NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

RYAN HAYES

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

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November 7, 2022

Respectfully Submitted,
RYAN HAYES
Petitioner
By his attorney of record

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DATE: November 7, 2022

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QUESTIONS PRESENTED

This case before the First Circuit Court of Appeals, where the District Court affirmed the denial of applying a role reduction and in failing to find a violation of due process and equal protection, reasoning that Mr. Hayes forfeited his right to make these claims by failing to challenge the enforceability of the appeal waiver. United States v. Hayes, No. 20-2121, (Aug. 10, 2021, 1st Cir. 2022) ("Hayes"). The First Circuit reasoned that because the sentencing court stated that it "would have imposed the same sentence" even if it had considered defendant's equal protection and due process arguments, "a clear and gross injustice" was not present sufficient for the First Circuit to exercise it's discretion to review the sentence. See Appendix A.

The questions presented are:

I. Whether considerations of equal protection and due process required the First Circuit to entertain Mr. Hayes' appeal where Mr. Hayes had not challenged the enforceability of the appeal waiver until he addressed the issue in his amended response brief, and where legitimate claims of such violations, including the sentencing court's failure to apply a minor role reduction were presented below.

II. Whether Ryan Hayes reasons to have the First Circuit review his appellate waiver was appropriately reviewed on appeal using an "abuse of discretion" standard.

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

RYAN HAYES respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated August 10, 2022, affirming the government's motion for summary disposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit in

United States v. Ryan Hayes, No. 20-2121 (1st Cir. Aug. 10, 2022) appears at Appendix A to this petition (hereinafter cited "A-1"). The United States District Court for the District of Maine Sentencing Transcript appears at Appendix B to this petition (hereinafter cited "PP-APP-1"). The Plea Agreement appears at Appendic C (hereinafter "APP-4"). Defendant's Sentencing Memorandum Appears at Appendix D (hereinafter "APP-10

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on August 10, 2022. This Petition is filed within ninety (90) days after entry of judgment on the petition for rehearing en banc. *See* Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT

1. Introduction

On August 10, 2022, the First Circuit allowed the government's motion for summary disposition and affirmed the judgment of the Maine District Court. United States v. Hayes, No. 20-2121 (1st Cir. Aug. 10, 2022) (hereinafter "Hayes"). At the First Circuit Mr. Ryan Hayes had set forth four independent grounds for the First Circuit to set aside the plea waiver, as argued by the government, and require the government to fully brief the issues.

Pursuant to First Circuit Local Rule 27.0(c), the government brought a motion for summary disposition based on a plea waiver. In response, Mr. Hayes stated that source material as applied to case law supported retaining the case on the First Circuit docket and required the government to fully brief the issues. Mr. Hayes set forth four independent grounds for setting aside the plea waiver and for full briefing. First, and most importantly, Mr. Hayes noted that he and the government had proceeded to sentencing having reformulated their plea agreement contract after the plea agreement had been signed. Mr. Hayes stated that this reformulation itself constituted a process which rendered the appellate waiver a nullity. Second, pursuant to First Circuit precedent in United States v. Teeter, Mr.

Hayes demonstrated that the Maine District Court Judge did not review the scope of the plea waiver with Mr. Hayes, that the District Court Judge made contradictory statements concerning the plea waiver, and that the issues briefed by Mr. Hayes in his opening brief were outside the scope of the appellate waiver provision contained within the plea agreement. See United States v. Teeter, 257 F.3d 14, 21 (1st Cir. 2001). Third, Mr. Hayes noted that an "Act of God" or force majeure – the pandemic – had obviated the requirement that the parties be bound by the plea agreement waiver. Last, Mr. Hayes stated that the arguments he had raised in his initial brief were of a constitutional dimension which had not been specifically waived and needed to be specifically waived in order for the appellate waiver to survive. As a consequence of these four points, Mr. Hayes had argued that the First Circuit should consider his appeal in full despite the appeal waiver because he had presented meritorious arguments of a constitutional and legal basis which required full briefing pursuant to "the interests of justice" as delineated in the First Circuit precedent United States v. Teeter, 257 F.3d 14, 21 (1st Cir. 2001)(general power of appellate courts to override pre-sentence waivers in the interests of justice).

