

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CORDARRYL ANTONIO BETTON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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November 3, 2020

QUESTIONS PRESENTED

Is a Plea Agreement breached by the government when the prosecutor announces the government's agreed to recommendation to the sentencing court but then sponsors argument and evidence contrary to its recommendation by vigorously advocating a series of sentencing enhancements that were not properly supported by the record?

LIST OF PARTIES

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

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PETITION FOR A WRIT OF CERT

Petitioner, Cordarryl Antonio Betton, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on September 8, 2020.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the appendix hereto, Appendix A, infra.

The judgment of the United States District Court for the Southern District of Mississippi (Guirola, L,) has not been reported and is reprinted in the appendix hereto, Appendix B, infra.

JURISDICTION

Petitioner Cordarryl Antonio Betton pleaded guilty to a violation of Title 21 U.S.C. § 841(a)(1). He was sentenced to One Hundred Thirty-five months imprisonment by the Honorable Louis Guirola, United States District Judge for the Southern District of Mississippi.

Mr. Betton timely appealed. A judgment dismissing his appeal was entered by the United States Court of Appeals for the Fifth Circuit on September 8, 2020. No petition for rehearing was sought. This Petition has been timely filed within ninety (90) days of that Judgment. Sup. Ct. Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment which provides in part: "...nor shall any personbe deprived of life, liberty, or property, without due process of law..."

STATUTORY PROVISION INVOLVED

21 U.S.C. § 841(a)(1)

STATEMENT OF THE CASE

On April 4, 2018, the Grand Jury sitting in and for the Southern District of Mississippi returned a six count indictment charging Cordarryl Antonio Betton with violations of 21 U.S.C. § 841(a)(1).

Mr. Betton entered a plea of guilty to count six of the indictment. On January 13, 2020, the district court sentenced him to 135 months imprisonment, \$ 3,000 fine, three years of supervised release, and a \$100 special assessment. Judgment was entered on January 15, 2020. Timely Notice of Appeal was filed on January 23, 2020.

At sentencing, the government intentionally and vigorously sponsored argument not adequately supported by the record to advocate a draconian guideline enhancement based solely on alleged relevant conduct resulting in essentially eviscerating its Plea Agreement and argued against the defendant qualifying for 'safety valve' and supported a dangerous weapon enhancement increase in the sentencing guideline range not adequately supported by the record not meeting the required preponderance standard.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE REPRESENTS AN EXCELLENT VEHICLE FOR THE COURT TO CLARIFY WHAT LEVEL OF SUPPORT IS REQUIRED BY THE GOVERNMENT IN PRESENTING ITS PLEA AGREEMENT TO THE SENTENCING COURT AND WHETHER THE GOVERNMENT CAN BREACH A PLEA AGREEMENT BY VIGOROUSLY ADVOCATING SENTENCING ENHANCEMENTS NOT SUPPORTED BY THE RECORD.

The Fifth Circuit has completely contravened any notion of fundamental fairness in negotiations between a defendant and the government when pronouncing that a prosecutor may promise one thing to induce a plea and then do another at sentencing.

While this Honorable Court has expressly recognized that there is no set level of enthusiasm the government must display when making a recommendation. *See United States v. Benchimol*, 471 U.S. 453, 455 (1985). And even though the Fifth Circuit has recognized that “personal reservations” expressed by the government’s attorneys as to a plea agreement are a breach. *United States v. Grandinetti*, 564 F. 2d 723 (5th Cir. 1977). Certainly, the Fifth Circuit is mistaken that the government can make its recommendation as to sentencing and then sponsor testimony that contravenes and discounts that very recommendation just made.

The Plea Agreement contained an “appeal waiver” which usual bars direct appeal. However, this appeal is not barred because this appeal is based on the fact that the government breached its agreement with Mr. Betton when it presented vigorous argument advocating sentencing enhancements to the Base Offense Level

not adequately supported in the record and thus not meeting the required standard of a preponderance of the evidence resulting in a draconian increase in the guidelines with an advocated sixteen (16) level increase resulting in a maximum authorized sentence capped at ten (10) years. Without the vigorous avocation of the government (when it was aware that the record did not adequately support its argument), resulting in the Court adopting the government's position (over defendant's numerous objections), Mr. Betton's sentence would have been significantly lower than the one hundred thirty-five (135) months he received.

