No. 20-6985

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Zongli Chang, MD, PhD — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Zongli Chang, MD, PhD
(Your Name)

FCI Elkton, P.O. Box 10
(Address)

Lisbon, OH 44432.
(City, State, Zip Code)

(Phone Number)

TRULINCS 56246039 - CHANG, ZONGLI - Unit: ELK-H-B

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: QUESTIONS PRESENTED
DATE: 12/07/2020 08:19 AM

QUESTIONS PRESENTED

In a plea agreement that was tied to a fine guideline range, the Petitioner was never told his "maximal possible penalty" in terms of fine and forfeiture could go up to 4 million (11(b)(1)(H) and 32(h) violations make plea unknowing and sentence unreasonable), and is ambiguous as to if he waived his appeal as to fines in these language in the plea: "there is no agreement as to fines" and "if the defendant's sentence of imprisonment does not exceed 135 months, the defendant also waives any right he may have to appeal his sentence on any grounds". This broad appellate waiver resulted Dr. Chang to be sentenced at the whim of the district in terms of fines. While the statutory maximum fine pursuant to 21 USC 841(b)(1)(C) is $1,000,000 and the Guideline range fine in plea agreement and PSR defined a maximum fine of 1,000,000 in accordance to statutory maximum, pursuant to 5E1.2(c)(4), the Court imposed the Petitioner to pay a total fine of $4,000,000, including forfeitures, at four times statutory maximum and Guideline maximum. This breached the plea agreement tied to the above guideline range, making the appeal outside of the scope of the appellate waiver. The 2D1.1 Guideline (c)(5), in plea, mismatches with the merely alleged drug quantity and offense level. The Court changed the 2D1.1 Guideline to (c)(3), and sentenced him accordingly, without making more factual findings. When the drug quantity is merely alleged, there is no way to verify the guideline range and figure out where the error originated. The Petitioner reserved objections to fine and forfeiture at sentencing. The Appellate Court ignored petitioner's request to fully brief and dismissed the appeal by essentially treating the appellate waiver as an absolute bar to any appeals citing US v. Grundy 844 F.3d 613 (6th Cir. 2016).

The questions presented are:

Did the Sixth Circuit err and violate Dr. Chang's Constitutional rights in enforcing an unknowing, invalid plea agreement, by interpreting ambiguities in favor of government, ignoring breach of promise in fine guideline range and maximum fines in plea, and ignoring fines that exceeded statutory maximum in violation of Supreme Court's rulings in Booker, Apprendi, Southern Union Company v. US (567 US 343) regarding application of Sixth Amendment jury trial right to Federal Sentencing Guidelines 18 USSC APPX (USSG) including statutes with statutory maximum for criminal fines, while he was sentenced under a different 2D1.1 guideline c(3) instead of the (c)(5) in plea, with a three point hike, relying on drug quantity that was merely alleged? Did the lower court violate Petitioner's Fifth Amendment right of Due Process and Equal Protection in not applying equitable standards in reviewing my case with the case (US v. Grundy) it used to dismiss the appeal? Is appeal for 32(h) violation waived when the plea is unknowing?

The petitioner argues that the plea is unknowing and the above appealable issues fall out of the scope of the appellate waiver.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- United States v. Zongli Chang, No. 18-cr-20008, U.S. District Court for the Eastern District of Michigan, Judgment entered on Apr. 17, 2019.
- United States v. Zongli Chang, MD, No. 19-1478, U.S. Court of Appeals for the Sixth Circuit, Judgment entered on Sept. 9, 2020.

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FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: TABLE OF AUTHORITIES CITED
DATE: 12/07/2020 07:47 AM

TABLE OF AUTHORITIES CITED

OTHER

The following Administrative Law Judge's ruling was cited as evidence in Statement of the Case and is available on Google as a PDF file: (next page)

Page numbe
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Mastrobuono v. Shearson Lebman Hutton, Inc. 514 US 52, 62.	14
Ruelas v. Wolfenbarger 580 F. 3d 403 (6th Cir. 2009)	13
United States v. Moncivais 492 F. 3d 652 (6th Cir. 2007)	14
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United States v. Gebbie 294 F. 3d 540 (3d Cir. 2002)	14.
United States v. Johnson 979 F. 2d 396 (6th Cir. 1992)	14..
United States v. Craven 478 F. 2d 1329 (6th Cir. 1973)	16.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1A to 2.c. the petition and is

[X] reported at U.S. v. Chang, 2020 U.S. App. LEXIS 13259 (6th Cir. 2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix 1B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Apr. 23, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Sept. 9, 2020, and a copy of the order denying rehearing appears at Appendix C. Appendix 3 2-c,

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: STATUTES
DATE: 12/07/2020 07:42 AM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and - district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be - informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 USCS 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 USCS 841(b)(1)(C):

In the case of a controlled substance in schedule I or II, ..., such person shall be sentenced to a term of imprisonment of not more than 20 years ... a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code, or $1,000,000 if the defendant is an individual.

21 USCS 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 USCS 853. Criminal forfeitures
(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.
...
In lieu of a fine otherwise authorized by this part [21 USCS 841 et seq.], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Fed. R. Crim. Proc. (or, FRCP) 32.2

(b)(1)(A)...If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. ...(B) Evidence and hearing. The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contended, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary order ... (B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the

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defendant under Rule 32.2(b)(4).

(5) Jury determination. (A) Retaining the jury. In any case tried before a jury, in the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitablility of specific property if it returns a guilty verdict. ...

18 USCS APPX Federal Sentencing Guidelines (In Booker, the Court expressly stated that "Six Amendment jury-trial right held to apply to Federal Sentencing Guidelines (18 USCS APPX).
(same statutes are under United States Sentencing Guidelines (USSG)):

5E1.2 Fines for individual Defendants

5E1.2(c)(3): Fine Table fines (for Offense Level 29-31, a minimum fine of $30,000, a maximum of $300,000).
5E1.2(c)(4): ...if the defendant is convicted under a statute authorizing ... a maximum fine greater than $500,000 ... In such cases, the court may impose a fine up to the maximum authorized by the statute.

Commentary:
n.4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c)will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the guideline, an upward departure from the fine guideline may be warranted. Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.

n.5 Subsection (c)(4) applies to statutes that contain provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. 841(b) and 960(b) ...; 21 U.S.C. 848(a) ...; 18 USC 1956 (a) ...; 18 USC 1957(b)(2) ...; 33 USC 1319(c) ...; 42 USC 6928(d) ...; 52 USC 30109(d)(1)(D) ... for violation of 52 USC 30122...

Fed. R. Crim. Proc. Rule 11

(b)(1) During this address, the court must inform the defendant of, and determine that the defendant understands, the following: ...(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release

Notes of Advisory Committee on 2002 Amendments

"Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The Committee determined to expand upon the incomplete listing in the current rule of the elements of the "maximum possible penalty" and any "mandatory minimum" penalty to include advice as to the maximum or minimal term of imprisonment, forfeiture, fine and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release. The outmoded reference to a term of "special parole" has been eliminated."

Fed. R. Crim. Proc. 32(h). Notice of Possible Departure From Sentencing Guidelines.

