

No. 21-7594

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

ORIN KRISTICH - PETITIONER

vs.
UNITED STATES OF AMERICA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
10TH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

ORIN KRISTICH
UNITED STATES PENITENTIARY TUCSON
P.O BOX 24550
TUCSON, AZ 85734

FILED
MAR 31 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. Whether the Appellant's Appeal Counsel, Mr. Acton, can tell the court that the Appellant agrees to dismiss the Appeal without ever talking to the Appellant about the government's motion to enforce the plea waiver?
2. Whether the Clerk of the Court for the (10th Circuit) Court of Appeals can refuse to file Mr. Kristich's misconduct complaint about Judge Johnson?
3. Whether the (10th Circuit) Court of Appeals can refuse to answer Mr. Kristich's request for De Novo Review?
4. Whether the plea waiver should be enforced when defense counsel lied to Mr. Kristich in order to get him to sign the plea agreement?
5. Whether the plea waiver should be enforced when defense counsel did not tell Mr. Kristich everything the government was saying about the plea agreement?
6. Whether the plea waiver should be enforced when the Court went outside the admission of facts?
7. Whether the plea waiver should be enforced when the Court did not reach the correct guideline range at sentencing?
8. Whether the government can add guidelines, sentencing factors, policy statements, or laws to the plea agreement at sentencing after the plea was accepted by the Court? (When the plea was an 11(C)(1)(c) plea agreement).
9. Whether the Judge can impose guidelines based on a statement the defendant/appellant never made?
10. Whether the district court can let the treatment provider or probation officer determine the defendant's sentence as part of supervised release?
11. Whether the Supreme Court should grant Mr. Kristich a new trial?

LIST OF PARTIES

1. Alejandro Fernandez; Assistant Federal Public Defender; Albuquerque Office.
2. Gregory Acton; Acton Law Office; Albuquerque
3. Sarha J. Mease; Assistant United States Attorney; Albuquerque
4. Tiffany L. Walters; at the U.S. Department of Justice; Counsel for the United States of America

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Appendix A Court of Appeals, Tenth Circuit: (No notice given)

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Appendix C. Note from Defense Counsel

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TABLE OF AUTHORITIES CITED

CASES:

1. Brady v. United States, 397 U.S. 742 (1970)
2. Henderson v. United States, 133 S. Ct. 1121 (2013)
3. Hill v. Lockhart, 474 U.S. at 59
4. Hughes v. United States, 138 S. Ct. 1765 (2018)
5. Kernan v. Cuero, 138 S. Ct. 724, 199 L. Ed. 2d 590 (2018)
6. Freeman v. United States, 131 S. Ct. 2685 (2011)
7. Lafler v. Cooper, 132 S. Ct. 1376 (2012)
8. Puckett v. United States, 556 U.S. 129, 137, 129 S. Ct. 1423
9. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 469, 30 L. Ed 427 (1971)
10. Strickland v. Washington, 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
11. United States v. Booker
12. United States v. Brunetti, 376 F.3d 93, 95 (2d Cir. 2004)
13. United States v. Doe, 810 F.3d 132, 160 (3d Cir. 2015)
14. United States v. Kissick, 69 F.3d 1048, 1054 (10th Cir. 1995)
15. United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997)

STATUTES AND RULES:

1. 18 U.S.C. § 3583(a)
2. 18 U.S.C. § 3583(b)(2)
3. 18 U.S.C. § 3583(d)(2)
4. 18 U.S.C. § 3583(d)(1)
5. 18 U.S.C. § 3553(a)(1)
6. 18 U.S.C. § 3553 (a)(2)(A)
7. 18 U.S.C. § 3553(a)(4)(A)
8. 18 U.S.C. § 3553(a)(6)
9. 18 U.S.C. § 3553(b)(1)
10. 18 U.S.C. § 3553(c)
11. 18 U.S.C. § 2422(a)
12. Fed. R. Crim. P. 11(c)(1)(C)

13. Fed. R. Crim. P. Rule 32

OTHER:

1. The Declaration of Independence

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.
reported at Case No. 21-2126.

