

No. _____

In The
Supreme Court of the United States

HAL HERRING BROWN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- A. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN DISMISSING THE PETITIONER’S MERITORIOUS APPEAL OF HIS CONVICTION FOR SECURITIES FRAUD AND MONEY LAUNDERING OFFENSES BECAUSE OF THE APPEAL WAIVER OF THE PLEA AGREEMENT WHEN THE PETITIONER’S APPEAL WAS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.**

LIST OF THE PARTIES

HAL HERRING BROWN, JR., *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hal Herring Brown, Jr. (hereinafter “Petitioner”) respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Fourth Circuit is reported at *United States of America v. Hal Herring Brown* (4th Cir. 20-4382). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on 18 February 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 15 U.S.C. § 78j(b) and 15 U.S.C. § 78ff, 18 U.S.C. § 1343, 18 U.S.C. § 1957, 18 U.S.C. § 3147, and United States Constitution, Sixth Amend.

STATEMENT OF THE CASE

The Petitioner was charged through a Bill of Indictment for one count of violating Title 15 U.S.C. §§ 78(b) and 78(ff) Securities Fraud (“Count One”), one count of violating Title 18 U.S.C. § 1343, Wire Fraud (“Count Two”), and two counts of violating Title 18 U.S.C. §§ 1957(a), Transactional Money Laundering (“Count

Three” and “Count Four”) (JA 23-29). The Petitioner plead guilty to Count One and Count Four through a plea agreement entered into on 2 November 2018 (JA 47-54).

The Petitioner was sentenced on 9 July 2020 (JA 96). The judgment was entered on 13 July 2020, requiring the Petitioner to serve three years in federal custody for Count One and three years in federal custody for Count Four, to run concurrently to each other (JA 147). On 21 July 2020, Brown filed a direct appeal of his conviction to this Court (JA, 157).

On 28 December 2020, Respondent filed a Motion to Dismiss Petitioner’s Appeal to the Fourth Circuit Court of Appeals. On 18 February 2021, the Fourth Circuit Court of Appeals dismissed Petitioner’s Appeal. Petitioner timely files this Writ of Certiorari before the United States Supreme Court.

STATEMENT OF THE FACTS

The Petitioner was charged through a Bill of Indictment for one count of violating Title 15 U.S.C. §§ 78(b) and 78(ff) Securities Fraud (“Count One”), one count of violating Title 18 U.S.C. § 1343, Wire Fraud (“Count Two”), and two counts of violating Title 18 U.S.C. §§ 1957(a), Transactional Money Laundering (“Count Three” and “Count Four”) (JA 23-29). The Petitioner plead guilty to Count One and Count Four through a plea agreement entered into on 2 November 2018 (JA 47-54).

The Bill of Indictment alleges that the Petitioner fraudulently obtained more than thirteen million and five hundred thousand dollars (\$13,500,000.00) by engaging in a Ponzi scheme through his company, Oodles, Inc. and its various affiliates (JA 23-29). It further alleges that the Petitioner falsely misrepresented its

Company owned hundreds of millions of dollars in intellectual property consisting largely of family entertainment shows and movies (JA 23-29).

In the Plea Agreement, Brown clearly and unequivocally admits his guilt to the criminal charges set forth in the Bill of Indictment (JA 47). Similarly, during the Plea/Rule 11 Hearing, Brown admitted his guilt to the charges set forth in the Bill of Indictment without written or oral objection to any of the facts as presented (JA 71-72). At the time he signed the Plea Agreement, Brown was informed that he was waiving his right to appeal; however, his acceptance of the Plea Agreement was based on the terms set forth in the Plea Agreement.

A PreSentence Investigation Report was prepared on 18 March 2020, and finalized on 8 April 2020 by U.S. Probation Officer, Ariel T. Casale, after consideration of both the Government and the Petitioner's objections (JA 158). In the Report, "the United States agrees that if the defendant is found by the Court to have accepted responsibility under U.S.S.G. § 31E1.1(a), the United States will acknowledge that defendant's entry of a guilty plea is timely for purposes of U.S.S.G. § 31E1.1(b), if that section applies to the defendant" (JA 162). It goes further to state:

The defendant provided the following written statement to the probation officer admitting involvement in the offense:
'Mr. Brown has pleaded guilty to the offense of conviction and accepts responsibility for his actions. In court, he has tendered a plea of guilty, agreed that the government could meet its burden by proving the elements of the offense and certified the factual basis, which addresses the facts that constitute the elements of the offense. I believe that satisfies the requirement for his acceptance' (JA 172).

The Petitioner's filed objections to the Report did not relate to the factual basis of the offenses set forth in the Indictment (JA 189-190).