Before the Court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the Court must give the parties reasonable notice that is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: STATEMENT OF THE CASE
DATE: 12/07/2020 09:22 AM

STATEMENT OF THE CASE

1. Zongli Chang MD PhD, pro se, pled guilty of violating 21 USCS 841 and 846, in a case in which some of his patients/codefendants sold prescribed controlled medications. The plea agreement used merely alleged drug quantity and was converted to "an equivalency under the Sentencing Guidelines exceeding 10,000 kg of marijuana", without any indicia how the original drug quantity was reached (e.g., never provided implicated patient list included for drug quantity calculation for verification), therefore does not meet the alleged "standard of proof": "preponderance of evidence". R. 177, PageID 655. A set of US Sentencing Commission Worksheets is attached at the end of the plea. Id PageID 664-671. The Offense Level Total was 31 on Worksheet D with a corresponding Guideline Range of 108 to 135 months. Id. PageID 668.

2. The matching Fine Table fines, pursuant to 5E1.2(c)(3) Fine Table are a minimum of $30,000 and a maximum of $300,000. The statutory maximum fines, pursuant to 21 USCS 841(b)(1)(C) (also see PSR) is $1,000,000. Therefore, the Fine Guideline Range is a minimum of $30,000 and a maximum of $1,000,000, pursuant to 21 USCS 841(b)(1)(C) and 5E1.2(c)(4). Id. PageID 671.

3. The cover page expressly defined a "Maximum fine: Not to exceed $1,000,000. Id. PageID 652. The plea stated "there is no agreement as to fines"

4. The 2D1.1 Guideline mismatches merely alleged drug quantity and offense level (there is no proof any was correctly calculated). The original pled Guideline 2D1.1(c)(5) Worksheet A corresponds to at least 1000kg but less than 3000 kg of converted drug weight and a level of 31 in USSG. However, it mismatches with the merely alleged "12,394 kg marijuana equivalency" and Level 34 (the Offense Level before adjustment) on Worksheet A. Id. PageID 664. The Offense Level Total that matches with 2D1.1(c)(5) was 27, which matches Guideline Range of 70-87 months. The matching Fine Guideline Range would be $25,000 to $1,000,000. There is no proof any of these were correct. The pled Count 1 would account for all the drug quantity in all related Counts (Counts 2-36), yet the sum of indicted drug quantity in Counts 2-36 is 2085 U of Schedule II medications (R. 1, PageID 5-13), or estimated 186.2-212 kg (a range since exact dose of hydrocodone not listed) marijuana. Since he pled to only Count 1, the total of indicted drug quantity that could be verified is 2085 U of Schedule II medications, far less than the merely alleged drug quantity.

5. According to the Indictment and Plea, Dr. Chang received payments for seeing patients. "Following the issuance of the prescriptions, the recruiters then transported the patients to various pharmacies where the prescriptions were filled, and then took possession of the controlled substances for further illegal distribution". It did not have any information how Chang got one penny of the drug proceeds because patients got prescriptions and sold pills to the codefendants among themselves and never came back to divide the profits.

6. Government fabricated in Indictment (R.1, PageID2) that "Dr. Zongli Chang fraudulently billed Medicare for physician services until September 10, 2014, when his Medicare enrollment was revoked". Public record on internet (by Googling "zongli chang PDF"; acceptable evidence per appellate rules) from Department of Health's Administrative Law Judge (ALJ) (Department of Health and Human Services, Departmental Appeals Board, Civil Remedies Division, Zonglic Chang, MD/Metro Home Visiting Physicians PLLC v.. Centers for Medicare & Medicaid Services, Docket No. C-15-1577, Decision No. CR4540, March 3, 2016) would show that Government's claim about Medicare fraudulent billing and event related with September 10, 2014 was fabricated in Indictment and maneuvered in plea to fabricate a reason to tell about conspiracy. There was never Medicare fraud involved. ALJ found that Medicare was at fault "For the reasons outlined above, I find CMS did not have a legitimate basis to revoke Petitioner's Medicare Enrollment and billing priviledges on the grounds that Petitioner was not operational, and I reverse its revocation determination and its imposition of a two-year reenrollment bar upon Petitioner". The fabricated information went into Indictment, Plea, PSR and I was sentenced accordingly to this fabrication. I only knew the codefendants for two years (mid-2015 to mid-2017; see codefendants' plea agreement for verification). However, three and half more years were added to the conspiracy to make it start from January of 2012 according to this fabrication (see Indictment, Plea Tr, Sentencing Tr and PSR) so that the Government could find an excuse to exact extra forfeiture amount of income from seeing Medicare patients from a physician, without any basis. Dr. Chang's top end guideline sentence and huge fines were a direct result of these fabricated, erroneous information.

7. "Income Analysis": Assume all the payments for seeing patients were drug proceeds and patients never needed any of the medications or other services, which were not true even according to Government reports, and assume that the merely alleged

drug quantity of 161,280 unit doses of Schedule II controlled medications (Id. PageID 655) meet factual basis requirement beyond mere allegation, this amount of medications would be equal to about 2150 patients visits (161,280 divided by 75) because usually 75 unit doses were prescribed on average per visit (Schedule IV medications were only sometimes prescribed and therefore would not reflect number of visits). Using $150 per visit as described in plea, the total charged would be $322,500 (2150 x 150; Government's own reports show many patients need their medications, therefore this is not drug proceeds). Per the plea, $400 were charged for a few new patients (to price out patients that want strong medications because patients with insurance usually try to find doctors that would take their insurances; established patients before a cut off date were not charged as such). With this information accounted, the total fees charged would not exceed $350,000 to $400,000. (Calculations based on Government's merely alleged drug quantity; Stand of proof: beyond reasonable doubt, if Government provided numbers are correct and assumptions of all being drug proceeds are coorect - much higher standandard than government's mere allegations).

8. "Street Value Analysis": Using street value of medications to calculate possible proceeds (again, there is nothing in factual basis to say I got one penny) would also be much smaller than the above, especially considering other parties in the conspiracy (Standard of proof: preponderance of evidence).

9. The plea hearing was on 11/20/2018 (R.206 Plea TR.), during which the Judge mentioned the fine amount is unknown (Id. PageID 826) and did not even mention the "possible maximum penalty" in terms of fines besides mentioning that the Indictment indicted a fine of up to a million (Id. PageID 818). An 11(b)(1)(H) violation, making the plea agreement unknowing. There was no mentioning that the fines could go up to 4 million.

10. In the Presentence Report (PSR), the Court changed the mismatching Guideline from 2D1.1(c)(5), matching 1000 to 3,000kg marijuana and Level 31 in plea agreement, to 2D1.1(c)(3), matching Level 34, with a three point Offense Level hike, without mentioning the error, without making any factual finding as to why the Court wanted to change the Guideline to (c)(3), although the Court noticed discrepancy in the drug quantity from different MERELY ALLEGED numbers it got, apparently from Government. The PSR mentioned that forfeiture was going to be determined at sentencing. Beside the USSR Guideline code change without mentioning the change from (c)(5) to (c)(3), the PSR gave same Guideline range in terms of imprisonment and Fine Guideline Range, as in Plea Agreement. It stressed the Fine Guideline maximum of $1,000,000.

11. Government had frozen Dr. Chang and his family's accounts that included his wife's income from work and many years of savings, account with his son's savings in it, accounts with large sum of income from another not-implicated business, Dr. Chang's retirement account, income from long before the conspiracy including income from when he worked as a medical research scientist, without proving any of these to be funds he acquired from the conspiracy. R. 97 and 100, Forfeiture Bill of Particulars (see account lists that included his wife solely owned retirement account, his retirement account at Charles Schwab and accounts solely or jointly owned, with his, her and their son's income and savings, including income from another not-implicated business).

