NO. 20-6743

IN THE

SUPREME COURT OF THE UNITED STATES

NEIL DUSSARD, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

In its Brief for the United States in Opposition, the government contends that Mr. Dussard's case is an "unsuitable vehicle" to address the substantive issue raised because a favorable decision by the Court would not benefit Mr. Dussard. Opposition, p.14. The government argues that if this Court agreed that Mr. Dussard's count of conviction under 18 U.S.C. § 924(c) should be vacated under plain error review, the government would be free on demand to reprosecute Mr. Dussard on Counts Two and Three of the indictment, which collectively carry a mandatory minimum sentence of 15 years. Id., pp. 20-23. For the reasons set forth below, the government is incorrect. Because Mr. Dussard remains convicted on Count One of the indictment, the language of his plea agreement bars reprosecution.

Mr. Dussard was indicted on three counts. Count One charged conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951. Count Two charged conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 841 (b)(1)(A), which carried a 10-year mandatory minimum for Mr. Dussard. Count Three charged Mr. Dussard with using and carrying a firearm during and in relation to a crime of violence, namely the Hobbs Act robbery conspiracy charged in Count One, and during and in relation to a drug trafficking crime, namely the narcotics conspiracy charged in Count Two, in violation of 18 U.S.C. § 924 (c)(1)(A) and (2), which charge carried a mandatory minimum

consecutive sentence of 5 years. United States v. Dussard, 967 F.3d 149, 151-52 (2d Cir. 2020).

Mr. Dussard entered into a plea agreement, under which he plead guilty to Counts One and Three. His plea to Count Three was based solely on the Hobbs Act robbery conspiracy charged in Count One. In consideration for Mr. Dussard's plea to these Counts, the government agreed that "the defendant will not be further prosecuted criminally" by the United States Attorney for the Southern District of New York for the Count One Hobbs Act robbery conspiracy and the Count Three use and carrying of a firearm in furtherance of that conspiracy, and that all "open Counts against Defendant" would be dismissed. Id. at 152.

The parties agreed that Mr. Dussard could not file a direct appeal, nor bring a collateral challenge, nor seek a sentence modification of any sentence within or below the Guidelines range of 101 to 111 months imprisonment, and the government could not appeal any sentence above this range. Importantly, Mr. Dussard did not agree to not challenge his conviction. The appeal waiver was limited to his sentence. See United States v. Hernandez, 242 F.3d 110, 113-14 (2d Cir. 2001).

In the plea agreement, Mr. Dussard did agree that he was waiving his right to withdraw his plea or attack his conviction, either on direct appeal or collaterally, on the ground that the government had failed to produce discovery materials, Jencks Act material, Brady material, and impeachment material pursuant to Giglio.

Mr. Dussard also agreed that he could not appeal based on adverse immigration consequences.

Finally, the plea agreement provided:

> It is further agreed that should the conviction following the defendant's plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

Dussard, 967 F.3d at 152-53.

The plea agreement, and this provision of the agreement, control whether the government can reindict Mr. Dussard. As argued more fully below, because Mr. Dussard will still remain convicted on Count One even if Count Three is vacated as unconstitutional, "the conviction" within the meaning of this provision has not been vacated, and the government is barred from reindicting.

As a threshold matter, Mr. Dussard has not breached the plea agreement. The plea agreement does not prohibit an attack on the constitutionality of his conviction on Count Three. He expressly agreed not to appeal on a number of grounds, but the constitutionality of his Count Three conviction was not one of them. Cady v. United States, 970 F.Supp. 97, 102 (N.D.N.Y. 1997)(defendant's motion to vacate was not breach of plea agreement). Accordingly, all of the caselaw which allows the government to treat the plea agreement as a nullity because of a

defendant's breach of the plea agreement is not germane. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 8-9 (1987)(defendant's breach of plea agreement removed double jeopardy bar to government's reprosecution of dismissed charge); United States v. Cimino, 381 F.3d 124, 127-28 (2d Cir. 2004)(defendant's breach of plea agreement permits government to treat it as unenforceable).

Nor has Mr. Dussard sought to vacate the plea agreement or otherwise withdraw his plea. His challenge, as permitted by the plea agreement, is to a single count of conviction. He is not challenging his remaining count of conviction pursuant to the plea agreement. Withdrawal or vacation of the plea agreement would allow for reinstatement of the original charges. See, e.g., United States v. Gonzalez, 420 F.3d 111, 116 (2d Cir. 2005); United States v. Adams, 448 F.3d 492, 497-502 (2d Cir. 2006). Cf. United States v. Olmeda, 461 F.3d 271, 279 n.7 (2d Cir. 2006) (double jeopardy does not attach when defendant affirmatively withdraws his plea).