The opinion of the United States district court appears at Appendix B to the petition and is
unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 4, 2022.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NO RESPONSE TO REQUEST, and a copy of the order denying rehearing appears at Appendix N/A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (1) The Due Process Clause of the United States Constitution under the Fifth Amendment.
- (2) The Fifth Amendment of the United States Constitution: because the government's actions are not rationally related to a legitimate governmental objective or it is excessive in relation to that purpose.
- (3) The Ex Post facto Clause of the United States.
- (4) The First Amendment of the United States; under article 3.
- (5) The Fourteenth Amendment of the United States Constitution.
- (6) The Fourth Amendment of the United States Constitution.
- (7) The Sixth Amendment of the United States Constitution.
- (8) The Stkickland Test.
- (9) The Jencks Act.
- (10) 18 U.S.C. 3583 (d)(2).
- (11) 18 U.S.C. 3583 (b)(2).
- (12) 18 U.S.C. 3583 (a).
- (13) 18 U.S.C. 3583 (d).
- (14) 18 U.S.C. 3583 (d)(1).
- (15) 18 U.S.C. 3553 (c).
- (16) 18 U.S.C. 3553 (a)(6).
- (17) 18 U.S.C. 3553 (b)(1).
- (18) 18 U.S.C. 3553 (a)(1).
- (19) 18 U.S.C. 3553 (a)(2)(A).
- (20) 18 U.S.C. 3553 (a)(4)(A).
- (21) 18 U.S.C. 2422 (a)
- (22) 18 U.S.C. 3742

(23) Fed. R. Crim. P. 11 (c)(1)(C).

(24) Fed. R. Crim. P. 32.

STATEMENT OF THE CASE

(1) A voluntary plea is one made by a defendant who is fully aware of the direct consequences, including the actual value of any commitments made to him by the court, the prosecutor, or the defendant's counsel. At sentencing the prosecutor said Mr. Kristich should have known about everything the government was going to use at sentencing, because the prosecutor and Mr. Kristich's attorney had talked about it. However, in the plea (under the admission of facts) it is shown that Mr. Kristich was told multiple times; that he did not have to have prior knowledge or intent under § 2422(a). The admission of facts says: "I Orin Kristich, induced Jane Doe, who I have learned was 13 years old at the time." At sentencing the government stated Mr. Kristich had prior knowledge of Jane Doe's age and breached the plea agreement. Moreover, Mr. Kristich could not have had prior knowledge of her age, if he learned that she used a fake I.D., age, and name. [REDACTED]

(2) Pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P. all sentencing factors, policy statements, and sentencing guidelines that the government or the court wanted to use must be in the plea agreement. The government and the court breached the plea by imposing guidelines and sentencing factors that were not part of the binding plea agreement. (That had been accepted almost a year prior.)

(3) Mr. Kristich's attorney knew that the court breached the plea and did nothing to help him on Appeal. (Enclosed is a copy

of a note handed to Mr. Kristich at sentencing, that said "read admission of facts." (Mr. Fernandez (F.P.D.O.)).

(4) The court cannot use a statement that Mr. Kristich never made to impose a higher guideline range. This is a breach of the plea agreement and an inapplication of the sentencing guidelines. (This is all found in the sentencing transcripts).

(5) Unconstitutional term(s) of supervised release were imposed in Mr. Kristich's case. Under the First Amendment in Article III; the Court cannot let the probation officer or the treatment provider determine any portion of the defendant's sentence, because they do not work for the Court. They did just that three different times; as found in Mr. Kristich's sentencing transcripts. Moreover, under the Fifth Amendment, the Court cannot impose mandatory polygraph testing or let the probation officer, and the treatment provider impose polygraph testing as a term/part of probation or treatment. This is Unconstitutional, (as upheld by the Tenth Circuit Court). The fact that defense counsel did not make one objection to this/these extreme violations of Mr. Kristich's Constitutional rights shows Ineffective Assistance of Counsel; under the two prong(s) of the Strickland test. One, it is very unreasonable defense counsel does not make objections of this nature. Two, it will always affect the outcome of the proceedings, when the court grants the probation officer and the treatment provider the power to determine the defendant's sentence; after the sentencing proceedings.