12. On Nov. 20, 2018, the Court scheduled sentencing for March 27, 2019. Dr. Chang repeatedly contested the amount of forfeiture in huge excess of the possible proceeds from pled crime. R. 200, 208, 217. Government encouraged the Judge to schedule the requested forfeiture hearing on sentencing day, to which after contest of being against requirements of F.R.C.P. 32.2, Judge scheduled the hearing on March 26, 2019, the day before originally scheduled sentencing. On morning of the hearing, Judge did not address Dr. Chang at all, and just asked the attorney to come to the back with the prosecutors. This whole arrangement, along with the Plea that did not specify amount of forfeiture, gave substantial, substantive procedural advantage to the Government to pass a message brought back by the attorney. The attorney told Dr. Chang $3 million is the best offer from the Government, either take it, or go to a hearing with the sentencing the next day, during which time the Government would paint the worst picture of him and he would be guaranteed the top end of sentence, without any reduction. Dr. Chang realized that the procedural advantage that has been created would make him in jail for 135 months unless he sign the document presented to him. He then signed the document: a Stipulated Amended Preliminary Order of Forfeiture in the amount of 3 million dollars. Right after Dr. Chang signed, the Judge changed the sentence hearing to April 17, 2019, to make the process looking like compliant with the requirement of F.R.C.P. 32.2.

13. The Court did not give any notice or give the ground for more fine besides the forfeiture, and also did not give any ground for doing so in PSR, in violation of 32(h). At sentencing on 4/17/2019, the Judge imposed a 1 million dollar fine. In the written Judgment (Appendix 2), the 3 million dollar forfeiture showed in the Schedule of Payment section, along with the 1 million dollar fine. The attorney objected the 135 months sentence, denial of the downward departure request, and the fine and stated "[t]he total forfeiture and fines in this case have now exceeded, greatly exceeded the amount that Dr. Chang has earned as a result of this activity" (Sentencing Tr.). The Judge did not give any specific reason why he departed from the Fine Table Guideline range as defined in the Plea and PSR. He did not mention at all statutory maximum fine defined by the Plea and 21 USCS 841(b)(1)(C) was exceeded by four fold and did not give any reasoning for doing so. He did not explain according to requirements of statutes including 21 USCS 841, Federal Sentencing Guidelines (18 USCS APPX)/USSG, F.R.C.P. 32(h), as well as Supreme Court's holdings in Booker, Apprendi, Southern Union Company.

14. On Sept. 11, 2019, his attorney filed a brief against Dr. Chang's will and instruction not to file it, which resulted in Dr. Chang to file a Motion to Withdraw Attorney and Supplement or Replace Brief on 9/25/2019 (#19-1478, R.18; original tile was: Appeal Brief and change of attorney; more details later).Then Government filed a Motion to Dismiss based on appellate waiver on 10/1/2019 (#19-1478, R.19). Without considering issues that fell out of the scope of the appellate waiver Dr. Chang raised in R.18, and without allowing him to fully brief through supplementing or replacing the intended-to-be withdrawn brief, on 4/23/2020, the panel in Sixth Circuit dismissed his appeal based on appellate waiver to be a absolute bar of appeals(Appendix 1) without giving him a chance to fully brief. On 8/17/2020, Dr. Chang filed a Petition for En Banc Rehearing, it was denied on 9/9/2020 (Appendix 3).

TRULINCS 56246039 - CHANG, ZONGLI - Unit: ELK-H-B

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: REASONS I. ISSUES,LAWS,HOLDINGS,CONFLICTS-FINES
DATE: 12/07/2020 09:39 AM

REASONS FOR GRANTING THE PETITION

I. THE MAIN SENTENCING ISSUES; CONFLICTS AMONG AND WITHIN CIRCUITS REGARDING FINE AND FORFEITURE, IN CONFLICTS WITH STATUTES AND SUPREME COURT HOLDINGS

A. Analysis of The Main Sentencing Issues Which Make the Appellate Waivers Not Enforceable
1. Breach of plea agreement:

After signing a plea agreement with appellate waiver that was tied to a Guideline Range of 105 to 135 months, Fine Table Guideline Range from $30,000 to 300,000 and Guideline Range fines of $30,000 to $1,000,000, with expressly stated and defined maximum of 1 million dollars, which was also the statutory maximum of $1,000,000. The Court imposed a 1 million statutory in personam fine on top of 3 million dollar "stipulated" in personam forfeiture. The total in personam fines reached $4,000,000, BREACHING THE $1,000,000 MAXIMUM FINE DEFINED IN THE PLEA AGREEMENT. R177, COVER PAGE PageID 652, PageID 671. Breached plea could not be enforced and is an issue that can not be waived by appellate waiver.

2. Rule 11(b)(1)(H) violation:

Both of the in personam fines were unknown in terms of amount, manner of deciding amount, at time of signing plea agreement. The Court did not mention the maximum possible penalty as required by 11(b)(1)(H), besides mentioning the fine amount was unknown, MAKING THE PLEA AGREEMENT UNKNOWING. The Court imposed procedurally and substantively UNREASONABLE SENTENCE, without giving any notice of departure from Fine Guideline Range, nor giving any ground sufficiently ahead of sentencing, in VIOLATION OF 32(h).

3. Total fines exceeded statutory maximum by four times: The total in personam fines exceeded the statutory maximum fines by 4 times. As clearly stated in PSR and plea agreement, the determining Guideline Range is determined by 21 USCS 841(b)(1)(C), which stated:

In the case of a controlled substance in Schedule I or II...such person shall be sentenced to a term of imprisonment of not more than 20 years..., a fine NOT TO EXCEED THE GREATER OF that authorized in accordance with the provisions of title 18, United States Code, OR $1,000,000 if the defendant is an individual...

The "Title 18 provisions" above apparently is referring to 18 USCS 853 regarding criminal in personam forfeiture, which says that persons convicted of certain drug crimes must forfeit to the United States (a)(1) "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation". 21 USCS 853 continued to clarify:

"IN LIEU OF a fine otherwise authorized by this part [21 USCS 841 et seq.], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds."

Combining the languages together, the statutory maximum fine in violation of 18 USCS 841(b)(1)(C) with Dr. Chang's Guideline Range is "A FINE" "NOT TO EXCEED THE GREATER OF "$1,000,000" OR "not more than twice the gross profits or other proceeds."

Please note the words "OR" in 841, and "IN LIEU OF" in 853. It does not mean "and", or "in addition to", as happened in my case, an in personam fine plus another in personam fine called forfeiture. Please also note that Congress used the word "a fine" and "be fined" in 21 USCS 841 and 18 USCS 853 to refer both fine and forfeiture as fines.

One thing is clear in Dr. Chang's case, a statutory maximum $1,000,000 fine, as defined in Plea, is already ordered by the judge, another penny additional fine would make it to exceed statutory maximum. As a matter of fact, it is 3 million in excess of the statutory maximum, or, four times of statutory maximum. An outside guideline judgment is an Booker issue and when the judgment is above statutory maximum, it triggers Sixth Amendment jury trial right as in Apprendi v. New Jersey (530 US 466) and Southern Union Company v. US (567 US 343) Supreme Court cases, a right that is not waived by the appellate waiver (more discussion later).