The day before the Sentencing Hearing, the Government filed a Supplemental Sentencing Memorandum, providing notice of its' intention to seek a sentence higher than the 121 months of imprisonment set forth (JA 193). This Memorandum was based on the fact that the Petitioner denied responsibility of the crimes set forth in the bill of indictment in an out-of-court statement he made prior to the Sentencing Hearing in an email on July 3, 2020 wherein he requested "letters of character reference to defend himself against a malicious law suit and the possibility he could be incarcerated," and attached a link to a video wherein he made further out-of-court statements about either the criminal charges or the civil lawsuits related thereto (JA 194). Senior U.S. Probation Officer Caryl A. Canella similarly filed a Supplement to the Presentence Report the night before the Sentencing Hearing. This report amends the Probation Office's final opinion that the Petitioner should be entitled to a downward variance pursuant to U.S.S.G. § 3E1.1, for acceptance of responsibility (JA 192). These documents were filed the day before sentencing, leaving the Petitioner's attorney no time to research, review the video, or prepare a response.

The Sentencing Judgment was entered on 13 July 2020 (JA 147). After hearing the arguments of counsel and statements of the Petitioner and victims, reviewing the video made by the Petitioner and reviewing the Presentence Reports submitted by the United States Probation Office, the Honorable Judge Bell stated that he watched the video of the Petitioner, and witnessed therein the Petitioner make false out-of-court misrepresentations regarding the criminal charges against

him (JA 101). He thereafter concluded based on a preponderance of the evidence that the Petitioner failed to establish “that he has clearly recognized and affirmatively accepted personal responsibility for his criminal conduct” (JA 101).

The Honorable Judge Bell went on to find that pursuant to the Guidelines, the Petitioner was an offense level of thirty-three (33), with a criminal history category of I, and an advisory guideline sentencing range of 135 to 168 months (JA 101).

The Court goes further to note that the Petitioner’s conduct is similar to the “guidelines enhancement for abuse of a position of trust or use of special skill under 2B1.3” (JA 141). However, the Court found that the Petitioner’s conduct did not warrant an upward variance under Section 2B1.3 (JA 141). However, the Honorable Judge Bell stated that “the Court will vary upward another level from the previously found offense level in imposing sentence and will sentence within offense level 35, criminal history category I, which is a guideline range of 168 to 210 months” (JA 142).

Under the Statement of Reasons set forth in the written Sentencing Judgment of the Court, the Court found that the following 18 U.S.C. § 3553(a) to be applicable in an upward variance: (1) The nature and circumstances of the offense regarding the Petitioner’s extreme conduct and the victim impact should through an Abuse of a Position of Trust and Obstructing Justice; (2) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) To afford adequate deterrence to criminal conduct; and (4) To protect the

public from further crimes of the defendant (JA 207). In further explanation on the Judgment, Judge Bell set forth “the nature and circumstances of the offense are horrendous, in that he preyed on not only family, friends and church members but also communities and families with special needs children, in the name of religion” (JA 208). This explanation goes further to state “the Court finds that the defendant’s conduct was well outside the guidelines and was much akin to obstruction and abuse of a position of trust. Although the defendant’s conduct does not meet the guideline definitions for these enhancements to apply, the Court finds that an upward variance is appropriate” (JA 208). The Court therefore found that “an upward variance of one level for obstruction and an upward variance of one level for a position of trust is warranted in this case, which results in an offense level 35” (JA 208). The Petitioner ultimately received a Judgment of three years for Count One, and three years for Count Two, to run concurrently to each other.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN DISMISSING THE PETITIONER’S MERITORIOUS APPEAL OF HIS CONVICTION FOR SECURITIES FRAUD AND MONEY LAUNDERING OFFENSES BECAUSE OF THE APPEAL WAIVER OF THE PLEA AGREEMENT WHEN THE PETITIONER’S APPEAL WAS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An appeal waiver within a plea agreement is valid when “the record establishes that: (1) the defendant knowingly and intelligently waived his right to appeal; and (2) the issues raised on appeal fall within the waiver’s scope.” *United States v. Atkinson*, 815 Fed. Appx. 704, 708, (4th Cir. 2020). The Court reviews

whether a defendant effectively waived such a right *de novo*. *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir. 2018).

B. The Plea was Not Entered into Knowingly and Intelligently

The validity of a plea agreement appeal waiver is not valid when the record on appeal indicates that a defendant did not otherwise understand the full significance of the waiver. *United States v. Johnson*, 410 F.3 137, 151, (4th Cir. 2005). “Even if the court engages in a complete plea colloquy, a waiver of the right to appeal may not be knowing and voluntary if tainted by the advice of constitutionally ineffective trial counsel.” *Id*; citing *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993).

