enhancement applied when the obstruction of the state investigation is based on the *same facts* as the

eventual federal conviction regardless of whether the federal investigation had commenced or the criminal conduct that ultimately is prosecuted under federal law. The Government's action was on facts that differed from the unpublished opinion in *United States v. Thomas*, (No. 12-20594, 5th Cir., 2013) which held that threats against witnesses were clearly and explicitly aimed at thwarting any investigation of the defendant's federal crime.

III. THIS COURT SHOULD GRANT JAMES' WRIT OF CERTIORARI TO RESOLVE A CIRCUIT SPLIT BETWEEN THE FIFTH AND EIGHTH CIRCUIT REGARDING THE SCOPE OF OBSTRUCTION OF JUSTICE ENHANCEMENT U.S.S.G. §3C1.1

In *United States v. Galaviz*, 687 F.3d 1042, 1043 (8th Cir. 2012) the Eighth Circuit reversed the application of the obstruction-of-justice enhancement for Galaviz a defendant that pleaded guilty and after being imprisoned conspired to murder the confidential informant (CI) in his case. *United States v. Galaviz*, 687 F.3d at 1043. Looking at the language of § 3C1.1, the Eighth Circuit said that "because Mr. Galaviz had already pleaded guilty, he could not have intended to obstruct justice 'with respect to the instant offense' by plotting to kill [the CI] unless he thought that [the CI] was going to testify against him at sentencing." *United States v. Galaviz*, 687 F.3d at 1043 (quoting § 3C1.1(1)). When "there is no evidence that retaliation would impede the progress of [the defendant's] case in any way," the enhancement pursuant to § 3C1.1 cannot be

applied. *United States v. Galaviz*, 687 F.3d at 1043. James' case is the perfect vehicle to clarify the correct application § 3C1.1. Is the Fifth Circuit correct or is the Eighth Circuit correct in its interpretation of § 3C1.1?

CONCLUSION AND PRAYER FOR RELIEF

In summary, this Petition is important. Given the far reaching consequences of the Fifth Circuit's decision review should be granted.

Respectfully submitted,
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