4. Forfeiture analysis: The above analysis already established that the fines are in excess of 21 USCS 841 and 21 USCS 853

defined statutory maximum fines. For clarity of the case purpose, please refer to the 7th and 8th paragraph of the Statement of Purpose section: the "Income Analysis" (income would not exceed $350,000 to 400,000) and "Street Value Analysis" (Estimate would not be bigger than income analysis). Although not one penny was proven by Government to be drug proceeds that Dr. Chang "obtained", assuming 50% to be drug proceeds obtained, 2 x profits or proceeds would not exceed $400,000. Assuming 100% drug proceeds (contradicting Government's reports), 2x profits or proceeds would not exceed $800,000 (2x 400,000). In a real conspiracy, if the Petitioner got all the profits, nobody would be participating. Notice this apparently exaggerated profit or proceeds even did not exceed the $1,000,000 statutory maximum fines. In real life situations of drug trafficking, the profit amount should be most likely within the Fine Guideline Range, limited by drug quantity, in other words, under $300,000. This is an amount the Booker Court asked all Courts to explain if departed upward. Moreover, the Booker, Apprendi, Southern Union Company Courts and the Congress would all inquire into the holdings of the Courts.

Honeycutt v U.S. 137 S. Ct. 1626 (2017)

5. Honeycutt violation: Government violated Supreme Court Honeycutt ruling on forfeiture. The Government explicitly wrote to Court that the following "is forfeitable including (1) amounts derived from uncharged substantive conduct; (2) proceeds of a conspiracy, the aspects of which were not fully alleged in an indictment; and (3) proceeds resulting from acts for which the defendant was not personally responsible". R. 207. PageID 844. These include claims or crime Petitioner never admitted to, never proven in court and all of these are proceeds petitioner never "obtained" and involved joint and several liability. These are banned by Honeycutt, pursuant to 21 USCS 853(a).

B. SUPREME COURT REITERATED REPEATEDLY THAT CRIMINAL FORFEITURE UNDER 21 USCS 853 IS A FINE

Not only Congress used terms of "fine" to refer to forfeiture, for example, in cited paragraphs of 21 USCS 841, 18 USCS 853 above, in USSG (also 18 USCS APPX) and in 21 USCS 855 (Alternative Fines). Supreme Court noted "that at the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'" (Browning-Ferris Industries of Vt. Inc. v. Kelco Disposal, Inc, 492 U.S. 257, 265 (1989)). "Forfeitures - payments in kind - are thus 'fines' if they constitute punishment for an offense." United States v. Bajakajian 524 US 321. "This forfeiture is plainly a penalty since there is no practical difference between taking a man's property by forfeiture and taking his money by a fine". United States v. Dixon, 347 US 381.

C. STATUTES ABOUT GUIDELINES OF FINE THAT INVOLVES FORFEITURE:

1. Criminal fine Guideline Range apply to fines including forfeiture and Booker applies:

Fine Table Guideline minimum and maximum are determined by Offense Level under FEDERAL SENTENCING GUIDELINES 18 USCS APPX (or USSG) 5E1.2(c)(3), (c)(4). These apply to forfeiture and is made clear in 5E1.2 Comment n.4:

"The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline maybe warranted. Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted".

Apparently, this Comment n.4 talks about how the Fine Table guideline and fine Guideline Range should be applied in forfeiture and restitution and said in most cases the maximum of (c)(3) Fine Table Range should be at least twice amount of the gain for forfeiture purpose. Upward departure could be warranted from the Fine Table Guideline or Fine Guideline Range to disgorge all gain from the offense.

Booker (US v. Booker 543 US 220) apply and court needs to explain why when Fine Table Range is exceeded when it departed upward (more below).

2. 5E1.2(c)(4) and 5E1.2 Comment n.5 defined statutory maximum for criminal fines under many statutes, Booker made Apprendi applicable to criminal fine and forfeiture where statutory maximum apply

According to 5E1.2(c)(4), "if the defendant is convicted under a statute authorizing ...a maximum fine greater than $500,000", "the court may impose a fine up to the maximum authorized by the statute". Then Comment n.5 gave a list of such statutes: 21 USC 841(b), 960(b), 848(a), 18 USC 1956(a), 1957(b)(2), 33 USC 1319(c), 42 USC 6928(d), 52 USC 30109(1)(D), 30122.

As mentioned earlier 5E1.2 Comment n.4 made it clear the criminal Fine Guideline Range apply to forfeiture. Therefore, 5E1.2(c)(3), (c)(4), Comment n.4 and n.5 defined the statutory maximum for fines and forfeiture under the above mentioned statutes.

3. Booker Court expressly extended its Sixth Amendment jury trial holdings to 18 USCS APPX Federal Sentencing Guidelines and made the Apprendi holding applicable to criminal fine and forfeiture

In Booker, the Court expressly stated that both its "Sixth Amendment holding" and "Sentencing Act" must be applied "to all cases on direct review. Id. at 268. Booker holds that "Sixth Amendment jury-trial right held to apply to Federal Sentencing Guidelines (18 USCS APPX); Guidelines made effectively advisory...; these holdings held to apply to all cases currently pending on direct review". The Booker Court extended Apprendi and Blakely to the Federal Sentencing Guidelines, holding the Sixth Amendment Right requires that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id, 125 S. Ct at 756.

Therefore, Because Booker extended Apprendi and Blakely's Sixth Amendment jury-trial right to the entire Sentencing Guidelines, including criminal fines. It included 5E1.2. Because 5E1.2(c)(4) and Comment n.5 defined statutory maximum for many statutes where statutory maximum apply, APPRENDI APPLY TO THESE STATUTES (SEE LIST ABOVE OR UNDER 5E1.2 COMMENT n.5).

In Southern Union Company, the Supreme Company affirmed this and noted that Apprendi rule apply to criminal fines and the statute involved is 42 USC 6928(d), one that is listed under 5E1.2 Comment n.5.

5E1.2 Comment n.4 explained that the fine guideline range applies to forfeiture and restitution. Upward departure from statutory maximum when it is also guideline range maximum is allowed in order to disgorge all profits (as much as 2x profits), but then Apprendi and Southern Union Company would apply. In the same time, 21 USCS 853, Fed. R. Crim. Proc. 32.2 and Honeycutt ruling all apply. Therefore, there is no conflicts with 21 USCS 853 or any other forfeiture statute.

4. Southern Union Company Court included forfeiture in its criminal fines ruling

In Southern Union Company v US (567 US 343), the Court holds that the rule of Apprendi applied to the imposition of criminal fines. In examining historical record, the Court stated "the record supports applying Apprendi to criminal fine ...for some other offense, the maximum fine was capped by statute" and then gave an example of such statute "any consul who gives a false certificate shall "forfeit" and pay a fine not exceeding ten thousand dollars, at the discretion of the court". The statute example of forfeiting the fine makes it clear that Southern Union Company Court meant to apply its ruling of applying Apprendi to the imposition of criminal fines include forfeiture when statutory maximum applies (see 5E1.2 Comment n.5 for a list of such statutes).

(Part I continued on next page)

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: Reasons I. ISSUES AND LAW (continued)
DATE: 12/07/2020 09:47 AM

Part I, C: continued

5. Circuit courts historically use guideline range to measure excessiveness of forfeiture, but has made rulings that conflicts each other, with statutes and Booker, Apprendi and Southern Union Company

Sixth Circuit, in United States v. Ely (468 F.3d 399), considered the guideline fine range and the statutory maximum in assessing proportionality in a criminal forfeiture case akin to Bajakajian and found that "the forfeiture amount here is also within the statutory fine of $250,000". 468 F.3d 399, 403 (6th Cir. 2006). Also see US v. Carpenter 317 F.3d 618 (6th Cir. 2003).

