

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MONTARIUS MONTRAEL SHABAZZ,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

James Bailey Halliday, Esq.*
Counsel for Petitioner
The BridgeWater Commons
Suite 204 B
8927 Lorraine Road
Gulfport, MS 39503
(228) 861-5759
Jamesbaileyhallidayesq@gmail.com

*Member Supreme Court Bar
And CJA Appointed Counsel

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QUESTIONS PRESENTED

Is a Plea Agreement breached by the government when the prosecutor supported a sentencing enhancement to substantially increase the Base Offense Level (for unrelated and subsequent possession of a weapon) that was not adequately supported by the record?

LIST OF PARTIES

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

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PETITION FOR A WRIT OF CERT

Petitioner, Montarius Monrael Shabazz, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on April 21, 2021.

CITATION TO OPINIONS BELOW

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

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

JURISDICTION

Petitioner, Montarius Monrael Shabazz, pleaded guilty to one count of possession of a firearm by an unlawful user of a controlled substance; a violation of 18 U.S.C. § 924(g)(3). He was sentenced to 90 months imprisonment by the Honorable H. S. Ozerden, United States District Judge for the Southern District of Mississippi.

Mr. Shabazz timely appealed. A judgment dismissing his appeal was entered by the United States Court of Appeals for the Fifth Circuit on April 21, 2021. No petition for rehearing was sought. This Petition has been timely filed within ninety (90) days of that judgment. Sup. Ct. Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(g)(3).

STATEMENT OF THE CASE

On April 3, 2019, the Grand Jury sitting in and for the Southern District of Mississippi returned an indictment charging Montarius Monrael Shabazz with a violation of 18 U.S.C. § 924(g)(3).

Mr. Shabazz entered a plea of guilty to the indictment. On July 24, 2020, the district court sentenced him to 90 months imprisonment, \$5,000 fine, three years of supervised release, and a \$100 special assessment. Judgment was entered on July 24, 2020. Timely Notice of Appeal was filed on July 28, 2020.

At sentencing, the government sponsored argument, not adequately supported by the record, to advocate a draconian guideline enhancement based solely on alleged relevant conduct resulting in essentially eviscerating its Plea Agreement. Whereby, the government breached its agreement with Shabazz when it supported and advocated sentencing enhancements to the Base Offense Level (BOL) that were improperly calculated because the relevant conduct used to enhance the calculation occurred after the offense of conviction and did not meet the required United States Sentencing Guidelines' criteria linking this antecedent

conduct to the offense of conviction and further was not adequately supported in the record. Not meeting the required legal standards and the required level of a preponderance of the evidence and resulting in a substantial increase in the guidelines' Base Offense Level by six levels, i.e., BOL 14 to 20. The initial Base Offense Level (BOL) should not have been based on antecedent relevant conduct but the offense of conviction for which Mr. Shabazz was indicted.

REASONS FOR GRANTING THE WRIT

I.

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

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

While this Honorable Court has expressly recognized that there is no set level of enthusiasm the government must display when making a recommendation. *See United States v. Benchimol*, 471 U.S. 453, 455 (1985). And the Fifth Circuit has recognized that "personal reservations" expressed by the government's attorneys as to a plea agreement are a breach. *United States v. Grandinetti*, 564 F. 2d 723 (5th Cir. 1977).

The Fifth Circuit has failed to properly pronounce that a prosecutor must not sponsor or otherwise support unsupported relevant conduct that contravenes the government's Plea Agreement.

Certainly, the Fifth Circuit is mistaken that the government can make its recommendation as to sentencing and then sponsor testimony that counteracts, diminishes and discounts that very recommendation just made.

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

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

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

The Supreme Court has recognized that disposing of charges via plea agreements is both "essential" and "highly desirable" in the criminal justice system. *Santobello v. New York*, 404 U.S. 257, 261 (1971). But to realize the benefits of plea deals, there must be "fairness in securing agreement between an accused and a prosecutor." *Id.* A key safeguard of this fairness is that, when a defendant pleads guilty in exchange for a promise from the prosecutor, the prosecutor must fulfill that promise. *Id.* at 262; *United States v. Harper*, 643 F.3d 135, 139 (5th Cir. 2011) ("The Government must strictly adhere to the terms and conditions of its promises in a plea agreement."). When alleging breach of a plea agreement, the defendant must prove the facts underlying the alleged breach by a preponderance of the evidence. *Harper*, 643 F.3d at 139. But whether the government's conduct amounts to a breach is a question of law for the court. *Id.* Assuming there was a plea agreement, the court must decide "whether the Government's conduct was consistent with the defendant's reasonable understanding of the agreement," construing the agreement strictly against the Government. *United States v. Purser*, 747 F.3d 284, 290 (5th Cir. 2014).

The government breached the Plea Agreement and Plea Supplement by supporting a sentencing enhancement to determine the Base Offense Level (for constructive possession of a dangerous weapon) that was not adequately supported by the record.

The Presentence Report (PSR) Base Offense Level (BOL) 20 was based upon a separate subsequent arrest of the defendant and a seizure of a different firearm (a

Sig Sauer pistol with a magazine containing 18 rounds of ammunition) on a different date, April 12, 2019, that the defendant was not indicted for (indicted offense was for alleged criminal conduct on January 19, 2020) and that occurred well after the date of the charged offense of conviction.