The district court's sentence was unreasonable as the sentencing guideline enhancements were not supported adequately by the record that did not meet the required standard of a preponderance of the evidence resulting in a draconian increase in the Base Offense Level resulting in a grossly increased guideline range and loss of the protective provisions of 'safety valve.'

The Plea Agreement and Plea Supplement created mutual obligations of the government and Appellant. The Plea Supplement required that the government recommend a lower fifty percent (50%) of the guideline range. However, the government sponsored argument not supported by the record to convince the court to accept a draconian increase (over the defendant's numerous objections) in the guideline range to maximize Mr. Betton's sentence thus rendering its promises and obligations within the Plea Agreement virtually meaningless. Without the government's advocation of an enhanced sentencing and consequential loss of 'safety valve', Mr. Betton's guidelines would have been significantly lower a mere

70-87 versus a draconian 135-166 months for a first time offender. Almost double the time of incarceration due to the government's breach of its promises.

An alleged breach of a plea agreement may be raised on direct appeal despite an express waiver of appellate rights. *United States v. Purser*, 747 F.3d 284, 289 (5th Cir. 2014) cert. denied, ___ U.S. ___, 135 S.Ct. 403 (2014); *United States v. Long*, 722 F.3d 257, 260 n.2 (5th Cir. 2013), cert. denied, ___ U.S. ___, 134 S.Ct. 1514 (2014); *United States v. Pizzolato*, 655 F.3d 403, 409 (5th Cir. 2011), cert. denied, ___ U.S. ___, 132 S.Ct. 1126 (2012).

To determine whether a plea agreement was breached a federal court must "consider whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." *United States v. Hinojosa*, 749 F.3d 407, 413 (5th Cir. 2014); *United States v. Barnes*, 730 F.3d 456, 457 (5th Cir. 2013).

Whether the government breached a plea agreement is a question of law that the appellate court reviews de novo. *Untied States v. Purser*, 747 F. 3d 284, 292 (5th Cir. 2014).

The Supreme Court has recognized that disposing of charges via plea agreements is both "essential" and "highly desirable" in the criminal justice system. *Santobello v. New York*, 404 U.S. 257, 261 (1971). But to realize the benefits of plea deals, there must be "fairness in securing agreement between an accused and a prosecutor." *Id.* A key safeguard of this fairness is that, when a defendant pleads

guilty in exchange for a promise from the prosecutor, the prosecutor must fulfill that promise. *Id.* at 262; *United States v. Harper*, 643 F.3d 135, 139 (5th Cir. 2011) ("The Government must strictly adhere to the terms and conditions of its promises in a plea agreement."). When alleging breach of a plea agreement, the defendant must prove the facts underlying the alleged breach by a preponderance of the evidence. *Harper*, 643 F.3d at 139. But whether the government's conduct amounts to a breach is a question of law for the court. *Id.* Assuming there was a plea agreement, the court must decide "whether the Government's conduct was consistent with the defendant's reasonable understanding of the agreement," construing the agreement strictly against the Government. *United States v. Purser*, 747 F.3d 284, 290 (5th Cir. 2014).

In the event of a breach, two remedies are available: specific performance of the plea agreement or withdrawal of the plea. *Santobello*, 404 U.S. at 263; *Harper*, 643 F.3d at 139. The trial court has discretion to determine the proper remedy.

Plea agreements are interpreted under general principles of contract law. See *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994). Thus, if a defendant has fulfilled his obligations under the plea agreement, the Government must perform its reciprocal obligations. *United States v. Davis*, 393 F.3d 540, 546 (5th Cir. 2004). Conversely, if a defendant "materially breaches" his plea agreement, the Government may withdraw from the agreement and seek a new indictment on charges previously dismissed. *Hentz v. Hargett*, 71 F.3d 1169, 1176 (5th Cir. 1996). A breach is material when it deprives the non-breaching party of the benefit of the

bargain. *United States v. Castaneda*, 162 F.3d 832, 837 (5th Cir. 1998). Thus, the materiality of a breach is directly proportional to the extent the non-breaching party is deprived of the expected benefits. See *Id.* ("The less the non-breaching party is deprived of the expected benefits, the less material the breach."). The concept of material breach is clarified by comparison with the converse concept of substantial performance: "if a party's nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance, the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission." *Id.* at 837-38 (alteration in original) (internal quotation marks omitted). The Government bears the burden of proving by a preponderance of the evidence both that the defendant breached the plea agreement and that the breach was material. *Id.* at 837.

