

Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

JASON TERRELL,

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

1. Whether the court of appeals erred by dismissing the appeal based upon an appeal waiver contained in the plea agreement and should have addressed Mr. Terrell's claims on their merits.

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BASIS FOR JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On November 23, 2021, the United States Court of Appeals for the Fourth Circuit dismissed Mr. Terrell's appeal and entered a judgment dismissing his appeal without addressing the merits of the claims raised by Mr. Terrell. This action by the appeals court had the effect of upholding the rulings made on sentencing issues and ratifying the 168 month sentence imposed by the district court

The United States Court of Appeals for the Fourth Circuit properly exercised jurisdiction in this matter, involving a criminal appeal from the United States District Court for the Southern District of West Virginia, pursuant to 28 U.S.C. § 1291, which grants the United States Circuit Courts of Appeals jurisdiction over appeals from United States District Courts within the appropriate judicial circuit. Mr. Terrell filed a Notice of Appeal less than ten days from entry of the Amended Judgment Order entered by

the district court.

Subject matter jurisdiction existed in the district court because this matter involves criminal offenses against the United States of America, specifically a violation of 21 U.S.C. § 846.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

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; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Introduction

This Court should grant certiorari in this case because it presents an important questions of federal law which has not been settled by this Court. This matter involves a provision in the plea agreement between Mr. Terrell and the United States providing, *inter alia* Mr. Terrell waived his right to appeal the sentence imposed unless that sentence was greater than that corresponding to offense level 38 in the United States Sentencing Guidelines. Mr. Terrell states that the 168 month sentence imposed corresponds to offense level 35, but asks this Court to hold that waivers of appeal are unenforceable and that the circuit courts of appeals should decide appeals of sentences imposed on their merits guided by the procedural and substantive reasonableness standard enunciated by this Court in *Gall v. United States*, 552 U.S. 31, 128 S. Ct. 586 (2007).

Therefore, Mr. Terrell asks the Court to reverse the order of The United States Court of Appeals for the Fourth Circuit dismissing his appeal and to

instruct the court of appeals to address his claims on their merits.

Brief Procedural History

A grand jury in the Southern District of West Virginia indicted Mr. Terrell and eleven others on August 25, 2020. J.A. 7-13.¹ The indictment charged Mr. Terrell with: conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 846 (Count One); aiding and abetting interstate travel in aid of racketeering enterprise, in violation of 18 U.S.C. §§ 1952 (a) and 2 (Count Two); conspiracy to distribute a quantity of heroin, in violation of 21 U.S.C. § 846 (Count Three); aiding and abetting the use of a communication facility to facilitate drug trafficking, in violation of 21 U.S.C. §§ 843 (b) and 2 (Count Four). Mr. Terrell entered pleas of not guilty to all counts at his arraignment and the magistrate judge ordered him detained. J.A. 3.

The parties reached a plea agreement and a change of plea hearing was held February 8, 2021. J.A. 14-42. Under the plea agreement, Mr. Terrell agreed to plead guilty to Count One and the government agreed to dismiss the

¹ Citations to “J.A.” refer to the joint appendix prepared by the parties and filed with United States Court of Appeals for the Fourth Circuit in the appeal below. Citations to a “docket entry” refer to the docket of the Southern District of West Virginia in United States v. Terrell, case number 2:20-cr-00154-01, available on PACER.

other three counts against him. J.A. 45. At the plea hearing, the court conditionally accepted the plea agreement and Mr. Terrell's guilty plea but deferred final acceptance of the plea agreement and guilty plea until the completion of a presentence investigation and the court's review of the presentence investigation report (hereinafter "PSR"). J.A. 27, 40.

Mr. Terrell objected to application of the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(12), and of the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(1). J.A. 135; he also objected to the failure of the PSR to recommend application of the "safety-valve" guideline provisions found at U.S.S.G §§ 2D1.1 (b)(18) and 5C1.2 and the statutory provision found at 18 U.S.C. § 3553 (f). J.A. 136. The district court overruled each of these objections and found that his total offense level was 35, following the grant of acceptance of responsibility, rather than total offense level 29 as would have applied if the court granted the three objections. J.A. 142. As Mr. Terrell is a criminal history category I offender, the court's rulings on these objections served to increase his advisory sentencing range from 87-108 months to 168-210. The court below also denied Mr. Terrell's motion for a downward variance and then imposed a sentence of 168 months imprisonment. J.A. 89, 96, 143.

Jason Terrell appealed the sentence imposed to the United States Court of Appeals for the Fourth Circuit. Undersigned counsel was appointed by the

court of appeals to represent Mr. Terrell and filed an opening brief on his behalf asserting the district court erred at sentencing by: (1) applying the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(12), and increasing the offense level by two levels for maintaining a premises for the purpose of drug trafficking; (2) by applying the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(1), and increasing the offense level by two levels for possessing a firearm in furtherance of drug trafficking; and (3) in denying application of the “safety-valve” provisions found at U.S.S.G § 2D1.1 (b)(18) and § 5C1.2, based upon its finding that the defendant possessed a firearm. The government then filed a motion to dismiss the appeal citing the waiver of appeal language in the plea agreement. Mr. Terrell filed a response to the motion opposing dismissal.