In US v. Castello, 611 f.3d 116 (2d Cir. 2014), Second Circuit made it clear "However, the proposed forfeiture must also be compared to the Guidelines range" and "the relevant metric is the top of the Guidelines for the fine and for imprisonment". Id. at 123.

However, after Supreme Court clarified that Apprendi applies to criminal fines in Southern Union Company v. United States, one circuit after another started turning against using statutory maximum in assessing jury trial right involving criminal forfeiture, claiming there is no statutory maximum for criminal forfeiture, despite the apparent list of such statutes in USSG 5E1.2, Comment n.5 in relation to 5E1.2(c)(4) and despite 5E1.2 Comment n.4 expressly tied forfeiture to the criminal fine guideline range.

For example, in United States v. Bradley 969 F.3d 585, 590 (6th Cir. 2020), Sixth Circuit stated that "But no jury right exists in criminal forfeiture proceedings", quoting Libretti v. United States 516 US 29, 49. However, Libretti was strictly about if jury right in 32(e) exists for petitioner who has a forfeiture defined and embodies in a plea agreement. 32(e) was repealed and the Due Process is now governed by 32.2 and 32.2(b)(5) specifically talks about jury determination in relation to a trial. Therefore, Libretti's holdings no longer apply when its underlying focus of discussion 32(e) no longer exists. Therefore, Libretti did not say Southern Union Company's ruling about jury trial does not apply to criminal forfeiture. As a matter of fact, Booker Court expressly extended Apprendi to the entire Federal Sentencing Guideline 18 USCS APPX, which 5E1.2 Comment n.4, which talked about is part of. Southern Union Company gave an explicit historical statute where forfeiting and fine was capped (discussed earlier).

Therefore, the issue of if Apprendi and Southern Union apply to forfeiture resolves by itself, when all statutes and Supreme Court rulings are taken together. When statutes define statutory maximums that apply to sentencing guidelines, Booker made it clear, Apprendi apply to the guidelines that include criminal fine, forfeiture. Accordingly, these statutes, USSG, relevant forfeiture statute, and relevant guideline and forfeiture related Supreme Court rulings including Booker, Apprendi, Southern Union Company, Honeycutt needs to be assessed together. All circuit rulings should satisfy all these statutes and holdings. By taking Libretti's outdated opinion and other circuit's rulings that conflict with statutes and Supreme Court rulings would lead to erroneous decisions.

6. Conclusion as to my case

As to my specific case, the Court did not let Petitioner know that he would be exposed to 4 million dollar total fines either in plea hearing, plea, PSR or anytime before sentencing, this made the waiver unknowing and unenforceable. Neither was it explained why the total fines exceeded the pled Fine Table Guideline, nor was it explained why the total fines exceeded the Fine Guideline range maximum and statutory maximum, nor was it explained why the maximum fine defined in plea's promise on cover page was breached. The explicit language of 21 USCS 841(b)(1)(C) regarding fines not to exceed the greater of $1,000,000 or two times gross profits or proceeds, in other words, 841(b)(1)(C) defined statutory maximum, was exceeded, by four times. These make Booker, Apprendi and Southern Union Company's Sixth Amendment jury trial right applicable.

(Part II on next page)

TRULINCS 56246039 - CHANG, ZONGLI - Unit: ELK-H-B

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: REASONS II: WAIVER NOT ABSOLUTE BAR TO APPEALS
DATE: 12/07/2020 09:51 AM

II. SIXTH CIRCUIT'S DECISION TO ENFORCE AN UNENFORCEABLE DECISION CONFLICTS WITH SUPREME COURT, OTHER CIRCUITS AS WELL AS ITS OWN HOLDINGS

A. In its decision of dismissal, Sixth Circuit erroneously treats appellate waiver as an absolute bar of appellate claims

On 9/25/2019, Petitioner filed an Appellant Motion to Withdraw Counsel and to Supplement or Replace Brief (#19-1478, R. 18; original title: Appeal brief and change of attorney), in which I listed nine Exhibits including two certified mails and numerous emails communications with my attorney Mr. Chapman, to show that despite my requests to discuss with him about appealable issues, he never did. Dr. Chang explained in the brief that not discussing with him about appealable issues does not meet ABA appellate standard (ABA Std, Criminal Appeals Std 21-22(b); ABA Std, The Defense Function Std. 4-8.2(a)) and that I need to withdraw him as counsul (R.18, Page 1). He also explained, on 9/10/2019, the day before the due date for a brief, Mr. Chapman sent petitioner a draft of his brief. Dr. Chang found out that his brief was lacking in depth and did not address issues Chang tried to talk with him at all. Dr. Chang clearly told him not to file the draft version and instructed him to "please file an extension" and stressed, in caps, that "I NEED TO READ THE FINAL BRIEF BEFORE FILING (Id. Page 2 and Exhibit 9 on Page 13). Petitioner mentioned about "significant appealable issues that Mr. Chapman failed to address, such as government and court's violation of 21 USC 853 and 21 USC 841 regarding fine and penalty, government's breach of plea agreement in seeking a fine that was 4 times as much as the maximum amount defined by the plea agreement and 21 USC 841, insufficient and erroneous factual basis that is contradicted by facts and evidence and even by other codefendants's plea agreements, reasonableness of sentencing .." (Id. Page 2). On 10/1/2019, the Government filed a Motion to dismiss based on appellate waiver. The Court allowed him to find a new attorney, but never gave him a chance to supplement or replace the brief all appealable issues and dismissed the appeal based on appellate waiver on 4/22/2020 (Appendix 1).

In its opinion, the panel cited United v. Grundy, 844 F.3d 613, 616 (6th Cir. 2016) and ignored Dr. Chang's request in a motion to supplement or replace brief and ignored the fact that the total criminal fines departured from the pled fine guideline range by four times and exceeded the statutory maximum by four times, and quoted United States v. Grundy, 844 F.3d 613, 616 (6th Cir. 2016) that stated "[B]y agreeing to waive his right to appeal his 'sentence', [a] defendant waive[s] any challenge to each of the constitutent elements of his sentence, including restitution."). The panel did evaluate and denied 11(b)(1)N) violation. However, the panel failed to recognize the apparent fact that the Fine Guideline Range maximum, which is derived from the statutory maximum of 21 USCS 841(b)(1)(C), that is tied to the appellate waiver, was exceeded by four times. Nowhere in the plea agreement, PSR, plea hearing could it be found that Dr. Chang knew that he was going to be fined to four times Plea promised maximum (11(b)(1)(H) violation), which is also the guideline range maximum and statutory maximum, making the appellate waiver unknowing, involuntary, unintelligent made, invalid and the sentence not reasonable, in violation of Booker, Apprendi and Southern Union Company.

The panel answered Dr. Chang's argument "that enforcing his appeal waiver will result in a miscarriage of justice" and that "[a]t the outset, a valid appeal waiver does not necessarily deprive us of jurisdiction to correct an unlawful sentence. See United States v. Caruthers, 458 F.3d 459, 472 n.6 (6th Cir. 2006)

In other words, without even allowing the Petitioner to fully brief (supplement or replace the brief), the panel took the appellate waivers appellate bar to any appeals.

