

No. _____

In the
Supreme Court of the United States

Nyambui Joe Gipson,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether this Court should recognize a “miscarriage of justice” exception to waivers of appeal in plea agreements?

PARTIES TO THE PROCEEDING

Petitioner is Nyambui Joe Gipson, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	2
LIST OF PROCEEDINGS BELOW	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THIS PETITION.....	9
I. This Court should decide whether to recognize a “miscarriage of justice” exception to waivers of appeal.	9
CONCLUSION.....	13

INDEX TO APPENDICES

Appendix A Order of the Fifth Circuit dismissing the appeal

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Garza v. Idaho</i> , — U.S. —, 139 S.Ct. 738 (2019)	10
<i>Ibarra v. Texas Employment Com'n</i> , 823 F.2d 873 (5th Cir. 1987)	10
<i>United States v. Adkins</i> , 743 F.3d 176 (7th Cir. 2014)	9
<i>United States v. Baramdyka</i> , 95 F.3d 840 (9th Cir.1996)	10
<i>United States v. Brown</i> , 232 F.3d 399 (4th Cir.2000)	9
<i>United States v. Burns</i> , 770 F. App'x 187 (5th Cir. 2019)(unpublished)	9
<i>United States v. Ford</i> , 688 F. App'x 309 (5th Cir. 2017) (unpublished)	9
<i>United States v. General</i> , 278 F.3d 389 (4th Cir.2002)	10
<i>United States v. Guillen</i> , 561 F.3d 527 (D.C. Cir. 2009)	9, 10
<i>United States v. Guzman</i> , 707 F.3d 938 (8th Cir. 2013)	9
<i>United States v. Johnson</i> , 347 F.3d 412 (2d Cir 2003).....	9
<i>United States v. Khattak</i> , 273 F.3d 557 (3d Cir.2001).....	9
<i>United States v. Leal</i> , 933 F.3d 426 (5th Cir. 2019)	10

United States v. Powell,
574 F. App'x 390 (5th Cir. 2014) (unpublished) 9

United States v. Shockey,
538 F.3d 1355 (10th Cir. 2008) 9

United States v. Taylor,
973 F.3d 414 (5th Cir. 2020) 7, 11, 12

United States v. Teeter,
257 F.3d 14 (1st Cir. 2001) 9, 10

Federal Statutes

18 U.S.C. 922(g) 4

28 U.S.C. § 1254(1) 1

U.S.S.G. § 2K2.1(a)(4)(A) 4

U.S.S.G. § 2K2.1(b)(4) 4

U.S.S.G. § 2K2.1(b)(6)(B) 5

U.S.S.G. § 5G1.3 2

U.S.S.G. § 5G1.3(b)(1) 2, 7, 11, 12

U.S.S.G. § 5G1.3(c) 12

Constitutional Provisions

U. S. CONST. amend. V 2

Other Authorities

Restatement (Second) of Contracts, § 153 (1981) 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nyambui Joe Gipson, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals entered an order dismissing the appeal on June 22, 2021. It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 22, 2021. The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

This Petition involves U.S.S.G. §5G1.3(b)(1). The relevant portions of that Guideline state the following:

[T]he court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.

This Petition also involves U.S.S.G. §5G1.3. The relevant portions of that Guideline state the following:

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

LIST OF PROCEEDINGS BELOW

1. *United States v. Nyambui Joe Gipson*, 4:20-CR-00142-9, United States District Court for the Northern District of Texas. Judgment and sentence entered on November 23, 2020. (Appendix B).
2. *United States v. Nyambui Joe Gipson*, CA No. 20-11208, Court of Appeals for the Fifth Circuit. Appeal dismissed on June 22, 2021. (Appendix A)

STATEMENT OF THE CASE

Facts and proceedings in district court

On June 17, 2020, Nyambui Joe Gipson (Gipson) was named in a one count indictment charging him with felon in possession of a firearm, in violation of 18 U.S.C. 922(g). (ROA.8). On June 29, 2020, Gipson entered a guilty plea pursuant to a written plea agreement in which he waived his right to appeal, with certain exceptions. *See* (ROA.28-31,160). As a part of the guilty plea Gipson entered into the following stipulation of facts:

After the guilty plea, Probation prepared a pre-sentence report (PSR). The “offense conduct” section of the PSR disclosed that on December 16, 2019, Arlington Police Department Officers responded to an apartment complex regarding a domestic dispute call. *See* (ROA.166). A witness reported she had argued with Gipson regarding the use of her car. *See id.* Gipson reportedly pointed a gun at the complainant, drug her out of the car and hit her with his fists and choked her. *See id.* Officers found Gipson at the apartment complex and saw the barrel of a firearm protruding from his backpack. *See id.* The officers searched the backpack and found the stolen Smith & Wesson pistol, 11 ounces of marijuana, a baggie containing 2.95 grams of methamphetamine, 2 pills of Alprazolam, 9 pills of ecstasy, 2 pills of Vyvanse, and a variety of other unidentified pills. *See id.*

The PSR calculated a base offense level of 20 for the offense occurring after a felony conviction for a crime of violence, pursuant to U.S.S.G. §2K2.1(a)(4)(A). *See* (ROA.168). The PSR added a two-level enhancement for a stolen firearm, (U.S.S.G.