The appeals court dismissed his appeal based upon the waiver of appeal language in the plea agreement, finding the waiver was enforceable and that the claims raised fell within the scope of the waiver language. (See Appendix A, Order, November 23 2021) Mr. Terrell now asks this court to hold the waiver of appeal is unenforceable and remand the case to the court of appeals with instruction to address the merits of claims raised by Mr. Terrell on appeal.

Facts Relating To Alleged Offenses

Between July 2019 and August 26, 2020, Mr. Terrell engaged in drug distribution in and around Montgomery, Kanawha County, West Virginia. He distributed mostly methamphetamine, but also smaller amounts of cocaine and heroin. J.A. 53 On approximately 20 occasions between July 11, 2019 and July 30, 2020, Mr. Terrell distributed methamphetamine to an informant working for the FBI. He also sold a quantity of heroin and a quantity of cocaine to the informant on one occasion each during the conspiracy. J.A. 53. These transactions occurred in or near a shed located on property adjacent to his mother's house on Morris Drive in Montgomery, West Virginia. J.A. 54.

On or about March 2, 2020, Mr. Terrell traveled to Columbus, Ohio with two co-defendants to obtain approximately two pounds of methamphetamine. As revealed by authorized wiretaps and agent surveillance, Mr. Terrell arranged this deal through another co-defendant who resided in Columbus, Ohio. Mr. Terrell brought the methamphetamine back to the Southern District of West Virginia where it was sold during the course of the conspiracy. J.A. 53.

The United States and Mr. Terrell reached a plea agreement calling for Mr. Terrell to plead guilty to Count One of the indictment, charging him with conspiring to distribute 500 grams or more of methamphetamine. J.A. 44-52.

The parties agreed the base offense level should be 34. J.A. 48. The agreement noted that the parties did not agree as to the applicability of either the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(1), for firearm possession or the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(12), for maintaining premises for the purpose of manufacturing or distributing a controlled substance. J.A. 49.

The PSR recommended that both the firearm enhancement and the premises enhancement be applied with each increasing Mr. Terrell's guideline offense level by two levels. J.A. 120-21. Mr. Terrell objected to these portions of the PSR. J.A. 135. Additionally, Mr. Terrell objected to the PSR failing to recommend relief under the "safety-valve" provisions, U.S.S.G. § 2D1.1 (b)(18) and § 5C1.2. This objection was based upon there being no dispute that Mr. Terrell satisfied four of the five criteria found at § 5C1.2 (a), and defendant's argument that the evidence was insufficient to support a finding that Mr. Terrell possessed a firearm and was therefore ineligible for the "safety-valve" pursuant to § 5C1.2 (a)(2) J.A. 136. Mr. Terrell's argument for the "safety-valve" was based both upon his position that the specific offense characteristic found at U.S.S.G. § 2D1.1 (b)(1) was not supported by the evidence and upon the argument that even if the court found the enhancement at § 2D1.1 (b)(1) applicable, Mr. Terrell still satisfied the requirement of § 5C1.2 (a)(2), because

of the differing standards of proof that applied. Mr. Terrell argued that whereas § 2D1.1 (b)(1) applies if a firearm is present unless the defendant succeeds in proving it was clearly improbable the firearm was connected to the offense, under 5C1.2 (a)(2), a defendant is eligible for relief if each of the five criteria are shown by a preponderance of the evidence. J.A. 60-62. Mr. Terrell also moved for a downward variance sentence. J.A. 65.

The district court denied each of the three described objections and denied Mr. Terrell's motion for a variance sentence. J.A. 137-42. Given the court's rulings, Mr. Terrell had a total offense level of 35 and was in criminal history category III, resulting in an advisory guideline sentencing range of 168-210 months. J.A. 142-43. The district court imposed a sentence of 168 months imprisonment. The defendant appealed his sentence on procedural and substantive grounds.

In response to the appeal the government filed a motion to dismiss, citing the appeal waiver included in parties' plea agreement. The waiver, constituting paragraph 12 of the agreement read:

12. WAIVER OF APPEAL AND COLLATERAL ATTACK.

Mr. Terrell knowingly and voluntarily waives the right to seek appellate review of his conviction and of any sentence of imprisonment, fine or term of supervised release imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever including any ground set forth in 18 U.S.C. § 3742, so long as that sentence of

imprisonment, fine or term of supervised release is below or within the Sentencing Guideline range corresponding to offense level 38, regardless of criminal history category. Mr. Terrell also knowingly and voluntarily waives any right to seek appellate review of any claim or argument that (1) the statute of conviction 21 U.S.C. § 846 is unconstitutional, and (2) Mr. Terrell's conduct set forth in the Stipulation of Facts (Plea Agreement Exhibit A) does not fall within the scope of the 21 U.S.C. § 846.