2. The Appellate Waiver

The appellate waiver contained within the plea agreement stated as follows:

> Defendant is aware that Title 18, United States Code Section, 3742

affords a defendant the right to appeal the sentence imposed. Knowing that, Defendant waives the right to appeal the following:

A. Defendant's guilty plea and any other aspect of Defendant's conviction in the above-captioned case; and

B. A sentence of imprisonment that does not exceed 108 months.

Defendant's waiver of his right to appeal shall not apply to appeals based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

The number of months in this paragraph does not necessarily constitute an estimate of the sentence that the parties expect will be imposed.

See Appendix C.

3. Change of plea colloquy in the Maine District Court

The exact language that the district court judge used in reviewing Mr. Hayes's appellate waiver with him at the change-of-plea colloquy was as follows:

> ...you waive, meaning give up, the right to appeal the following, and subparagraph A says, you are the defendant and you agree that you give up the right to appeal your guilty plea and any other aspect of your conviction....And you also have agreed, under this provision, that you waive, meaning you give up your right, to appeal a sentence of imprisonment that does not exceed 108 months. So if I impose a sentence of 108 months, you will have – you have no right to appeal that sentence....
>
> Outstanding. All right. Within the confines of the plea agreement that we just went over, both you and the Government have the right to appeal any sentence that I impose.

See Brief for Appellant.

The Maine District Court sentencing judge had informed Mr. Hayes that he had "the right to appeal any sentence," and the Maine District Court sentencing court failed to note where or when the appeal waiver did not apply.

4. The Government's pandemic Policy

During his sentencing Mr. Hayes stated that fundamental fairness and both equal protection and due process required that he be given a three point variance because he was being sentenced via video in keeping with the government's response to the pandemic's effect on the Federal court system. The government felt that Mr. Hayes only deserved a two point variance because "the defendants that are being offered the three level recommendation are those that specifically pled guilty via video and are sentenced via video." The defense countered that because he pled guilty prior to the pandemic, and, thus, did not appear for plea via video, the pandemic should not penalize Mr. Hayes for only appearing via video for sentencing. In denying the applicability of the government's three level variant policy to Mr. Hayes case, the Maine District Court stated "that it is somewhat by fortuity that he pled before the pandemic started and the shutdown of the court began" thereafter.

5. The Maine District Court "Town Meeting"

At a "Town Meeting" conducted via Zoom in September 2020 and presided over by Chief Judge Levy, Assistant United States Attorney F. Todd Lowell speaking on behalf of the new policy and on behalf of the government, stated that

the policy would not be written down and distributed to members of the defense bar. Instead, members of the defense bar would be contacted by the appropriate member of the United States Attorneys' Office on their respective cases and would be apprised as to what part of the new policy would be applied to their client.

6. The First Circuit's decision in *Hayes*

Mr. Hayes brought four independent grounds before the First Circuit arguing that the appellate waiver provision should be set aside and full briefing commence.

6a. Contract Law Principles

Mr. Hayes argued that contests concerning the validity of plea agreements should be analyzed by reviewing courts under principles of contract law. Mr. Hayes stated that he had been offered a change from the original contract of a two level variance as a consequence of the advent of the pandemic, and that his acceptance of that variance offer abnegated the original contract. Mr. Hayes argued that the positions of the parties to the original contract had been altered by the pandemic when Mr. Hayes accepted the government's new offer.

In Newbert the First Circuit utilizing principles of contract law declined to enforce a defendant's waiver of appellate rights contained in a plea agreement

based on a "miscarriage of justice." United States v. Newbert, 504 F.3d 180 (1st Cir. 2007). Judge Lynch writing for the First Circuit found that it would be a miscarriage of justice were the defendant to be held to the terms of the appellate waiver after he successfully moved to withdraw his guilty plea. Id. at 183. Judge Lynch wrote that

> Basic contract principles apply to the construction of plea agreements.[United States v.] Clark, 55 F.3d [9] at 12 [(1st Cir. 1995)]; [United States v.] Atwood, 963 F.2d [476] at 479 [(1st Cir. 1992)]. Ambiguities in plea agreements are construed against the government. United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988)("[W]e find that the costs of an unclear agreement must fall upon the government...[W]e hold that the government must shoulder a greater degree of responsibility for lack of clarity in a plea agreement.").