If the PSR had relied upon the 'instant offense' for which Mr. Shabazz was indicted, his BOL would be a 14 under USSG §2K2.1(a)(6), a full six (6) levels lower.

The initial BOL should be calculated by using the offense of conviction, i.e., instant offense, not a later subsequent offense tenuously related only by means of subsequent relevant conduct.

Under the USSG, where more than one base offense level is specified (as here under 2K2.1), the BOL is required to be determined on all acts of the defendant "that occurred during the commission of the *offense of conviction*" under § 1B1.3 (emphasis added).

The *offense of conviction* is clearly and definitively defined as: "The offense conduct charged in the indictment or information of which the defendant has been convicted" as set forth in USSG *The Glossary of Federal Sentencing-Related Terms*.

Commentary, notes and definitions to and within the USSG are considered authoritative unless indicated or instructed otherwise. *Stinson v. United States*, 508 U.S. 36 (1993). None exist in this case.

The term "offense" is defined in the Sentencing Guidelines as "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." See U.S.S.G. §

1B1.1, cmt. (n.1(I)). "Relevant conduct" is defined in § 1B1.3. Pursuant to § 1B1.3(a)(1)(A), to qualify as relevant conduct, the defendant's conduct must have:

1. "occurred during the commission of the offense of conviction,
2. in preparation for that offense" or
3. "in the course of attempting to avoid detection or responsibility for that offense."

See U.S.S.G. § 1B1.3 (emphasis added). *United States v. Randall*, 924 F.3d 790 (5th Cir. 2019).

None of the alleged actions by the Defendant that occurred *after* the offense of conviction, i.e. conduct underlying the uncharged pseudo counts as set forth in the PSR, bear the necessary connection under the standards set forth above with the count of conviction. See: *Randall* at 799-800.

"Finally, he urges that this court to find that the error affected the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Randall*, 924 F.3d 790 (5th Cir. 2019).

Outside the Fifth Circuit, the Sixth Circuit has addressed the issue but not on plain error review. See *United States v. Schock*, 862 F.3d 563, 565-69 (6th Cir. 2017) (vacating the sentence because the timing of the incidents indicated that the uncharged conduct did not occur "during" the offense of conviction); *United States v. Weiner*, 518 F. App'x 358, 363-66 (6th Cir. 2013) (same).

Lastly, relative to the discretionary nature of plain error relief, the court "should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343. According to the Supreme Court's recent pronouncement: "In the ordinary case, [] the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles*, 138 S. Ct. at 1911. As cited in *United States v. Randall*, 924 F.3d 790 (5th Cir. 2019).

As utilized herein, a "Guidelines sentence" refers to a sentence determined pursuant to the advisory provisions of the Sentencing Guidelines Manual, as opposed to a "non-Guidelines sentence" (or sentencing variance) imposed based on the factors set forth in 18 U.S.C. § 3553(a). The uncharged conduct, if established by a preponderance of the evidence, seemingly could provide a basis for a lawful non-Guidelines sentence under 18 U.S.C. § 3553(a). The instant issue on appeal, however, involves the proper application of the Sentencing Guidelines in calculating the defendant's offense level for purposes of determining a "Guidelines sentence."...

United States v. Randall, 924 F.3d 790 (5th Cir. 2019).

As noted, but not urged, by the Government, we have held, on several occasions, that questions of fact capable of resolution by the district court, upon proper objection at sentencing, cannot constitute plain error. See e.g., *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Errors occurring in the application of the guidelines to undisputed facts and circumstances, however, are legal error and

susceptible to plain error review. See *United States v. Campo-Ramirez*, 379 Fed. App'x 405 (5th Cir. 2010) (citing *United States v. Arviso-Mata*, 442 F.3d 382, 385 (5th Cir. 2006)). Moreover, although the court may rely on facts in the PSR to which there is no objection or rebuttal, see e.g., *United States v. Rodriguez*, 558 F.3d 408, 412 (5th Cir. 2009), the PSR here does not include facts evidencing the necessary linkage with the offense of conviction that is required by § 1B1.3(a)(1)(A). To conclude otherwise requires 'speculation' rather than 'reasonable reliance' on pertinent factual information contained in the PSR and/or the remainder of the record.

Section 1B1.3(a)(2) of the Guidelines provides that the "relevant conduct" that a district court should consider when applying the Guidelines includes "all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction."¹⁰ "For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor , such as common victims, common accomplices, common purpose, or similar modus operandi ." *United States v. Ainabe*, 938 F.3d 685 (5th Cir. 2019).

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

Plea agreements are interpreted under general principles of contract law. See *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994). Thus, if a defendant has fulfilled his obligations under the plea agreement, the Government must perform its reciprocal obligations. *United States v. Davis*, 393 F.3d 540, 546 (5th Cir. 2004). Conversely, if a defendant "materially breaches" his plea agreement, the Government may withdraw from the agreement and seek a new indictment on charges previously dismissed. *Hentz v. Hargett*, 71 F.3d 1169, 1176 (5th Cir. 1996). A breach is material when it deprives the non-breaching party of the benefit of the bargain. *United States v. Castaneda*, 162 F.3d 832, 837 (5th Cir. 1998). Thus, the materiality of a breach is directly proportional to the extent the non-breaching party is deprived of the expected benefits. See *Id.* ("The less the non-breaching party is deprived of the expected benefits, the less material the breach.").