(6) If the Federal Courts say that they will not tolerate inappropriate behavior, inappropriate social media, police brutality, racial profiling or misconduct, then the Courts will need to be transparent and address it appropriately in each case. If the people in the United States of America don't believe that any government agency is policing itself, even if they do come and approach that agency, they feel like their concerns are not valued and respect for the agency is lost. This happens when their complaints aren't investigated, and nothing changes. Mr. Kristich filed objections after sentencing in accordance to the Fed. R. Crim. P., the U.S. Attorney filed a response, however Judge Johnson never made any kind of ruling, and the Court did not send Mr. Kristich a copy of the U.S. Attorney's response. To this day he has not received a copy of the response. Because of these Due Process violations, Mr. Kristich filed a late appeal, and the motion of Notice of Appeal was granted after the Appeal was granted, Mr. Kristich filed a Judicial Misconduct Complaint, because of facts found in the sentencing transcripts: the most concerning fact is that Judge Johnson used a statement that Mr. Kristich never made as "additional facts" that allowed him to use a higher offense level. The 10th Circuit Court has ruled that it is highly important that he reach the correct sentencing guidelines, before imposing a sentence. It should be noted that an inapplication of the guidelines can only be challenged on Direct Appeal. Moreover, he imposed a

different guideline than the one he was trying to use to increase Mr. Kristich's base level. The Tenth Circuit Court Clerk, Christopher Waloport, sent Mr. Kristich a letter saying, he could not take any action in his appeal and only his new attorney could speak for Mr. Kristich. He went on to say he would not file or take action on any pro-se filings, and would not reply again. However, a misconduct complaint is not part of Mr. Kristich's appeal case, and gets its own case number. Moreover, Mr. Kristich does not have a right to an attorney under the Sixth Amendment in a misconduct complaint. Even if the Tenth Circuit Court would have been kind enough to appoint me an attorney, there is no guarantee it would be the same attorney. He also must not know that even with an attorney, Mr. Kristich can Ex Parte his attorney at anytime. (This is why the Court Clerk should not be giving Mr. Kristich legal advice). This is Judicial Misconduct by the Tenth Circuit Court Clerk, and a Due Process Violation, leading to a conspiracy by the Federal Court system to violate Mr. Kristich's Constitutional rights. To this day Mr. Kristich's misconduct complaint has never been filed, and no reply.

- (7) The sweeping nature of several of the conditions of supervised release shows that the district court failed to weigh the burden of the conditions on the defendant's liberty against their likely effectiveness, as required by 18 U.S.C § 3583(d).
- (8) Conditions of supervised release must be reasonably related to the nature and circumstances of the offense and history

and characteristics of the defendant. Mr. Kristich did not have a history with using or viewing pornography. The record contains no evidence that Mr. Kristich indulged in adult or child pornography, or that viewing adult pornography would increase the likelihood that Mr. Kristich would reoffend. After all he did not seek to indulge in sex with non-adults in the first place. More than one of the supervised release conditions appear to be a more significant deprivation of liberty than is reasonably necessary in this case.

REASONS FOR GRANTING THE PETITION

COUNSEL -- DEFICIENT PERFORMANCE -- PREJUDICIAL

Headnote: 1

When an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed with no further showing from the defendant of the merits of his underlying claims.

(Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

ASSISTANCE OF COUNSEL -- APPEAL WAIVER -- PREJUDICE

Headnote: 2

The presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), applies regardless of whether the defendant has signed an appeal waiver. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL -- EFFECTIVE ASSISTANCE

Headnote: 3

The Sixth Amendment guarantees criminal defendants the right to have the assistance of counsel for their defense. The right to counsel includes the right to the effective assistance of counsel. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL -- INEFFECTIVE ASSISTANCE -- PREJUDICE -- APPEAL WAIVER

Headnote: 5

In certain Sixth Amendment contexts, prejudice to the defense is presumed for purposes of the Strickland test. For example, no showing of prejudice is necessary if the accused is denied counsel at a critical stage of his trial or left entirely without the assistance of counsel on appeal. Similarly, prejudice is presumed if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. And prejudice is presumed when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken. This final presumption applies even when the defendant has signed an appeal waiver. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL -- INEFFECTIVE ASSISTANCE

Headnote: 4

Under the Strickland test, a defendant who claims ineffective assistance of counsel must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that any such deficiency was prejudicial to the defense. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

WAIVER OF RIGHT -- PLEA BARGAIN

Headnote: 6

As courts widely agree, a valid and enforceable appeal waiver only precludes challenges that fall within its scope. That an appeal waiver does not bar claims outside its scope follows from

the fact that, although the analogy may not hold in all respects, plea bargains are essentially contracts. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

WAIVER OF RIGHT

Headnote: 7

As with any type of contract, the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived. Additionally, even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver. Accordingly, a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

WAIVER OF RIGHT

Headnote: 8

All jurisdictions appear to treat at least some claims as unwaivable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable, for example, on the grounds that it was unknowing or involuntary. Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL -- DISREGARD OF ACCUSED'S INSTRUCTIONS

Headnote: 9

A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

PLEA BARGAIN -- NOTICE OF APPEAL -- PERFORMANCE OF COUNSEL

Headnote: 10

Simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope. And in any event, the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make. Where a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant's instructions. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Kagan, and Kavanaugh, JJ.)

