

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 2020

MARKEY ANTONIO GOLDSTON,
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 DEFENDANT'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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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Markey Antonio Goldston, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit announced on July 21, 2020, 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 July 21, 2020, 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

On May 3, 2019, a grand jury sitting in the Middle District of North Carolina returned a two-count indictment in which Petitioner was charged with possession with intent to distribute a quantity of a mixture and substance containing a detectable amount of cocaine base in violation of 21 U.S.C § 841(a)(1) and one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C § 924(c). On July 8, 2019, Petitioner pled guilty to both charges pursuant to a written plea agreement filed with the court on July 5, 2019. The presentence investigative report, in final form, was filed on September 19, 2019. The presentence report contained a section entitled “Offense Behavior Not Part of Relevant Conduct.” Petitioner objected to the inclusion of this information. At sentencing, the court overruled Petitioner’s objection and allowed the information to remain in the presentence report. The court indicated it would not consider the information except for Petitioner’s admission to “driving the car.” The court then imposed a sentence of 34 months for Count One, to be followed by a consecutively imposed 60-month sentence for Count Two. Petitioner was placed on supervised release for a period of three years. The court then dismissed additional counts against Petitioner in a separate indictment. Petitioner filed a timely notice of appeal on November 24, 2019.

STATEMENT OF THE FACTS

On August 10, 2018, Durham City Police Officers conducted a traffic stop of a vehicle that was driven by Petitioner, Markey Antonio Goldston. Petitioner was arrested at the time of

the stop, as he was wanted on unrelated outstanding warrants. He was removed from the vehicle and placed under arrest. During a search of the vehicle, officers found a loaded 9mm handgun on the driver's side and 16.8 grams of what was later determined to be crack cocaine.

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. Petitioner's presentence report contained information regarding him in a section entitled "Offense Behavior Not Part of Relevant Conduct." Petitioner objected to the inclusion of this material, as it was not relevant and could negatively affect him in the Bureau of Prisons. The court rejected Petitioner's argument and allowed the material to remain in the presentence report. Petitioner sought to challenge this ruling by right of appeal. 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 the appeal waiver violates 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 15th day of September 2020.

/s/ John D. Bryson
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APPENDIX A

Fourth Circuit Court of Appeals Order filed on July 21, 2020, Dismissing Petitioner's Appeal

FILED: July 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**No. 19-4874
(1:19-cr-00229-NCT-1)**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARKEY ANTONIO GOLDSTON,

Defendant - Appellant.

· O R D E R

Markey A. Goldston seeks to appeal his 94-month sentence imposed following his guilty plea to possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (2018); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (2018). The Government has moved to dismiss the appeal as barred by Goldston's waiver of the right to appeal included in the plea agreement. Upon review of the plea agreement and the transcript of the Fed. R. Crim. P. 11 hearing, we conclude that Goldston knowingly and voluntarily waived his right to appeal and that the issue Goldston seeks to raise on appeal falls squarely within

the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss.

Entered at the direction of the panel: Judge Agee, Judge Diaz, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk