

Supreme Court, U.S.
FILED

MAR 15 2022

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No. 21- **1275**

In the
Supreme Court of the United States

ABETUBOKUN ADESIOYE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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MARCH 16, 2022

SUPREME COURT PRESS

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BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Did the Court of Appeals err in finding that the petitioner knowingly and intelligently waived his right of appeal without having considered the existence, nature and extent of the Rule 11 colloquy and did the court of appeals err in determining the scope of the appeal which the petitioner had waived including his right to appeal that part of the sentencing which exceeded the guidelines and that part of the sentencing which established the offense level?

LIST OF PROCEEDINGS

This is a petition for two cases which were consolidated for sentencing and appeal. The cases were identified as 20-4621 and 20-4621(L) in the United States Court of Appeals for the Fourth Circuit. The cases were identified in the United States District Court as PJM 00-0605 and PJM 00-0373 and were consolidated on January 24, 2001. This petition is for both cases.

United States Court of Appeals for the Fourth Circuit
Nos. 20-4621, 20-4621(L)

United States of America, *Plaintiff-Appellee*,
v. Abetubokun A. Adesioye, *Defendant-Appellant*

Date of Final Judgment: December 16, 2021

United States District Court, District of Maryland
Nos. PJM-8-00-CR-00373, PJM-8-00-CR-00605-001
United States of America v. Abetubokun A. Adesioye
Date of Final Order: December 15, 2020

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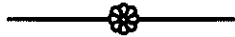
PETITION FOR A WRIT OF CERTIORARI

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



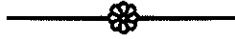
OPINIONS BELOW

The per curiam Opinion of the United States Court of Appeals for the Fourth Circuit dated December 16, 2021, included at App.1a. (These Opinions were not designated for publication). The Judgment of the United States Court of Appeals for the Fourth Circuit dated December 16, 2021, included at App.4a. The Judgment of the United States District Court for the District of Maryland dated December 16, 2020 included at App.6a.



JURISDICTION

The date of the decision of the United States Court of Appeals in this case was December 16, 2021. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).



JUDICIAL RULES INVOLVED

Fed. R. Crim. P. 11(b)

(b) Considering and Accepting a Guilty or Nolo Contendere Plea

(1) *Advising and Questioning the Defendant.*

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witness, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
 - (G) the nature of each charge to which the defendant is pleading;
 - (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
 - (I) any mandatory minimum penalty;
 - (J) any applicable forfeiture;
 - (K) the court's authority to order restitution;
 - (L) the court's obligation to impose a special assessment;
 - (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);
 - (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
 - (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.
- (2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is volun-

tary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.



STATEMENT OF THE CASE

On July 31, 2000, a four count indictment was filed against Abetubokun A. Adesioye and four co-defendants charging Mr. Adesioye with conspiracy and bank fraud. (JA 26). This indictment was designated as case number AW-00-CR-0373. On December 20, 2000, a second indictment was filed against Abetubokun A. Adesioye charging him with four counts of bank fraud. (JA 34). This indictment was designated as case number AW-00-CR-0605. These cases were consolidated on January 24, 2001. (JA 8).

On March 13, 2001, Adesioye entered a plea of guilty in case number AW-00-CR-0373 as to count one conspiracy to commit bank fraud in violation of 18 U.S.C. § 371 and in case number AW-00-CR-0605 as to count one bank fraud in violation of 18 U.S.C. § 1344. (JA 8). This plea was entered pursuant to a plea agreement with the government which Adesioye signed on March 12, 2001. (JA 115).

Adesioye was released by Judge Williams on May 30, 2001, pending sentencing and after having served 314 days in detention. (JA 8, 20). In January of 2005, Adesioye absconded to Nigeria where he established

his residence and failed to appear for sentencing in these matters. (JA 206). A bench warrant was issued for Mr. Adesioye on March 17, 2005. (JA 9, 20, 155, 159).

Mr. Adesioye remained in Nigeria until 2019. (JA 159, 206). On October 23, 2019, Mr. Adesioye flew into New York where he surrendered to authorities. (JA 206). Mr. Adesioye has been incarcerated from that date to the present date. (JA 206).

In preparation for Mr. Adesioye's sentencing, the U.S. Probation Office prepared a presentence investigation report on April 26, 2001. (JA 126). That report was revised on May 18, 2001. (JA 126). An updated second revision was prepared on June 25, 2020. (JA 199). The Probation Office calculated Mr. Abetubokun's total offense level as 23 and his criminal history category as V corresponding to an advisory guideline range of 84 months to 105 months. (JA 126, 199). Adesioye disputed several of the guidelines calculations and filed Objections to Presentence Report on May 19, 2020. (JA 192). Adesioye also filed a Sentencing Memorandum on May 19, 2020 and August 7, 2020. (JA 158, 226).

On December 10, 2020, Judge Messitte of the district court held a sentencing hearing. (JA 38). The Court heard argument and evidence from Mr. Adesioye and a witness for Mr. Adesioye. (JA 291, 324, 70). The Court imposed a sentence of 60 months imprisonment as to count one of indictment number PJM 00-0373 and 153 months imprisonment as to count one of indictment number PJM 00-0605. (JA 99, 105). The sentence in PJM 00-0605 was ordered to run concurrent to the sentence imposed in PJM 00-0373. (JA 105).

The Court entered Judgment and issued a Statement of Reasons in both cases on December 16, 2020, (JA 99, 105, 336, 341) and Adesioye timely filed a notice of appeal in each case in the district court on December 18, 2020 (JA 111, 113).



REASONS FOR GRANTING THE PETITION

The reason for granting the petition is that the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power. In the instant case the court of appeals erred in finding that the petitioner had waived his right to appeal his sentence and erred in failing to determine the scope of the waiver of appeal.

A defendant may not appeal his sentence if his plea agreement contains an express or unqualified waiver of the right to appeal unless that waiver is unknowing or involuntary *U.S. v. Brown*, 232 F.3d 399 (4th Cir. 2000). A waiver will be enforced if it is valid and if the issue sought to be appealed is within its scope *U.S. v. Blick*, 408 F.3d 162 (4th Cir. 2005). An appellate waiver is valid if the defendant knowingly and intelligently agreed to it. Whether a defendant knowingly and intelligently agreed to waive his right to appeal must be evaluated by reference to the totality of the circumstances *U.S. v. Manigan*, 592 F.3d 621 (4th Cir. 2010). An important factor in such an evaluation is whether the district court sufficiently explained the waiver to the defendant during the Rule 11 plea

colloquy. *U.S. v. Manigan, supra*. Rule 11 requires that a district court inform the defendant of the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the sentence. In the instant case the Court of Appeals relied solely on the plea agreement to determine that the defendant had knowingly and intelligently waived his right to appeal his sentence. The Court of Appeals completely failed to review the nature, existence or substance of any Rule 11 plea colloquy. Without such review, the court of appeals could not conclude that defendant had knowingly and intelligently waived his right to appeal his sentence.

The court of appeals also failed to consider the scope of petitioner's waiver of appeal. In paragraph 7 of his plea agreement, the waiver of appeal did not include a waiver of the right to appeal from an upward departure from the offense level. In fact, such a basis for appeal was reserved from the waiver of appeal. Therefore, even if petitioner waived his right of appeal he did not waive it as to his scope. It was further agreed that the sentence would be within the guideline's range. In this case the sentence greatly exceeded the guideline's range by forty-eight months and the petitioner reserved his right of appeal as to that issue.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 16, 2022