Because there has been no breach by Mr. Dussard of the plea agreement, he is entitled to enforcement of its terms. United States v. Padilla, 186 F.3d 136, 140-42 (2d Cir. 1999) (defendant entitled to enforcement of plea agreement because he did not breach it); United States v. Robinson, 634 Fed. Appx. 47, 51 n.4 (2d Cir. 2016)(defendant did not breach plea agreement and consequently entitled to its enforcement). Under the agreement, the government cannot further prosecute him for the conduct underlying Counts One and Three, and was obligated to dismiss Count Two. Plea Agreement, pp. 1-2.

The government carved out a limited exception to this bar on reprosecution. As set forth in the paragraphs quoted above, the government could commence or reinstate any prosecution (including of dismissed counts) "should the conviction following the defendant's plea of guilty pursuant to this Agreement be vacated for any reason." Plea Agreement, p. 6. But, in Mr. Dussard's case, "the conviction" has not been vacated. Mr. Dussard still stands convicted on Count One. Accordingly, under the terms agreed to by the government, they cannot reprosecute Mr. Dussard, and remand must be limited to resentencing on Count One.

The government, as the drafter of the plea agreement, and the party who holds the bargaining power, bears the risk of ambiguity.

> [I]t is quite settled that "courts construe plea agreements strictly against the Government. This is done for a variety of reasons, including the fact that the Government is usually the party that drafts the agreement, and the fact that the Government ordinarily has certain awesome advantages in bargaining power."

United States v. Mergen, 764 F.3d 199, 209 (2d Cir. 2014)(quoting United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996)); Padilla, 186 F.3d at 141 (same).

The government could have written this paragraph to provide that "should any counts of conviction following the defendant's plea of guilty pursuant to this Agreement be vacated for any reason," then reprosecution would be allowed. But they did not. At a minimum, it must be recognized that it is ambiguous whether "the conviction" has been vacated when Mr. Dussard still stands convicted on Count One. This ambiguity must be construed in Mr. Dussard's favor. There is no getting around the conclusion that, at best for the government, the "the conviction"

language is ambiguous, which ambiguity must be construed against the government.

The Ninth Circuit's decisions in United States v. Sandoval-Lopez, 122 F.3d 797 (9th Cir. 1997), and United States v. Barron, 172 F.3d 1153 (9th Cir. 1999)(en banc), are instructive, and should be followed. In Sandoval-Lopez, the defendants were indicted on drug trafficking charges and two § 924(c) gun counts. They plead guilty to the two gun counts, and the government dismissed the trafficking count. After the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995), the defendants' conduct was no longer criminal under § 924(c). The defendants moved under 28 U.S.C. § 2255 for vacation of their convictions. The district court granted this motion, but then held that defendants' § 2255 challenge violated their plea agreement, and consequently the government could reinstate the dismissed drug trafficking charge.

The Ninth Circuit reversed the district court, finding that the defendants did not breach their plea agreement. As in the instant case, there was nothing in the plea agreement which barred the defendant's challenge, and this challenge consequently was not a breach. 122 F.3d at 801. If the government had wanted to draft the plea agreement to make this a breach, it had failed to do so. Because the defendants did not breach the plea agreement, they were entitled to enforcement of its terms, which meant that the government was not free to reinstate the dismissed counts. Id. at 801-02. See also Cady v. United States, 970 F.Supp. 97, 99-102

(N.D.N.Y. 1997)(defendant's motion attacking 924(c) conviction did not breach plea agreement).

In Barron, the defendant plead guilty to three counts in federal court, including a § 924(c) count. After Bailey, the defendant moved to set aside his conviction and sentence imposed on the § 924(c) count. The district court agreed that Bailey rendered his plea on that count involuntary, but conditioned relief on the defendant withdrawing his plea and returning the parties to the "status quo ante." 172 F.3d at 1155-56.

The Ninth Circuit reversed. The defendant had not moved to withdraw his plea. As in the instant case, he solely attacked the viability of one count of conviction. Id. at 1158. This was not a breach or repudiation of the plea agreement. Id. The court did not appreciate the position the government was trying to place the defendant in, which was to either acquiesce to serving his remaining sentence on the improper § 924(c) conviction or risk being recharged with the dismissed counts and the potential accompanying life sentence. Id. at 1159. Further, the court was not required to treat the plea agreement as a package which crumbled with a challenge to one of multiple counts of conviction. "A collateral challenge to the legality of a particular count of conviction does not constitute a breach of or withdrawal from a plea agreement," and the remainder of the plea remains in effect. Id. at 1160. If the government wanted a different outcome, it could have drafted a different plea agreement. Id. at 1161.