Here, the Petitioner’s sentence increased upward two levels from the guidelines based on conduct of the Petitioner that happened *after* the Plea Agreement was executed by the Petitioner. This conduct had not yet occurred, and at the time of execution of the agreement, it would have been unforeseeable to need to advise the Petitioner about a possible increase in the length of his sentence that would result therefrom.

During the sentencing hearing, the record indicates that Counsel for the Petitioner had not yet listened to the audio recording of the Petitioner’s conduct, which was the basis for the increase in the Petitioner’s sentence (JA 100). However, the sentencing hearing was not continued to a later date to allow the Defendant’s counsel time to listen to the recording. .JA (96-146). As a result, the Petitioner’s Counsel was unable to fully advise the Petitioner regarding a likely sentence that

would result from entering into the Plea Agreement. The Petitioner was therefore not fully advised by counsel prior to the Sentencing Hearing as to the possible outcomes that could result from his conduct, and his plea was not entered into knowingly and intelligently.

The Petitioner could not have been fully advised as to how the pre-sentence conduct would affect his sentencing because the conduct happened after the Plea Agreement was executed and his counsel had not viewed or listened to the entirety of the video at any time during or before the Sentencing Hearing. His plea could therefore not have been knowingly and intelligently entered into. The Petitioner's waiver of his appeal rights was therefore ineffective, and his appeal should not be dismissed. Proceeding forward with the hearing, without having reviewed the video, also violated the Petitioner's Sixth Amendment Constitutional right to counsel.

Even further, through the filing of the Government's Supplemental Sentencing Memorandum the day before the Sentencing Hearing, the Petitioner's Due Process rights under the Fourteenth Amendment of the Constitution have been violated because the Petitioner was not afforded a meaningful opportunity to review the "new" evidence against him with his attorney. To dismiss the Petitioner's appeal of this violation, would result in procedural and substantive unfairness to the Petitioner.

C. Lack of Consideration in the Plea Agreement

An appellate court must also examine plea agreements according to contract law principles. *United States v. Lutchman*, 910 F.3d 33, 37 (2d Cir. 2018). In doing

so, the appellate court must “temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards.” *Id.*; citing *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011). As a result, plea agreements are construed “strictly against the Government” because the Government “is usually the party that drafts the agreement and ordinarily has certain awesome advantages in bargaining power.” *Id.*; citing *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

In *Lutchman*, the Court found that his appeal waiver was unsupported by consideration because the defendant “received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement.” *Lutchman*, at 38 (2d Cir. 2018). While the Defendant in *Lutchman* received a three-level reduction in the agreement¹, the same reduction would have been available to the Defendant pursuant to the guidelines. *Id.* Therefore, the reductions set forth in the plea agreement had no practical effect. Ultimately, the Court in *Lutchman* severed the waiver from the agreement and proceeded to the merits of the Defendant’s arguments. *Id.*

The Petitioner here similarly did not receive any benefit from the plea agreement beyond what he would have gotten by pleading guilty without an agreement. The benefits derived in the original plea agreement between the parties provided the Petitioner with an agreement that the Government would support the

¹ In *Lutchman*, the Defendant received a two-level reduction for acceptance of responsibility and a one-level reduction for timely notifying the government of his intention to plead guilty. *Lutchman*, at 37 (2d. Cir. 2018).

Petitioners guilty plea as timely for the purposes of acceptance of responsibility reductions (JA 47-54). The Government withdrew this consideration through the filing of the Government's Supplemental Sentencing Memorandum the day before the Sentencing Hearing, when they argued against the Petitioner's eligibility to receive a reduction based on Acceptance of Responsibility (JA 193-196).

Here, the District Court Judge Presiding found that "the defendant's conduct was well outside the guidelines and was much akin to obstruction of justice and abuse of a position of trust. Although the defendant's conduct does not meet the guideline definitions for these enhancements to apply, the Court finds that an upward variance is appropriate." (JA 208). The Court also found, in accordance with the Government's Supplemental Sentencing Memorandum, that the Defendant was not eligible for a downward departure for acceptance of responsibility (JA 141-142). The Petitioner herein was ultimately sentenced two offense levels higher than what was advised by the Guidelines and received no benefit from the Plea Agreement that he would not have received had he plead guilty without an agreement (JA 141-42, 144, 148).

The Petitioner received no consideration for entering into the Plea Agreement. Therefore, the appeal waiver within the plea agreement should be severed and removed from the Agreement, and the Petitioner's appellate claims should proceed forward to be determined on their merits.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the United States Supreme Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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