Id. at 185.

Similarly, before the First Circuit, Mr. Hayes had argued that it would be a miscarriage of justice to let the parties change the terms of their contract, and then let the district court judge apply those changes to Mr. Hayes in an inequitable manner.

6b. First Circuit Precedent – United States v. Teeter, 257 F.3d 14, 21 (1st Cir. 2001)

Mr. Hayes had argued that the appellate waiver provision in his case should be set aside pursuant to First Circuit precedent set forth in United States v. Teeter, 257 F.3d 14 (1st Cir. 2001).

In United States v. Teeter, the First Circuit explicated the issue of when appellate waivers contained in plea agreements should be set aside, and, thereby, cause appeals to go forward fully briefed. United States v. Teeter, 257 F.3d 14 (1st Cir. 2001). Judge Selya wrote for the First Circuit that because appellate waivers are "anticipatory," some errors "may be visited upon" a defendant in a manner which neither the defendant nor the government "thought possible," when the appellate waiver was signed. Id. at 21. Thus, he wrote, "[i]n a certain sense, then – though not in the usual criminal law sense – a waiver of the right to appeal cannot be 'knowing.'" Id. Judge Selya held, however, "that presentence waivers of appellate rights are valid in theory" based on the prediction that pursuant to Fed.R.Crim. P. 11(c)(6) a trial court will clearly review the waiver at issue at the change-of-plea hearing, as well as the public policy goal that waivers provide defendants with a bargaining chip in negotiating plea agreement terms. Id. at 21-23. Yet, Judge Selya warned, during circuit court review waivers must "meet stringent criteria" to insure "public confidence in the judicial system." Id. at 23.

The stringent criteria mentioned by Judge Selya included a review of the plea colloquy to determine if the defendant's waiver was "knowingly and voluntarily" given, and a review of the plea agreement itself to determine if the phrasing of the waiver has clearly delineated the "scope" of the waiver and is

otherwise pellucid. Id. at 24. Concerning the plea colloquy, Judge Selya stated that Rule 11(c)(6) requires "that the district court judge must question the defendant specifically about her understanding of the waiver provision and adequately inform her of its ramifications." Id. Specifically, the district court judge "should be especially careful in its choice of words, taking pains to explain to the defendant that her right to appeal is circumscribed by her pre-existing waiver," or, presumably, not circumscribed by her pre-existing waiver. Id. at 24-25. Beyond this, "because such waivers are made before any manifestation of sentencing error emerges, appellate courts must remain free to grant relief from them in egregious cases." Id. at 25. Waivers are not meant "to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable)." Id. For this reason, "if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver." Id. Instances of a miscarriage of justice listed by Judge Selya include: "the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." Id. at 26. To this list can be added the impact retention of the error will have on future defendants if the error is

allowed to stand.

In the matter before Judge Selya, the district court judge had asked defendant Teeter during her plea colloquy "[D]o you understand that both you and the government will have a right to appeal any sentence I impose?" Id. at 26. This unqualified inquiry drew an affirmative response from Teeter. Id. Unfortunately, the inquiry contradicted the language of the plea waiver which was that "the Defendant waives to the full extent of the law any right to appeal...the conviction and sentence, and the manner in which it was determined." Id. As a consequence, Judge Selya writing for the First Circuit, held "that the proper remedy, given the circumstances, is to sever the waiver of appellate rights from the remainder of the plea agreement." Id. at 27.

In the case sub judice the Maine District Court judge made the same errors noted by Judge Selya in Teeter. The Maine District Court judge failed to inform Mr. Hayes that the plea agreement had an exception, namely, that the "waiver of his right to appeal shall not apply to appeals based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Then the Maine District Court judge made contradictory statements as follows: a) the district court asked Mr. Hayes whether he understood that if the court were to impose a sentence that did not exceed 108 months, Mr.

Hayes would "have no right to appeal that sentence." (emphasis added). A 77-78; and b) the district court judge then said that "[w]ithin the confines of the plea agreement that we just went over, both you and the Government have the right to appeal any sentence that I impose." A. 78 (emphasis added). This second sentence, and the one most present in Mr. Hayes's mind, informed Mr. Hayes that both he and the government could appeal any sentence the court could impose. Thus, as in Teeter, the Maine District Court judge ignored the full scope of the plea waiver and made contradictory statements about what Mr. Hayes could appeal.