In Garza v. Idaho, 203 L Ed 2d 77 (2019), in explaining the term "appeal waivers", Supreme Court clarified that "no appeal waiver serves as an absolute bar to all appellate claims". "All jurisdictions appear to treat at least some claims as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable- for example, on the ground that it was unknowing or involuntary. Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain" Id. at 86. In n.6, the Court further noted that "Lower courts have also applied exceptions for other kinds of claims, including 'claims that a sentence is based on race discrimination, exceeds the statutory maximum authorized, or is the product of ineffective assistance of counsel.' King & O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L.J. 209, 224 (2005)(collecting federal cases); see also, e.g., United States v. Puentes-Hurtado, 794 F.3d 1278, 1284 (CA 11 2015)([A]ppellate review is also permitted when a defendant claims that the government breached the very plea agreement which purports to bar him from appealing or collaterally attacking his conviction and sentence")...(holding that appeal waivers are subject to a "miscarriage of justice" exception)".

In various cases, Sixth Circuits have similar views regarding all above issues discussed above in Garza (see more discussions

later). These made the panel's dismissal quoting an absolute bar to stand on thin ground. In United States, v. Caruthers, 458 F.3d 459, 472, Sixth Circuit held that "an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded". Well, Dr. Chang's waiver was tied to a 1 million statutory Max guideline, never knew he would get 4 million total fines, making the plea unknowing. Also the statutory maximum has been exceeded in this case and the guideline promise was breached.

B. Unknowing plea is unenforceable: 11 (b)(1)(H) violation

As described above in Garza, unknowing plea is not valid and unenforceable. An appeal waiver can not "bar a claim that the waiver itself - or the plea agreement of which it was a part - was unknowing and involuntary". United States v. Carreon-Iharra, 673 F.3d 358, 362, n.3 (5th Cir. 2012).

Rule 11 held that "the court must inform the defendant of, and determine that the defendant understands, the following ...(H). any maximum possible penalty, including imprisonment, fine, and term of supervised release". In the Notes of Advisory Committee on 2002 Amendments under Rule 11, the Committee wrote "Amendment Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty .... The Committee determined to expand upon the incomplete listing in the current rule of the elements of the "maximum possible penalty" and any "mandatory minimum" penalty to include advice as to the maximum or minimum term of imprisonment, forfeiture, fine, and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release...". Therefore, total maximal possible fines including fine, forfeiture, special assessment, and restitution were all part of this requirement.

In United States v. Ortiz-Garcia, "Fed. R. Crim. P. 11(b)(1)(H) refers to 'maximum possible penalty' and not to 'statutory penalty' or 'statutory maximum'; it therefore does not provide exception for situations in which statute itself does not specify maximum". 665 F.3d 279 (1st Cir. 2011). "Fed. R. Crim. P. 11 violation constituted plain error because district court failed to comply with Rule 11(b)(1)(H)'s mandate that it inform defendant of, and ascertain defendant's understanding of, any maximum possible penalty". Id.

In Sixth Circuit, similar standard is held. "However, it is well-established that 'for a defendant's plea of guilty to be voluntary, the defendant must be aware of the maximum sentence that could be imposed." King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994). See Rueas v. Wolfenbarger, 580 F.3d 403 (6th Cir. 2009), where defendant did not know maximum sentence he was exposed. Also see United States v. Syal, 963 F.2d 900, 905 (6th Clr. 1992): "To plead knowingly, the defendant must know the maximum possible penalty provided by law." (internal quotations omitted); and United States v. Monie, 858 F.3d 1029 (6th Cir. 2017).

Petitioner never knew the "maximum possible penalty" was going to be 4 million. As a matter of fact, I was fooled to believe it was going to be below the Fine Table maximum since that was what I pled to and thought at most it was going to be 1 million because I never thought the Government would breach words on paper and play a game to get an absolute-bar type of appellate waiver and trap me into a much higher penalty that I was never told since I could not appeal if his language to match Grundy-type appellate waiver work for the appellate court.

Nevertheless, the Rule 11(b)(1)(H) violation made the plea unknowing, involuntary and not intelligent. The plea agreement is therefore unenforceable.

(PART II continued on next page)

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: Reasons II. NOT ABSOLUTE BAR - (CONTINUED)
DATE: 12/06/2020 11:23 PM

(PART II continued)

C. Sixth Circuit interpreted ambiguous appellate waiver that was constructively-worded in Grundy-type language in government's favor

Supreme Court held that, in appropriate cases, the Court apply "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that crafted it." Mastrobuono v. Shearson Lebman Hutton, Inc., 514 US 52, 62. "[P]lea agreement is contractual in nature, and as such, courts are guided by general principles of contract interpretation when construing plea agreements." United States v. Moncivais 492 F.3d 652, 662 (6th Cir. 2007). "[A] plea agreement is ambiguous if it is capable of more than one reasonable interpretation." United States v. Debreczeny, 69 Fed Appx 702, 706 (6th Cir. 2003) (quoting United States v. Gebbie, 294 F.3d 540, 551 (3d Cir. 2002))" (United States v. Zakharia (418 Fed Appx 414 (6th Cir. 2011).

In a case similar to the case US v. Grundy used by Sixth Circuit to dismiss this case, United States v Chino 331 Fed APPX 592 (6th Cir. 2009), Sixth Circuit first explained that "we read any ambiguities in plea agreements against the government, and in favor of a defendant's right to appeal" and "[w]hile the portion of the agreement entitled "SENTENCING" includes "restitution as may be ordered by the Court, ...the appellate waiver indicates only that Ms. Chino "knowingly waive[d] the right to appeal any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined)"...whether the sentence includes an order of restitution, with regard to the appellate waiver, is unclear".

In another similar case, the Court found that because "[t]he plea agreement is ambiguous as to the amount and manner of determining restitution", "[w]e therefore hold that Defendant's appeal is not waived. See United States v. Johnson, 979 F.2d 396, 399 (6th Cir. 1992)(stating that "ambiguity [in a plea agreement] must be construed against the government"). United States v. Smith 344 F.3d 479 (6th Cir. 2003).

Zakharia's case is extremely similar to the current case, although the current case involved more problems as described. It even contained specific language that says he waived appeals as to fines. However, as in the current case, Zakharia's case specifically states "[t]here is no agreement as to fines" and his total fines exceeded guideline maximum. And as in this case described in Statement of the Case, at 13, Zakharia reserved his objection. Because of these, he held that "he has not waived the right to challenge on appeal the fine and costs imposed by the district court. The court found that "Zakharia's contrary interpretation is equally viable. This ambiguity requires that we give the benefit of the doubt to Zakharia". Zakharia, 418 Fed Appx 414.

In the current case, the plea agreement clearly stated "there is no agreement as to fines". Its waiver language stated "[i]f the defendant's sentence of imprisonment does not exceed 135 months, the defendant also waives any right he may have to appeal his sentence on any grounds". In this waiver language, two occasions of the same word within the same sentence should be referring to the same thing. There is no doubt the first word "sentence" means "sentence of imprisonment" and by logic, grammar, common sense, good practice of writing, and ethics of good moral value in practice of law, the second "sentence" also means sentence of imprisonment. At least this created a viable interpretation, an ambiguity. The fact that the plea explicitly stated "there is no agreement as to fines" adds to the argument, and the counsel's objection to the fines including forfeiture at sentencing confirmed the argument. For example, if I make such a promise to John Smith by writing "since John Smith is a good friend, I will send John a gift". The readers would understand it to mean that John Smith should expect a gift, not John Doe, or John Miller. At least, I meant to refer to John Smith is a viable interpretation, if not prevailing one.