§2K2.1(b)(4)), and a four-level enhancement because Gipson used the firearm in connection with another felony offense – the aggravated assault described above (U.S.S.G. §2K2.1(b)(6)(B)). *See* (ROA.168-169). The PSR found a total offense level 23, a criminal history category V, and a guideline imprisonment range of 84-105 months. (ROA.183).

Paragraphs 51 through 54 of the PSR set forth four pending cases all arising from the events of Gipson’s arrest on December 16, 2019, possession of a controlled substance under 28 grams (case no. 1624252), possession of a firearm by a felon (case no. 1624279D), possession of a controlled substance of more than 4 grams and less than 200 grams (case no. 1624283D), and aggravated assault with a deadly weapon (case no. 1624278D). *See* (ROA.178).

Paragraph 89 of the PSR purported to list the defendant’s pending cases. Confusingly, however, it only identified three pending cases from the December 16, 2019 arrest: the felon in possession offense (case no. 1624279D), and the two possession of controlled substances offenses (case nos. 1624252 and 1624283D). (ROA.183) Even more confusingly, paragraph 89 identified only the felon in possession of a firearm as “related”, and stated that the two possession of controlled substance cases were “unrelated.” *See id.* The latter description was particularly baffling because the PSR identifies these offenses as part of the offense of conviction and even increased the offense level on account of the aggravated assault. *See* (ROA.166-169,178)

Other than three clarifications that did not affect the guideline calculations, Gipson asserted no objections to the PSR. *See* (ROA.189-190). At the sentencing hearing, the district judge sentenced Gipson to 96 months imprisonment, to run concurrently with the pending felon in possession case (case no. 1624279D) and consecutively to the two possession of controlled substances offenses (case nos. 1624252 and 1624283D) and a pending parole violation. *See* (ROA.143). The district court said nothing about the pending aggravated assault case (case no. 1624278D), likely because the PSR's author forgot to list the offense in paragraph 89 of the PSR.

After imposing sentence, the court made the following statement:

The Court will also order that the defendant be given credit for time served in custody already from December the 19th (sic), 2019 to the present.

(ROA.143). The written judgement states, "The Court recommends to the Bureau of Prisons that the defendant be given credit for time served since his incarceration on December 16, 2019 . . .". (ROA.51)

Gipson's attorney pointed out that the court did not have the authority to determine the credit and the date from which credit will be received and urged the court to adjust the sentence:

MR. STICKNEY: Yes, Your Honor. My only concern -- and I don't know for sure and I apologize -- I believe the BOP will certainly give him credit for time served since July 1st, that's when he was transferred to marshal custody.

I don't believe they can give him credit prior to, from December, so the only way that they can give credit is if you subtract the time from the sentence that you gave, and so that would be roughly an 89-and-a-half month sentence.

That's my understanding. I could be wrong, Your Honor, but that's how I understood how they calculated the time already served.

(ROA.147-148).

The court asked if the government had an objection, and the government's objection revealed that the prosecutor was apparently unaware that the provisions of U.S.S.G. §5G1.3(b)(1) as well as *United States v. Taylor*, 973 F.3d 414 (5th Cir. 2020) required the court to do exactly what the defense attorney was requesting to do. The court then responded as follows:

The Court: I think your right. I'm going to leave it at 96 months with the proviso that I made, and I'll let the chips fall where they may, and we'll let the state folks figure that out.

(ROA.147).

On Appeal

Gipson argued on appeal that the district court committed an error of manifest injustice by attempting to award credit for time served while ignoring the directives of the Guidelines and the Fifth Circuit requiring that such credit must be accomplished through an adjustment to the sentence. *See* U.S.S.G. §5G1.3(b)(1); and *United States v. Taylor*, 973 F.3d at 418-419. Gipson also argued that the district court committed plain error by failing to run the federal sentence concurrently with pending state sentences that were relevant conduct to his federal offense. Finally, Gipson argued for the Fifth Circuit to adopt a “miscarriage of justice” exception to

waivers of appeal contained in plea agreements. The Fifth Circuit dismissed the appeal, presumably based upon the waiver of appeal provision in Gipson's plea agreement. *See Appendix A.*