Explicating further, the two questions asked of Mr. Hayes by the Maine District Court judge about his appellate waiver during his change-of-plea colloquy served to circumscribe the effect of the appeal waiver, and, therefore, did not serve to fully review the waiver with Mr. Hayes. By using the word "any" in the first question, and "no" in the second question made it appear that the district court judge was rushing through with the plea colloquy, which resulted in the district court ineffectively reviewing the scope of the plea waiver with Mr. Hayes. Additionally, by not reviewing with Mr. Hayes when his waiver of his right of appeal shall not apply, and by leaving Mr. Hayes with the impression that "[w]ithin the confines of the plea agreement that we just went over, both you and the Government have the right to appeal any sentence that I impose," necessarily left

Mr. Hayes with an ambiguous understanding of his appellate waiver.

Since Teeter, much energy has been expended in the First Circuit attempting to analyze the wording of the waiver in plea agreements. In United States Edelen, a post-Booker plea, the following "appellate waiver clause...was read aloud in court:"

> Defendant hereby waives his right to file a direct appeal if the sentence imposed by the Court is within the guideline range determined by the Court or lower or the Court imposes the mandatory minimum.

United States v. Edelen, 539 F.3d 83, 84-85 (1st Cir. 2008). In Edelen, the First Circuit set-forth Teeter as a three-prong test as follows:

> In Teeter, we held that appellate waivers are binding so long as: (1) the written plea agreement clearly delineates the scope of the waiver; (2) the district court inquired specifically at the plea hearing about any waiver of appellate rights; and (3) the denial of the right to appeal would not constitute a miscarriage of justice. [Teeter] 257 F.3d at 25.

Edelen, supra at 85.

Given the foregoing, Mr. Hayes argued that his appellate waiver should be deemed unenforceable on the basis of both of Teeter's first two prongs. Additionally, Mr. Hayes averred that his appellate waiver should be deemed unenforceable on the basis of Teeter's third prong, in that it would be a miscarriage of justice to deny Mr. Hayes's right to appeal.

6c. Act of God – Force Majeure

Mr. Hayes, in essence, stated that the pandemic had the effect of constituting an Act of God, or force majeure. which invalidated the plea contract, and, so too, invalidated the plea agreement. Appellant Hayes saw the pandemic as an unforeseeable intervening circumstance that prevents the parties from fulfilling the terms of the contract. An unexpected course of events which altered the parties ability from fulfilling obligations.

The United States Supreme Court has long held that an Act of God can change the relative positions of parties to an agreement. See Pollard v. Shaaffer, 1 U.S. 210, 215 (1787)(defendant is excused frm his covenant because his acceptance would have been different absent an act of God). The Ninth Circuit has labeled the pandemic a "force majeure." National Urban League v. Ross, 977 F.3d 770, 779 (9th Cir. 2020)(question whether a government deadline "might be equitably tolled due to the force majeure of the pandemic").

Recently the Seventh Circuit has had occasion to determine whether the Covid-19 pandemic, ceteris paribus, under contract law principles of public policy and unconscionability presents a sufficient ground to change the relative positions of parties to a plea agreement. United States v. Bridgewater, No. 20-2413 (7th Cir. Apr. 28, 2021). Bridgewater had filed a motion to modify his sentence under these principles of contract law, which, he felt, rendered his appellate waiver

unenforceable. The Seventh Circuit disagreed. The appellate waiver stated that "[d]efendant knowingly and voluntarily waives his right to seek modification of or contest any aspect of the conviction or sentence in any type of proceeding...except...if the sentence imposed is in excess of the Sentencing Guidelines." Id. slip op. at 1-2. Under these terms, the Seventh Circuit found that Bridgewater had voluntarily waived his right to seek a modification pursuant to compassionate release under he First Step Act. Id. The Seventh Circuit held that "[t]he change in circumstances brought on by the pandemic does not render Bridgewater's earlier waiver unknowing or involuntary." Id. slip op. at 2. The Seventh Circuit stated that the sentencing judge had approved the waiver and Bridgewater, therefore, had reaped the benefits of the waiver at sentencing. Id. slip op. at 6-7. Additionally, perhaps salving its conscience, the Seventh Circuit noted that Bridgewater had a "safety-valve' provided by the First Step Act in that he could file for modification through a petition with the Bureau of Prisons. Id. slip op. at 6.