LACK OF MERIT -- APPOINTED COUNSEL -- WITHDRAWAL

Headnote: 11

After an appeal has been preserved and counsel has reviewed the case, counsel may always, in keeping with longstanding precedent,

advise the Court and request permission to withdraw, while filing a brief referring to anything in the record that might arguably support the appeal. The existence of this procedure reinforces that a defendant appellate rights should not hinge on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal..

COUNSEL- INEFFECTIVE ASSISTANCE- APPEAL

Headnote: 12

To succeed in an ineffective assistance claim in the appeal context, a defendant needs make only one showing; that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. So long as a defendant can show that counsel's constitutionally deficient performance deprived him of an appeal that he otherwise would have taken, Court's are to presume prejudice with no further showing from the defendant of the merits of his underlying claim. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsberg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL- DEFICIENT PERFORMANCE- PREJUDICE

Headnote: 13

Given that past precedents call for a presumption of prejudice whenever the accused is denied counsel at a critical stage, it makes even greater sense to presume prejudice when counsel's deficiency forfeits an appellate proceeding altogether. After all, there is no disciplined way to accord any presumption of reliability to judicial proceedings that never took place. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsberg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL- INEFFECTIVE ASSISTANCE- APPEAL

Headnote: 14

When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal, with no need for a further showing of his claims' merit, regardless of whether the defendant has signed an appeal waiver. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsberg, Breyer, Kagan, and Kavanaugh, JJ.)

COUNSEL- DEFICIENT PERFORMANCE- APPEAL

Headnote: 15

When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal. (Sotomayor, J., joined by Roberts, Ch. J., and Ginsberg, Breyer, Kagan, and Kavanaugh, JJ.)

CONCLUSION

- (1) The Declaration Of Independence say(s)- "All men ... are endowed by their creator with certain unalienable Right(s)". Unalienable mean(s)- can not be taken away or denied. Unalienable is a word that can be used interchangeably with inalienable- this means that we were born with these rights. The Declaration Of Independence clearly states that these rights were "endowed to us by our creator". We did not earn them, we did not design them, we did not ask for them; they were simply given to us. These rights have been given to us for ever and are part of our human nature. Everyone was born with the desire for life, liberty, and the persuit of happiness. From a legal standpoint, liberty means the right to live without unwarranted intrusion into our privacy and property. The responsibility to honor everyone's rights is ours. (This is the government's responsibility as well.)
- (2) Failure to apply the correct legal standard itself constitutes an abuse of discretion in this case. Objections of Plain Error were filed within fourteen days in accordance with Fed. R. Crim. P. 52 (b). Under Plain Error review, the error must have been clear or obvious, rather than subject to reasonable dispute.
- (3) The Federal Sentencing Guidelines repeat 18 U.S.C. 3583 (d), under U.S. Sentencing Guidelines Manual 5D1.3(b); Mr. Kristich claimed Plain Error in his Notice of Appeal.
- (4) 18 U.S.C. 3583 (d)'s requirement that the condition must involve no greater deprivation of liberty than is reasonably necessary;

it is threaded to deprivation of liberty in terms that in effect require the Court to choose the least restrictive alternative. Section 3583 (d)(2) is thus a narrow tailoring requirement. Moreover, using a statement that was never made by Mr. Kristich to increase his sentencing guidelines and then impose a sentence is an abuse of discretion and a violation of due process, judicial process, and the United States Constitution. Furthermore, the District Court and the government breached the plea agreement and went outside the admission of facts when sentencing Mr. Kristich in this case; making the plea and the plea waiver null and void.

CONCLUSION

Wherefore, the petitioner, Mr. Kristich prays that his petition for writ of certiorary be granted.

Respectfully submitted.

Dated: March 29, 2022

Signed: 
Orin Kristich