The United States also waives its right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever including any ground set forth in 18 U.S.C. § 3742, so long as that sentence of imprisonment or fine is within or above the Sentencing Guideline range corresponding to offense level 33, regardless of criminal history category.

Mr. Terrell also knowingly and voluntarily waives the right to challenge his guilty plea and his conviction resulting from this plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

The waivers noted above shall not apply to a postconviction collateral attack or direct appeal based on a claim of ineffective assistance of counsel.

Mr. Terrell filed a response that while acknowledging that the Fourth Circuit generally enforces knowing and voluntary appeal asked the court of appeals to deny the motion to dismiss and address the sentencing issues raised by Mr. Terrell on their merits. The appeals court granted the government's motion and dismissed the appeal without addressing the merits.

ARGUMENT

Standards of Review

The question of whether a defendant has effectively waived his right to appeal is an issue of law subject to de novo review. *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). This petition is raising a slightly different issue: whether an appellate waiver in a plea agreement should be enforced even where it was knowingly and voluntarily accepted by a defendant.

Generally, with regard to sentencing issues, a sentence is reviewed under a deferential abuse of discretion standard, "first ensur[ing] that the district court committed no significant procedural error." *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597 (2007). If a sentencing decision is determined to be "procedurally sound," the sentence imposed is reviewed for "substantive reasonableness" under an abuse-of-discretion standard. *Id.*

Discussion of Issues

Courts review sentences for reasonableness, applying an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007); see also *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir. 2007). The appellate court first must ensure that the trial court did not commit any procedural error, such as

failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider

the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Gall, 552 U.S. at 51.

If a court finds procedural unreasonableness, there is no need to inquire further and the case should be remanded for resentencing. See, *United States v. Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010) (“Only if we conclude that the district court committed no significant procedural error . . . may we move on to the second step of considering the substantive reasonableness of [the] sentence . . .”).

If, however, a court finds the sentence to be procedurally sound, it must then consider the substantive reasonableness of the sentence, taking into consideration the totality of the circumstances. *Id.* Ultimately, this boils down to whether the sentence imposed was greater than necessary to comply with the purposes of 18 U.S.C. § 3553 (a)(2). Here, the court of appeals did not assess the 168 month sentence for procedural or substantive reasonableness. The Fourth Circuit instead found the claims raised by Mr. Terrell were within the scope of the appeal waiver and dismissed the appeal finding the waiver was enforceable even though it foreclosed consideration of the issues presented on their merits.

Mr. Terrell now asks this Court to hold that appeal waivers are void and

unenforceable where they preclude review of otherwise properly preserved issues. This Court has, generally held that a defendant may waive a number of constitutional and other rights as long as such waiver is knowing and voluntary. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Godinez v. Moran*, 509 U.S. 309 (1993)

This Court, however, has never directly held that the right to appeal errors committed by a sentencing court may be waived. *Garza v. Idaho*, 586 U.S. ___, 139 S. Ct. 738 (2019), and other cases could be read to implicitly condone enforcement of appeal waivers but those cases did not squarely address the issues at hand. Unequal bargaining power exists between the United States government and an individual defendant. To the extent there is mutual consideration exchanged in plea agreements, the consideration is hugely unbalanced. In most agreements, defendants are compelled to give up numerous constitutional and procedural rights essentially in exchange for the three level decrease in the their offense level for acceptance of responsibility. The government receives a guilty plea and less onerous work demands and gives up little of real consequence particularly in cases involving controlled substances or financial crimes where offense levels are usually dictated by the relevant conduct which sweeps in all the drugs or money which are part of the same course of conduct or a common scheme or plan. Additionally, appeal

waivers require defendants to prospectively waive their right to appeal rulings which the sentencing court has not yet made and which often cannot be predicted or foreseen.

Appeal waivers undoubtedly serve to reduce the government's workload and to some extent judicial efficiency, but these benefits are outweighed by the detriment to defendants who have their appeals dismissed when they are appealing from rulings made subsequent to the execution of the plea agreements. Furthermore. The prevalence of appeal waivers serves to reduce the guidance to district courts and practitioners that flows from precedential decisions of courts of appeals because a great many issues evade scrutiny on review due to the government's reliance on motions to dismiss citing appeal waivers.

CONCLUSION AND RELIEF SOUGHT

Jason Terrell respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit directing that Court to vacate the order of dismissal and the judgment in this matter with instruction that the court of appeals rule on the merits of the claims raised by Mr. Terrell in his appeal.

Respectfully submitted this 18th Day of February, 2022

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