The issue sub judice is not premised on the advent of the unforeseeable event of the Covid-19 pandemic, and only the unforeseeable event of the Covid-19 pandemic, as was the case in Bridgewater. Here, not all other conditions remained the same. The United States Attorney's Office created a policy in response to the

pandemic, which policy not only affected all existing plea agreements then extant in the District of Maine, but also was applied as they saw fit and only as they saw fit, to different groups and individual defendants. For this reason, any argument disfavoring arguments based on public policy and unconscionability as the Seventh Circuit did in Bridgewater, must fail.

Mr. Hayes's position finds support in the Restatement (Second) of Contracts § 265 or "frustration of purpose." The rule respecting discharge of performance under a contract is set forth in § 265 as follows:

> Where, after a contract is made, a party's principle purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary.

Restatement (Second) of Contracts § 265. In Mr. Hayes's case both the Covid-19 pandemic and the government response to it were not Mr. Hayes's fault and it was Mr. Hayes's basic assumption that he would be treated as a defendant qua human being as all similarly situated individuals would be treated by the United States Attorney's Office. He was not. His remaining duty to consider the implications of his appellate waiver, therefore, are discharged pursuant to basic contract principles. See also United States v. Gardner, No. 19-1584, slip op. at 2-3 (1st Cir. July 20, 2021)("[w]hen interpreting a plea agreement, we apply 'basic contract principles'"

citing Newbert supra at 185).

6d. Abandonment of Constitutional Rights Needs Specificity

The Maine District Court judge did not inform Mr. Hayes at the change-of-plea colloquy that by the terms of the appellate waiver Mr. Hayes was abandoning any argument Mr. Hayes might have had down the road based on fundamental fairness or equal protection.

In United States v. Reckmeyer, the Fourth Circuit held that any waiver of a constitutional right must be knowing and voluntary with respect to the particular right being waived. United States v. Reckmeyer, 900 F.2d 257 (4th Cir. 1990). The Fourth Circuit stated:

> A criminal defendant may...waive the right to conflict free representation, just as he may waive the right to any counsel....Such a waiver, like the waiver of any constitutional right, must be "voluntarily, knowingly, and intelligently [made] with sufficient awareness of the relevant circumstances and likely consequences." [United States v.] Bridges, 794 F.2d [1189] at 1193 [(7th Cir. 1986)]. While the waiver of constitutional rights is never presumed, e.g., Marzullo v. Maryland, 561 F.2d 540, 546 (4th Cir. 1977), waiver may be found despite the lack of specific knowledge of all the implications of the waiver, see Bridges, 7094 F.2d at 1194 (*citing* United States ex rel. Tonaldi v. Elrod, 716 F.2d 431, 438 (7th Cir. 1983). The question of waiver is one of law for the court. See Brewer v. Williams, 430 U.S. 387, 397 n. 4 (1977).

Reckmeyer slip op. at 4.

Because Mr. Hayes did not waive any constitutional argument based on

fundamental fairness and equal protection, his appellate waiver should not have prevented the First Circuit from considering these issues on the merits.

REASONS FOR GRANTING THE WRIT

The First Circuit in *Hayes* failed to adequately address defendant Hayes's concern that the pandemic changed the parties plea agreement contract which would have rendered the plea waiver invalid if they had done so. Defendant Hayes had argued that four independent grounds required setting aside the plea waiver and required full briefing by the parties. First, principles of contract law invalidated the plea contract. Second, First Circuit precedent in Teeter required setting aside the plea waiver. Third, the plea contract was rendered a nullity by the Act of God known as the pandemic. Last, abandonment of constitutional protections required specificity.

By failing to find a valid waiver of the plea agreement, the First Circuit avoided having to address the constitutional issues raised by Mr. Hayes in his appeal, namely, that it violated due process and equal protection to treat criminal defendants disparately by granting a three level variance to some and a two level variance to others.