However, the Government insists that the second instance of "sentence" means sentence of fine, forfeiture, restitution, or anything, at any amount, creating a situation that thee signer would be subject him to be sentenced at the whim of the Court, for indefinite amount of fines to wipe out defendant's all assets. In Caruthers, Sixth Circuit made it clear that "It is well settled in federal courts that 'a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court.' United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992)" Caruthers, 458 F.3d at 471 and "we agree with our unanimous sister circuits that an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded". In other words, the Government's interpretation would not be enforceable when the fines exceeded statutory maximum sentence.

Significantly, the ambiguity in the waiver is constructively-worded to follow a similar pattern - waive one thing and then claim

more later for unknown amount of criminal fines or forfeiture - all these cases (Zakharia, Grundy, US v Winans 748 F.3d 268 (6th Cir. 2014), and this case) originated from the same Eastern District Court of Michigan. But in Grundy and Winans, the cases are distinguishable in that the plea was not unknowing in that defendants knew their maximum exposure of penalty, while in Zakharia, the Circuit Court ordered district to correct his sentence. If the Government meant to include all types of sentences, just say so. To constructively and intentionally word a waiver to say one thing and then claim more later is deceiving and is a trap and, according to Supreme Court, is unenforceable.

In dismissing the appeal by citing US v. Grundy (844 F.3d 613)(6th Cir. 2016) without addressing the clear ambiguities and the distinguishable characteristics, the panel's opinion contradicted that of the Supreme Court, in Mastrobuono v Shearson Lehman Hutton, Inc., regarding the common-law rule of contract interpretation and that of the Sixth Circuit's standings in Smith, Chino and Zakharia, and essentially made the appellate waiver absolute bar for appeals, and is contracting this court's opinion in Garza v. Idaho.

D. Even If The Appellate Waiver Is Knowing And Not Ambiguous, It Was Still Not Enforceable Because It Was Tied To A Fine Guideline Range And The Range Maximum (Plea Agreement) Was Breached And Statutory Maximum Was Breached

1. The panel's assessment of upward departure from guidelines and miscarriage of justice:

The panel did address the issue of guideline range and its maximum was breached by a factor of four: "Chang's argument is that his fine, when combined with a $3,00,000 forfeiture judgment enforced by the district court, "exceed[s] the maximum fine by a factor of four." This is information that would make the panel be on alert it would make Grundy and Winans not applicable because in both cases the defendants knew ahead of time their exposure range and the range was not breached either. The panel argued that since Chang does not allege that he will be unable to pay the fine in reasonable installments, and he is psychologically capable of entering a knowing plea. Therefore, "Chang has not established that enforcing his appeal waiver will result in a miscarriage of justice".

2. Circuit holdings in assessing miscarriage of justice

US v. Hahn (359 F.3d 1315) is frequently cited in assessment of miscarriage of justice: "Appellate waivers are subject to certain exceptions including (1) where the district court relied on an impermissible factor such as race, (2) where ineffective assistance of counsel in connection with the negotiation of the waiver render the waiver invalid, (3) where the sentence exceeds the statutory maximum, or (4) where the waiver is otherwise unlawful".

In various cases, various circuits recognizes the above exceptions to appellate waivers. See Gruthers, King v. Dutton in Sixth Circuit. In United States v. Attar, 38 F.3d 727 (4th Cir. 1994) holds that a defendant "could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by a statute or based on a constitutionally impermissible factor such as race".

3. The total criminal fines of four millions exceeded statutory maximum by a factor of four

The plea's cover and fine guideline range clearly limited fine not to excess 1 million dollars, as is limited by 21 USCS 841(b)(1)(C) and also defined statutory maximum as 1 million, as was in PSR. This, however, was breached by a factor of four.

Therefore, as adequately discussed, this made the appellate waiver unenforceable. "A defendant who executes a general waiver of the right to appeal his sentence in a plea agreement does not [thereby] subject himself to being sentenced entirely at the whim of the district court. US v. Marin, 961 F.2d 493, 496. See also Caruthers, Attar, Hahn. This also triggered Sixth Amendment jury trial right as defined by Apprendi, and Southern Union Company and affirmed in Booker.

4. The upward departure from fine guideline maximum by a factor of four breached the plea agreement

In US v. Barnes 278 F.3d 644 (6th Clr. 2001), "the government breached the plea agreement in the matter at hand by failing to expressly request that Defendant be sentenced at the low end of the guideline range". In the current case, the Government limited maximum fine not to exceed 1 million, and tied the appellate waiver to a fine guideline range of $30,000 to $1,000,000, but ended up started pursuing 4 million or more in total fines. The fines Dr. Chang received as a result of Government's actions breached the plea.

In Barnes, Sixth Circuit relied mainly on Santobello v. New York, 404 US 257, and stated ""[b]ecause a defendant is foregoing these precious constitutional guarantees when entering into a plae agreement with the government, it is essential that "fairness" on the part of the prosecutor is presupposed." See Santobello, 404 US at 261. In this context, "fundamental fairness means that the courts will enforce promises made during the plea bargaining process that induce a criminal defendant to waive his constitutional rights and plead guilty." (quoting Staten v. Neal, 880 F.2d 962,963 (7th Cir. 1989).

In Barnes, the Court followed Supreme Court's Santobello's remedy:"we VACATE Defendant's sentence and REMAND for resentencing before a different district judge". (Santobello, 404 US at 263).

5. Lower Court's Decision of Dismissal Violated Defendant's Fifth Amendment Right of Due Process and Equal Protection

"The Fifth Amendment does not contain an explicit equal protection clause as does the Fourteenth Amendment applicable on its face only to the states, but statutory classifications may be so unjustified as to be violative of the due process clause of the Fifth Amendment (...). Consequently, the due process clause of the Fifth Amendement provides the same basic safeguards as the equal protection clause and the general principles of the latter apply to the former" (US v. Craven 478 F.2d 1329, 1338)(5th Cir. 1973).

The lower court cited US v. Grundy in dismissing this case, but in Grundy's case, the Petitioner was allowed to fully brief because"" [g]iven the fact-specific inquirey necessary to determine whether the appellate-waiver provision is enforceable," we deferred decision on the govenment's motion until full briefing and preparation of the record" ..."Having received both, the appeal and motion are ripe for decision".

However, in the current case, after Dr. Chang showed evidence that the brief was filed against his will when his counsul did not follow ABA Std and filed a Motion to Withdraw Attorney and to Supplement or Replace Brief (#19-1478; R.18; see Statement of the Case, at 14 for more details) . The Court allowed him to withdraw his attorney, but dismissed the appeal on Government's motion to dismiss before he was able to fully brief by supplementing or replacing the originally wrongly filed brief, citing Grundy.

However, as in my case, the appellate waiver was tied to "a USSG range that itself was explicitly based on a specific loss amount range", "of between $1 million and $2.5 million". His restitution amoun of $1,380,767 was well within the range. Grundy, 844 F.3d at 614. Similarly, in Winans, the case cited in Grundy to make its ruling, the court explained the difference of that case with US v. Smith 344 F.3d 479, and made the case that Smith's plea was neither knowing or voluntary because he did not know the amount and manner of determinng amount of restitution, then explained that his restitution sentence amount was of about 4.8 million (next page)

FROM: 56246039 CHANG, ZONGLI
TO:
SUBJECT: REASONS III UNREASONABLE SENTENCE
DATE: 12/07/2020 07:34 AM

was within the guideline loss amount of between 7 to 20 million dollars, that he knew before signing plea.

In other words, the panels in Winans and Grundy assessed the appealable issues of unknowing plea, guideline departure, and breach of plea, which are nonexistent in these.