The concept of material breach is clarified by comparison with the converse concept of substantial performance: "if a party's nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance, the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission." *Id.* at 837-38 (alteration in original) (internal quotation marks omitted). The Government bears the burden of proving by a preponderance of the evidence both that the defendant breached the plea agreement and that the breach was material. *Id.* at 837. Although a plea agreement is a contract, "[t]he analogy to contract law doctrines is not determinative in the area of plea negotiation." *United States v. Calabrese*, 645 F.2d

1379, 1390 (10th Cir. 1981). This follows from the recognition that a plea agreement is " a contract in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." *United States v. Maya*, 864 F.2d 1324, 1329 (7th Cir. 1988); see also *United States v. Martin*, 25 F.3d 211, 216 (4th Cir. 1994) (" [P]lea agreements between the government and a defendant are unique and call for special due process considerations."); *Calabrese*, 645 F.2d at 1390 (" Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate safeguards to insure the defendant what is reasonably due [in] the circumstances.") (alteration in original) (internal quotation marks omitted); *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (recognizing that although " [p]lea agreements are construed according to contract law principles [D]ifferent types of contracts are subjected to different interpretative rules and background understandings.") (first alteration in original) (citations omitted) (internal quotation marks omitted). Against this background, the Court assesses a claim for breach of plea agreement " with greater scrutiny than in a commercial contract." *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); *Ricketts v. Adamson*, 483 U.S. 1, 16, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1988).

As explained above, the proper inquiry in determining whether a plea bargain has been breached is whether the prosecution's conduct comports with the defendant's reasonable understanding of the plea agreement. *Hinojosa*, 749 F.3d at

413; *United States v. Sharma*, 703 F.3d 318, 326-27 (5th Cir. 2012), cert. denied, ___ U.S. ___, 134 S.Ct. 78 (2013).

While "The sentencing court is permitted to make common-sense inferences from the circumstantial evidence." *U.S. v. Juarez*, 626 F.3d 246 (5th Cir., 2010); "The government must prove sentencing enhancements by a preponderance of the evidence." *Id.* at 251. *United States v. Hagman*, 740 F.3d 1044 (5th Cir., 2014). "[T]he preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact may be found." *United States v. Wilson*, 322 F.3d 353, 361 (5th Cir. 2003). If the evidence appears to be equally balanced, or the Court cannot say upon which side it weighs heavier, the Court must resolve the question in favor of the defendant because the burden of proof on this issue remains with the government. See *Id.*; *United States v. Hagman*, 740 F.3d 1044 (5th Cir. 2014).

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

The Plea Agreement and Supplement with Shabazz contained an appeal waiver. However, this Court has clearly stated that "[An] alleged breach of a plea agreement may be raised despite a waiver provision." *United States v. Purser*, 747

F.3d 284, 289 (5th Cir. 2014). If the court accepts a defendant's guilty plea entered in reliance on a plea agreement or other promise that is then not honored by the Government, the defendant's due process rights are violated. *Mabry v. Johnson*, 467 U.S. 504, 507, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). Because the government breached its agreement with Shabazz or otherwise did not honor its promises to him, Shabazz is not bound by the appeal waiver and thus is entitled to pursue his present appeal.

The government sponsored argument, that the government knew or should have known, was not adequately supported by the record (i.e., did not meet the defined requirements as set forth in connection of the Offense of Conviction under § 1B1.3 and relevant conduct requirements under § 2K2.1) for a guideline enhancement based solely on alleged relevant conduct (for constructive possession of a weapon) thereby essentially eviscerating its Plea Agreement as its recommendation of the lower fifty percent (50%) became meaningless.

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

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

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

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

CONCLUSION

The government cannot promise one thing and then by do another. The perception of fair dealing for the accused at all stages of criminal proceedings is critical to the integrity of our system of justice. Plea Agreements between defendants and the government are an integral part of resolving criminal cases. To

the extent these agreements are breached and otherwise not lived up to, the criminal justice system is compromised. Certainly, blatant breaches and as here more subtle failures to live up to the government's end of the bargain seriously affect the fairness, integrity and public reputation of judicial proceedings and therefore, this Honorable Court should exercise its discretion and grant the appellant relief that he requests herein.

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

Respectfully Submitted, this the 8th of July, 2021.

Petitioner Montarius Montreal Shabazz

s/James Bailey Halliday, Sr.
JAMES BAILEY HALLIDAY, Sr.
CJA Panel Attorney
Attorney for Petitioner
MS Bar No 2924

James Bailey Halliday, Sr.
Attorney and Counselor at Law
The BridgeWater Commons Ste. 204-B
8927 Lorraine Road
Gulfport, MS 39503
(228) 861-5759
jamesbaileylawesq@gmail.com