A. The Court of Appeals erred in not finding a violation of due process and fundamental fairness where the district court chose not to adequately address Mr. Hayes argument concerning disparate treatment of criminal defendants under the government's pandemic policy.

Criminal defendant's enjoy a right to a "Fifth Amendment promise of fundamental fairness." United States v. Tsarnaev, 968 F.3d 24, 108 (1st Cir. 2020)(verdict vacated because pretrial publicity and attendant failure to change

venue rendered proceeding violative of due process and fundamental fairness). See United States v Vega-Figueroa, 234 F.2d 744, 752 (1st Cir. 2000) *citing* and *quoting* "Lisenba v. California, 314 U.S. 219, 236 (1941) (holding that '[a]s applied to a criminal trial, denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.')"

With respect to the government's pandemic policy and the video variance, the positions of the parties and the court were presented as follows:

Court: My understanding to this point has been that those who agree to plea and be sentenced by video get the benefit, generally speaking, of a three point recommendation. Those who are simply before the Court for sentencing only get a two-point variance.

See Brief for Appellant.

Government: The Government has been offering a nonbinding recommendation for those who plead and are sentenced via video and a nonbinding two-point variance for those that are willing to be sentenced via video like Mr. Hayes is doing today. And that is in part because of the pandemic.

Mr. Hayes pled guilty prior to the pandemic, and the pandemic has created a substantial backlog within the court system, is our understanding, and so trying to aid not only the Court, but, frankly, the interest of justice in trying [to] resolve cases so that defendants are not sitting in jail waiting for their day in court.

Id.

Defense: We would argue that Mr. Hayes should not be given this kind of disparate treatment, that under the equal protection clause of the Fifth and Fourteenth Amendment...that he is being unfairly excluded. And that the fundamental fairness is that he get the same three-point variance that everyone else is being offered, especially those who are pleaing after he is.

...It's just violative of fundamental fairness....I haven't heard a reason why he is not getting it. It doesn't make any sense actually.

Id. at 20.

Court: I am willing to take into account Mr. Hayes' willingness to participate in sentencing by video conference. And I intend to impose a variant sentence for a variety of reasons, video conferencing among them. That's all by way of saying I'm not likely to increase or decrease my conclusion about the extent to which Mr. Hayes is deserving of the variant sentence based on a dispute that you may have with the U.S. Attorney's Office about disparate treatment between and among defendants in terms of what they're recommending for variant sentences for participating by video.

Id. at 21. The government continued,

Government: In terms of the policy,...the defendants that are being offered the nonbinding three level recommendation are those that specifically plead guilty via video and are sentenced via video.

Mr. Hayes is in the category of defendants that pled guilty in person before the pandemic started and is now agreeing to be sentenced via video....he took responsibility very early on and may not receive the written recommendation from the Government, but at virtual sidebar, certainly the Government would not object to taking all of that into consideration.

Id. at 22.

The Maine District Court noted that "it is somewhat by fortuity that he pled before the pandemic started and the shutdown of the court began in mid-March, I'll take that into account as I analyze all of the other 3553(a) factors." Id.

In Bundy v. Wilson, the First Circuit vacated a judgment of the New Hampshire Supreme Court on the grounds that defendant's Fifth Amendment due process rights were violated because by denying the defendant's access to a transcript of the proceedings, the New Hampshire Supreme Court disposed of their appeals without granting the defendant's access to an adequate trial record and a meaningful opportunity to persuade the court that their appeals should be accepted. Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987). The Bundy court stated that "[t]he Fourteenth Amendment's due process guarantee of fundamental fairness requires states to provide a criminal defendant with 'the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.'" Id. at 130 *citing* Ake v. Oklahoma, 470 U.S. 68, 76, 105 S. Ct. , 1087, 1093. 84 L.Ed. 2d53 (1985). Referencing Evitts v. Lucey, the First Circuit stated that "[t]he {United States Supreme] Court also has emphasized that the holdings in these lines of cases...involving a criminal defendant's right of access to a transcript, are rooted firmly in both the due process and equal protection clauses of the fourteenth amendment." Bundy, supra at 131, referencing Evitts v. Lucey,469 U.S. 387, 403-

404, 105 S. Ct. 830, 839-840, 83 L.Ed. 2d 821 (1985).