REASONS FOR GRANTING THIS PETITION

I. This Court should recognize a “miscarriage of justice” exception to waivers of appeal.

A. Due Process and Fundamental Fairness requires a “miscarriage of justice” exception to waivers of appeal.

The Fifth Circuit has expressly reserved the question of whether “miscarriages of justice” constitute an exception to appeal waivers. *See United States v. Burns*, 770 F. App'x 187, 191 (5th Cir. 2019)(unpublished) (“Burns contends that we could find his waiver unenforceable under a miscarriage of justice exception. The Fifth Circuit has declined to explicitly adopt or reject this exception.”) (citing *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (unpublished), and *United States v. Powell*, 574 F. App'x 390, 394 (5th Cir. 2014) (unpublished)). The court dismissed Mr. Gipson’s appeal without addressing the issue. *See Appendix A.*

Most other circuits hold that a waiver of appeal cannot shield a miscarriage of justice. *See United States v. Teeter*, 257 F.3d 14, 21–27 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 559–63 (3d Cir. 2001); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Shockley*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009).

Other circuits exempt certain fundamental issues from a waiver, but without using the “miscarriage” language. *See United States v. Johnson*, 347 F.3d 412 (2d Cir. 2003) (appeal waiver cannot bar appeal of sentence that unconstitutionally considers defendant’s “status”); *United States v. Brown*, 232 F.3d 399, 403 (4th

Cir.2000)(challenges to sentence based on race or sentence exceeding maximum cannot be waived); *United States v. General*, 278 F.3d 389, 399 n. 4 (4th Cir.2002) (*Apprendi* errors and lack of competence cannot be waived); *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996) (“the waiver of a right to appeal may be subject to certain exceptions such as claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence imposed in excess of a maximum statutory penalty”).

Both this Court and the Fifth Circuit have agreed that “no appeal waiver serves as an absolute bar to all appellate claims.” *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019)(quoting *Garza v. Idaho*, — U.S. —, 139 S.Ct. 738 (2019)).

This Court should hold that defendants may appeal a miscarriage of justice, notwithstanding a waiver of appeal. As a matter of contract law, it is unlikely that parties to the plea agreement contemplated leaving no remedy in the event of an extreme injustice following the plea. The D.C. Circuit has concluded that “[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court.” *Guillen*, 561 F.3d at 530. After all, most “waivers are made before any manifestation of sentencing error emerges,” so “appellate courts must remain free to grant relief from them in egregious cases.” *Teeter*, 257 F.3d at 25.

This merely applies a general principle of contract law: that parties may avoid an unconscionable contractual obligation premised on a fundamental mistake. *See* Restatement (Second) of Contracts, Section 153 (1981); *Ibarra v. Texas Employment*

Com'n, 823 F.2d 873, 879 (5th Cir. 1987). Here, the defendant – and likely both parties – bargained with the assumption that the sentence would not amount to a miscarriage of justice.

B. Mr. Gipson's case presents a good vehicle for the Court to adopt a "miscarriage of justice" exception.

Mr. Gipson's case presents a situation where the district court ignored the requirements of both the Guidelines as well as the Fifth Circuit that the district court cannot order the Bureau of Prisons to award credit for time served. If the district court intends for a defendant to receive credit for time he has served in state custody prior to imposition of his federal sentence, the court must adjust the sentence. *See* U.S.S.G. §5G1.3(b)(1); and *United States v. Taylor*, 973 F.3d at 418-419. This was brought to the attention of the trial court and the court simply ignored the law. *See* (ROA.147-148). As defense counsel pointed out, this has cost Mr. Gipson more than 6 additional months in custody. (ROA.147-148).

Moreover, on direct appeal, Mr. Gipson pointed out that the district court failed to order the federal sentence to run concurrently with pending state court cases that were relevant conduct to the federal offense. Specifically, the district court treated a pending case as "unrelated" to the federal case even though the pending state case had been used to enhance Mr. Gipson's offense level by four levels. *See* (ROA.168). The court also failed to run concurrently the pending state charges which were the drug exhibits that were found at the same moment and in the same backpack as the firearm that was the basis of the federal charge.

Gipson was substantially prejudiced by both of these errors. First, although the district court intended for Mr. Gipson to receive credit for the time he served in custody beginning on his arrest December 16, 2019, the court had no authority to accomplish that by ordering it in the judgment. *See U.S.S.G. §5G1.3(b)(1); and United States v. Taylor*, 973 F.3d at 418-419. The court was required to adjust the sentence to accomplish this. *See id.* Mr. Gipson will not receive credit for this six months, despite the intent of the district court.

Second, Mr. Gipson's pending state sentences for conduct that was a part of the same incident, and was undeniably relevant conduct to his federal offense, will not run concurrently with his federal sentence. This despite the fact that the Guidelines direct the sentences to run concurrently. *See U.S.S.G. §5G1.3(c)*. This will cause Mr. Gipson to spend additional time in custody for whatever term of imprisonment is imposed on these state cases when that should not be the case. This is a true miscarriage of justice.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 19th day of November, 2021.

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