The panel knew that Dr. Chang was sentenced to fines "exceed[ing] the maximum fine by a factor of four" (Appendix 1, Page3), and that Dr. Chang did not know this before signing the plea, yet still used Grundy to dismiss his appeal.

There is no rational basis for the appellate court to blindly take Dr. Chang's appellate waiver as an absolute bar to any appeals, and apply a different standards as the "binding precedent" Grundy by neglecting the apparent departure that "exceed [s] the maximum by a factor of four" and not to give him a chance to fully brief, to deny his appeals. There is no rational basis in ignoring the apparent ambiguity constructively created to deceive - in other words, if the Government who drafted the plea intended to enforce a broader appellate waiver, they should write it clearly as such, instead of writing it in a way that are more likely to be logically interpreted in a much narrower way than not as a inducement, if not deception and trap, for the signer defendant.

Therefore, Sixth Circuit violated Dr. Chang's Fifth Amendment Rights of Due Process and Equal Protection in Direct Appeal process in applying different standards to its cited case and defendant in Grundy. He was not equitably denied a chance of direct appeal guaranteed by law.

III. INSUFFICIENT FACTUAL BASIS, PROSECUTORIAL MISCONDUCT, DISTRICT COURT'S JUDGMENT IS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

A. Insufficient Factual Basis and Prosecutorial Misconduct

An appeal waiver does not bar a Rule 11 claim that there is an insufficient factual basis to support a guilty plea. See United States v. Hildenbrand, 527 F.3d 466, 474 (5th Cir. 2008); United States v. Adams, 448 F.3d 492, 497-98 (2d Cir. 2006); United States v. Portillo-Cano, 192 F.3d 1246, 1250 (9th Cir. 1999). Such a claim "go to the heart of whether [the] guilty plea, in including the waiver of appeal, is enforceable" Portillo-Cano, 192 F.3d at 1250.

Dr. Chang pled in his plea agreement to Count 1 which stated that the conspiracy was related with codefendants only. However, he only knew these codefendants for two years from mid 2015 to mid 2017 (see their plea agreements for evidence). In order to exact more fines from him, the Government fabricated evidence about "Medicare fraudulent billing" from 2012 "until September 10 2014" to add three and half more years of conspiracy so as to "justify" a much bigger fine. Citing public record as evidence, the Petitioner showed that the September 10 2014 revocation had nothing to do with fradulent Medicare billing and was reversed by ALJ at HHS and Medicare was found to be "without any basis" (see Statement of the Case, at 6 and cited HHS authority).

However, the fabricated information has poisoned the grand jury hearing, indictment, plea and sentence hearing, leading to the status of the case and the court used this erroneous information of five and half years of conspiracy from 2012 in sentencing top-end guideline imprisonment and excessive fines that exceeded statutory maximum by four times (see Sentencing Tr.).

Therefore, out of the 5.5 years conspiracy, three and half years was fabricated and without any evidence, the other two years were without evidence too but were pled by petitioner in relation to Count 1. Therefore, at least 3.5 years out of 5.5 years of conspiracy were completely without any basis and greatly affected the whole unfair process with no integrity. This is not a complete discussion of factual basis, but the evidence presented is enough to prove that 3.5 years of it was complete fabrication.

B. Procedural and Substantive Unreasonable Sentence

A sentence is not procedurally reasonable if the district court "fails to calculate [or improperly calculates] the Guidelines range, treat[s] the Guidelines as mandatory, fail[s] to consider the 3553(a) factors, [or] selects[s] a sentence based on clearly erroneous facts ..." Gall v. US 552 US 38 (2007). "Substantive unreasonableness focuses on the length and type of the

sentence and will be foud when the district court selects a sentence arbitraily, bases the sentence on impermissible factrs, fails to consider relevant sentencing factors, or give an unreasonable amount of weight to any pertinent factor." United States v. Camacho-Arellano, 614 F.3d 244, 247 (6th Cir. 2010).

As discussed before, Court changed 2D1.2 Guideline from (c)(5) to (c)(3), a three point hike, without any factual finding. Guid2D1.1(c)(5) mismatches with merely alleged drug quantity and offense level. "The Government must prove drug quantity by a preponderance of evidence" (US v. Anderson 526 F.3d 319) because the Circuit treats drug quantity as an essential element of the offense. The drug quantity was a mere allegation and there was no way to verify (no implicated patient list, for example). "A miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendants' substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case" Rosales-Mireles v. US 138 S Ct 1897 (2018).

The plea agreement tied a fine guideline of $30,000 to 1,000,000 fine and expressly defined fines as "there is no agreement as to fines" and also "not to exceed 1,000,000" on the cover page. The Court in PSR confirmed this maximum fine. In no time during the plea hearing, in the plea agreement, or PSR, was the petitioner given notice that he may receive a departure by a factor as much as four times, nor was he given grounds for this even during the sentence hearing. He was never given factual findings to warrant departure from fine table guidelines (the quantity he pled), pled fine guideline range maximum and statutory maximum. This is a 32(h) violation, in addition to the 11(b)(1)(H) violation discussed earlier.

During the sentence hearing, the court based the sentence on erroneous, fabricated information. The fines exceeded the guideline range maximum and exceeded the statutory maximum by a factor of four times, without any specific information as to why there was this departure from the fine table range, fine guideline range maximum or statutory maximum fine. The court did not make any factual findings in finding any nexus or forfeitability of any of the assets. This makes the sentence substantively unreasonable.

FROM: 56246039 CHANG, ZONGLI
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SUBJECT: REASONS IV: National Importance; V: Conclusion:
DATE: 12/06/2020 10:54 PM

IV. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION

The Sixth Circuit panel's dismissal of the appeal without addressing the unknowing, involuntary nature (unknowing final exposure to total fines; 11(b)(1)(H) violations) the appellate waivers. The appellate waiver was constructively-modeled according to Grundy to mislead the Petitioner to think he waived his appeal for sentence of imprisonment and his fines would be according to the pled drug quantity and corresponding guideline range, including fine guideline range. However, upon appeal, the Government claimed that the appellate waiver applied to fines. The panel realized the total fines exceeded the guideline maximum in the plea by a factor of four, which should make the plea as unknowing, involuntary, per Sixth Circuit's ruling in US v. Smith, and per the Smith Court's interpretation of the ambiguity against the interest of the Government.

The panel, without addressing the unknowing plea nature caused by the total fines falling way out of the scope of the plea by a factor of four, and the apparent ambiguous nature of the waiver language, dismissed the appeal, essentially making the appellate waiver as an absolute bar to appeals, in contradiction to this Court's opinion in Garza v. Idaho, and Sixth Circuit's US v Caruthers.

The dismissal essentially subjects the Defendant to unlimited fine, forfeiture, restitution, even supervised release on the basis of appeal waiver.

This essentially gave green light to Government to induce unsuspecting defendants to sign ambiguous and deceiving appellate waivers and only later find out the waiver made himself to be subject to be sentenced at the whim of the court for criminal fines and restitution that departs from pled fine guideline range maximum and statutory maximum, for the target of wiping out their and their family's life time savings, most of which were unrelated to pled crime.

This is a serious case, but quite unique in its scheme. But excessive fines affect many people. Not to follow previous precedents and blindly enforce a plea agreement and disregard all the departures would seriously affects the fairness, integrity of the proceedings and the system.

This warrants this court's immediate resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Zongli Chang

Date: 12/6/2020