In evaluating due process and equal protecion claims, the Bundy court stated

> The Supreme Court has identified three distinct factors that must be considered when evaluating a claim of due process deprivation. First, the private interest that is affected by the official action. Second, the risk of an erroneous deprivation caused by the procedures used, and the probable value, if any, of additional procedural safeguards. Third, the governmental interest at stake, including the function involved and the fiscal and administrative burden engendered by additional procedural requirements. Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976).

Bundy at 131.

The private interest affected by the government's pandemic video variance policy is the government's discretion to award an extra level reduction in Mr. Hayes sentencing recommendation, commensurate with or without those reductions offered other defendants. The risk of an erroneous deprivation in Mr. Hayes's case is to go from a total offense level of 25 and criminal history category I, to a total offense level of 24 and criminal history category I. This translates in going from an advisory guideline range of 57-71, to 51-63. This results in a 6-8 month incarcerative difference for Mr. Hayes. The burden on the United States Attorney's Office, both administratively and fiscally, would have been minimal had it extended a three point variant reduction offer to all defendants who pled via video. When presenting a two point reduction to any particular defendant, had the

government merely changed the offer from two to three, the burden on the government is insignificant. As the Bundy court stated, the government policy "illustrate[s] the real and continuing risk of an erroneous deprivation of a defendant's due process rights inherent in the current manner of administering New Hampshire's declination of acceptance [for providing a transcript] procedure." Id. at 134. Likewise, the government's declination to award Mr. Hayes an additional point reduction recommendation was a real deprivation of his due process rights which deprivation is continuing to any and all similarly situated defendant's who had the "fortuity' of pleaing guilty before the pandemic started, instead of after the pandemic started.

Mr. Hayes had also argued that in the event that the pandemic shall have subsided (should that be determinable) before his case was decided by the First Circuit, his case should survive any "mootness" argument which might be raised by the government. In analyzing the majority opinion in Richardson v. Ramirez, the dissent stated that the majority opinion "seems to hold "that review is not foreclosed by the possible mootness of the named plaintiff's claim because, but for he California Supreme Court's decision, unnamed class members would still subject to the challenged disenfranchisement, hence the case presents, as to unnamed class members, an issue capable of repetition, yet evading review."

Richardson v. Ramirez, 94 S.Ct. 2655, ____, 418 U.S. 24, 65, 41 L.Ed. 2d 551, __ (1974) (Marshall, J., dissenting).

It was violative of due process and fundamental fairness, therefore, for the sentencing court to not consider a possible three point video variant for Mr. Hayes, and, instead, to brush aside Mr. Hayes's request based on the Constitutionally-challenged government pandemic policy, as a fortuity of time and circumstance.

B. The Court of Appeals erred in not assessing whether Mr. Hayes was eligible for a minor role reduction.

Before the First Circuit Mr. Hayes had argued that his sentence on a possession of a conspiracy to distribute and possess with intent to distribute, was procedurally unreasonable because the sentencing court did not articulate a basis for not granting the role reduction under U.S.S.G. § 3B1.2. He also argued that thIs error constituted substantive unreasonableness because the district court should have departed downward from the guidelines range.

B-1. Minor Role

Both in his Sentencing Memorandum and at sentencing, Mr. Hayes claimed a role reduction pursuant to U.S.S.G. § 3B1.2. In his Sentencing Memorandum he

claimed a four-level reduction for minimal participant. At sentencing, however, he changed his focus and alleged that a two-level reduction should be granted by the sentencing court. In both, he argued that a comparison between the facts outlined in the PSR and as adduced from the suppression transcripts of co-defendant Angela Doody, arrayed against the criteria set forth in § 3B1.2 supported his requests. The government countered merely by denying the requests and by stating at sentencing that Mr. Hayes had agreed with the prosecution 's version of events, and that the Doody transcripts were inapplicable. The Maine District Court denied the request for role reduction merely by stating it had reviewed the record.