Although a plea agreement is a contract, " [t]he analogy to contract law doctrines is not determinative in the area of plea negotiation." *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981). This follows from the recognition that a plea agreement is "a contract in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." *United States v. Maya*, 864 F.2d 1324, 1329 (7th Cir. 1988); see also *United States v. Martin*, 25 F.3d 211, 216 (4th Cir. 1994) (" [P]lea agreements between the government and a defendant are unique and call for special due process considerations."); *Calabrese*, 645 F.2d at 1390 (" Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate safeguards to insure the

defendant what is reasonably due [in] the circumstances.") (alteration in original) (internal quotation marks omitted); *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (recognizing that although " [p]lea agreements are construed according to contract law principles [D]ifferent types of contracts are subjected to different interpretative rules and background understandings.") (first alteration in original) (citations omitted) (internal quotation marks omitted). Against this background, the Court assesses a claim for breach of plea agreement " with greater scrutiny than in a commercial contract." *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); *Ricketts v. Adamson*, 483 U.S. 1, 16, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1988).

As explained above, the proper inquiry in determining whether a plea bargain has been breached is whether the prosecution's conduct comports with the defendant's reasonable understanding of the plea agreement. *Hinojosa*, 749 F.3d at 413; *United States v. Sharma*, 703 F.3d 318, 326-27 (5th Cir. 2012), cert. denied, ___ U.S. ___, 134 S.Ct. 78 (2013).

While "The sentencing court is permitted to make common-sense inferences from the circumstantial evidence." *United States v. Juarez*, 626 F.3d 246 (5th Cir., 2010); "The government must prove sentencing enhancements by a preponderance of the evidence." *Id.* at 251. *United States v. Hagman*, 740 F.3d 1044 (5th Cir., 2014). "[T]he preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact

may be found." *United States v. Wilson*, 322 F.3d 353, 361 (5th Cir.2003). If the evidence appears to be equally balanced, or the Court cannot say upon which side it weighs heavier, the Court must resolve the question in favor of the defendant because the burden of proof on this issue remains with the government. See *Id.*; *United States v. Hagman*, 740 F.3d 1044 (5th Cir. 2014).

To show constructive possession, the government must prove that the Defendant, though lacking physical custody, "still ha[d] the power and intent to exercise control over the object." *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015); The court uses a "common sense, fact-specific approach" to determine constructive possession in these kinds of cases. *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2012). *United States v. Williams* (citation omitted) (5th Cir. 2018).

In a case similar to Mr. Betton's now before the Court, (wherein a number of guns were found in a vehicle, in a residence, on other persons, under the control of other persons, claimed by other persons and where Mr. Betton denied in an official Gulfport police interview any knowledge of the guns), the Fifth Circuit discussed these similar circumstances as follows: "Williams did not mention the Ruger during his post-arrest interview with police despite openly admitting to knowing about and handling the two other guns found at the scene of the arrest. This could suggest either Williams was unaware of the third firearm found at the scene or that he knew it was stolen and would substantially increase his sentence. See *United States v. Houston*, 364 F.3d 243, 248 (5th Cir. 2004) (finding no constructive possession under U.S.S.G. § 2K2.1 when "[t]he gun was not in plain