Countervailing precedent is neither persuasive nor fully on point. In United States v. Bunner, 134 F.3d 1000 (10th Cir. 1998), and United States v. Moulder, 141 F.3d 568 (5th Cir. 1998), the courts allowed for reinstatement of dismissed charges where the defendant plead guilty solely to a § 924(c) count of conviction, and then collaterally attacked this conviction after Bailey. Both courts held that the "frustration of purpose" doctrine of contract law called for this result. 134 F.3d at 1004-05; 141 F.3d at 571-72. An aggrieved party is discharged from his obligations under a contract when, through no fault of either party, a reasonably unforeseeable event intervenes, destroying the basis of the contract. Id.; Restatement (Second) Contracts § 265 (1981) .

As summarized in Bunner, several elements must be present before a party's contractual obligations will be discharged under the frustration of purpose doctrine.

> First, the frustrated purpose must have been "so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." Restatement 2d Contracts § 265 cmt. a. Second, the frustration must be such that the intervening event cannot fairly be regarded as within the risks the frustrated party assumed under the contract. *Id.* Finally, "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." *Id.*

134 F.3d at 1004. For the doctrine to apply, the supervening event must make one party's performance "virtually worthless to the other." Id.

As a threshold matter, courts have been appropriately cautious about reflexively applying civil contract principles to criminal plea agreements, given their unique context and the extraordinary power the government wields in the bargaining process. In re Altro, 180 F.3d 372, 375 (2d Cir. 1999). It is difficult to

equate frustration of purpose with a criminal plea, where a defendant like Mr. Dussard has given up his trial rights, resolved the prosecution, and commenced service of a sentence. It is hard to imagine how this could ever be characterized as "virtually worthless" to the government.

Equally important, there is an important distinction between the facts here and those in Bunner and Moulder. In both of those cases, the sole count defendants plead to was the § 924(c) count. So, if their motions were granted, they would have no convictions and no further sentence. This is what both courts found to be "virtually worthless" to the government. "Defendant's performance, for all practical purposes, became worthless to the government." Bunner, 134 F.3d at 1005. In contrast, Mr. Dussard will remain convicted and be resentenced on Count One, even after vacating Count Three. And his resentencing on Count One will be adversely impacted by the gun enhancement which was not originally applied because of the § 924(c) Count Three conviction. This posture and outcome cannot be considered "virtually worthless" to the government. They still have a conviction and substantial jail time. Stated another way, one out of two counts of conviction is not "so completely the basis of the contract," that without it, "the transaction would make little sense." Bunner, 134 F.3d at 1004.

Finally, the Second Circuit's decision in United States v. Podde, 105 F.3d 813 (2d Cir. 1997), is not inconsistent with the analysis set forth above. In Podde, the defendant was indicted on two counts, but plead guilty to a single lesser charge. The Supreme Court subsequently defined the lesser charge in a manner that no

longer encompassed the defendant's conduct. The defendant then moved to withdraw his plea to the single count. This motion was granted, and the government reindicted him on the dismissed counts and he was convicted. On appeal, this Circuit held that reprosecuting the defendant did not violate his double jeopardy rights, but that the new prosecutions were time-barred.

The principal distinction between Podde and Mr. Dussard's case is that the defendant in Podde moved to withdraw his plea. As discussed supra, it is well established that a defendant's withdrawal of his plea will put the parties back to square one, and reindictment will not violate double jeopardy. United States v. Glass, 613 Fed. Appx. 75, 78 (2d Cir. 2015) (mem); Adams, 448 F.3d at 502; Olmeda, 461 F.3d at 279 n.7. It is also important to note that the defendant's challenge in Podde was to his single count of conviction. Successful challenge to the sole count of conviction was characterized by the court as "repudiation" of the plea bargain. In contrast, Mr. Dussard is not moving to withdraw his plea, and is not moving to repudiate the plea agreement. He remains convicted, and will be resentenced accordingly.

The government is bound by the choices it made in the plea agreement it wrote. If the government had drafted the plea agreement such that vacating a single count of a multiple count conviction would be considered repudiation, and allow for reinstatement of the dismissed charges, that would be one thing. But the government did not. By the terms of the plea agreement – or by the ambiguities in the terms of the plea agreement – the government could reindict only if Mr.

Dussard's entire conviction was vacated. Because of this language in the plea agreement, Mr. Dussard's attack on one count of conviction cannot be characterized as "repudiation" of the plea agreement, and cannot be followed by reinstatement of the dismissed charges.

Because a favorable decision by this Court reversing Mr. Dussard's Count Three conviction would benefit Mr. Dussard, this Court should not reject Mr. Dussard's case as an unsuitable vehicle to decide the important question raised on the merits in Mr. Dussard's petition.

DATED at Middlebury, Vermont, this 16th day of April, 2021.

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