view, [someone other than the defendant] disclosed the location of the gun, and [the defendant] expressed to the officers his belief that the room contained two, rather than three, firearms."). His silence could cut either way and thus is not strong enough evidence to infer knowledge. The limited visibility of the gun, the lack of information about where the ammunition was found, and the fact that Williams was only a guest in the apartment mean the evidence of knowledge is too thin to say the government proved possession by a preponderance of evidence. See, e.g., *Sealy*, 661 F. App'x at 282 (vacating a sentencing guideline determination of constructive possession when nothing in the record suggested the defendant had carried, handled, or even knew about the firearms found in the same apartment)." *United States v. Williams* (citation omitted) (5th Cir. 2018). To prove actual possession, the Government must demonstrate that Mr. Betton "exercised direct physical control over them." *Id.* To prove constructive possession, the Government must show that Mr. Betton exercised ownership, dominion, or control over the firearms or the premises in which they were discovered. See *Id.*; see also *United States v. Houston*, 364 F.3d 243, 248-49 (5th Cir. 2004) (finding no constructive possession of a firearm because there was no evidence that defendant knew of the pistol discovered in his wife's purse). Even jointly occupying a space (which is more than what Mr. Betton did here) is insufficient to show constructive possession. *United States v. Fields*, 72 F.3d 1200, 1212 (5th Cir. 1996). *United States v. Sealy* (citation omitted) (5th Cir. 2016).

The Plea Agreement and Supplement with Betton contained an appeal waiver. However, this Court has clearly stated that “[An] alleged breach of a plea agreement may be raised despite a waiver provision.” *United States v. Purser*, 747 F.3d 284, 289 (5th Cir. 2014). If the court accepts a defendant's guilty plea entered in reliance on a plea agreement or other promise that is then not honored by the Government, the defendant's due process rights are violated. *Mabry v. Johnson*, 467 U.S. 504, 507, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). Because the government breached its agreement with Betton or otherwise did not honor its promises to him, Betton is not bound by the appeal waiver and thus is entitled to pursue his present appeal.

The government intentionally and vigorously sponsored argument not supported by the record to support a draconian guideline enhancement based solely on alleged relevant conduct resulting in basically (for all practical purposes) eviscerating Mr. Betton's Plea Agreement as its recommendation of the lower fifty percent (50%) became meaningless.

This is a clear breach of what Betton expected the government to do. It clearly prejudiced him. When prosecutors make comments contrary to the recommendations according to their Plea Agreements during sentencing reversal is required. *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir. 1993). The interest of justice and standards of good faith in negotiating plea bargains require reversal where a plea bargain is breached. *Santobello v. New York*, 404 U.S. at 262-263. A lesser standard would permit the government to make a plea bargain attractive to a

defendant, subsequently violate that agreement, and then argue harmless error thereby defrauding the defendant.

Betton entered into a guilty plea as part of a plea agreement and therefore the government must strictly adhere to the terms and conditions of its promises, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. In determining whether the terms of a plea agreement have been violated, the court must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. If it is determined that a plea agreement has been breached, specific enforcement of the agreement is called for and the defendant must be sentenced by a different judge.

The government was bound by the material promises it made to Betton as part of the Plea Agreement that induced him to plead guilty. Regarding breaches of plea agreements by the government, this court has stated, "If a breach has in fact occurred, the sentence must be vacated without regard to whether the judge was influenced by the government's actions." *United States v. Sailing*, 205 F.3d 764, 766-767 (5th Cir. 2000).

The government cannot promise one thing and then by do another. The perception of fair dealing for the accused at all stages of criminal proceedings is critical to the integrity of our system of justice. Plea Agreements between defendants and the government are an integral part of resolving criminal cases. To the extent these agreements are breached and otherwise not lived up to, the criminal justice system is compromised. Certainly blatant breaches and as here

more subtle failures to live up to the government's end of the bargain seriously affect the fairness, integrity and public reputation of judicial proceedings. Therefore, this Honorable Court should grant the Petitioner's petition herein.

CONCLUSION

The government cannot promise one thing and then by do another. The perception of fair dealing for the accused at all stages of criminal proceedings is critical to the integrity of our system of justice. Plea Agreements between defendants and the government are an integral part of resolving criminal cases. To the extent these agreements are breached and otherwise not lived up to, the criminal justice system is compromised. Certainly blatant breaches, and as here more subtle failures, to live up to the government's end of the bargain seriously affect the fairness, integrity and public reputation of judicial proceedings

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted, this the 3rd of November, 2020.

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