The facts relevant to this issue in the PSR were that there had existed a conspiracy to distribute and possess with intent to distribute controlled substances. PSR at ¶6. The probation officer noted that Mr. Hayes had allowed his address to be used as a place for shipment on three occasions. Id. at ¶ 8. Consequently, the PSR determined that defendant was an average participant of the conspiracy because he was a small-scale distributor, but that he had no contact with the sources of supply. Id.

In his sentencing memorandum, Mr. Hayes initially had argued that given the totality of the circumstances of this conspiracy, he should receive a four level reduction as a minimal participant. He felt that his placement in the indictment as

the last named participant was not by accident. Mr. Hayes noted that in order to be considered for this role reduction the defendant must "prove that he was less culpable than his cohorts....[which] can be located on a continuum." United States v. Arias-Mercedes, 901 F.3d 1, 8 (1st Cir. 2018). He asserted that his place in the indictment established this location.

Additionally, in his sentencing memorandum, Mr. Hayes had argued the following:

The Introductory Commentary to Part B – Role in the Offense, states that "[w]hen an offense is committed by more than one participant,...§3B1.2...may apply." Section 3B1.2 states that if a defendant was a "minimal participant" in the subject activity decrease by 4 levels, and if the defendant was a "minor participant" in the subject criminal activity, decrease by 2 levels. U.S.S.G. §3B1.2. Section 3B1.2 "provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity." Application Note 3(A) §3B1.2.

In Application Note 3(C) to U.S.S.G. §3B1.2, the guidelines state that "[t]he determination whether to apply subsection (a) [a 4 level minimal participant adjustment] or subsection (b) [a 2 level minor participant adjustment], or an intermediate [3 level] adjustment, is based on the totality of the circumstances and

involves a determination that is heavily dependent upon the facts of the particular case." U.S.S.G. §3B1.2, app. n. 3(C). In determining whether to apply a mitigating role adjustment, the Sentencing Commission stated the court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;
(ii) the degree to which the defendant participated in planning or organizing the criminal activity;
(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
(v) the degree to which the defendant stood to benefit from the criminal activity.

Id. See United States v. Arias-Mercedes, supra at 8.

Mr. Hayes' Sentencing Memorandum noted that the First Circuit has written that

> Among this pool of defendants eligible for an adjustment, a defendant "who plays a minimal role in the criminal activity" – that is, one "who [is] plainly among the least culpable of those involved in the conduct of the group" – is considered a minimal participant. U.S.S.G. § 3B1.2 cmt. n. 4. A minor participant, on the other hand, is a defendant who is substantially "less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." US.S.G. § 3B1.2 cmt. n. 5; See United States v. Arias-Mercedes, 901 F.3d 1, 5-6 (1st Cir. 2018). In this context, "participant" means "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.2 cmt. n. 1; § 3B1.1 cmt. n. 1.

United States v. Mendoza-Maisonet, 962 F.3d 1, 23 91st Cir. 2020). For guidance,

the First Circuit wrote that "determining one's role in an offense is a fact-specific inquiry." Id.

Amendment 794, amending the Commentary to §3B1.2 Application Note 3(A) points out that an award of a 2, 3, or 4 point mitigating role reduction, is made by a court upon consideration of comparing the defendant under discussion with others participating in the same criminal activity. See Amend. 794. Additionally, Amendment 794 "provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment." U.S.S.G. § 3B1.2 app n. 3(C); Amend 794.

Based on this criteria, Mr. Hayes had argued in his Sentencing Memorandum that: 1) he did not understand the scope and structure of the larger criminal activity; 2) he did not participate in the planning or organizing of the larger criminal activity; 3) he did not possess decision-making authority nor did he influence the exercise of decision-making authority; 4) even though he let one conspirator use his home as a delivery location (Angela Doody), he did not possess discretion in how the first ten named indicted participants performed in the criminal activity; and 5) Mr. Hayes's derived benefit was in furtherance of his own medical issues. Additionally, he lacked a proprietary interest in the criminal

activity and was involved in the conspiracy for an amount of time less than the entire duration of the conspiracy.

Given the foregoing, Mr. Hayes had argued that he was a minimal participant in the conspiracy and argued for a four level reduction. U.S.S.G.§ 3B1.2. "[T]he relevant comparison in determining which of the § 3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand. United States v. Cantrell, 433 F,3d 1269, 1283 (9th Cir. 2006)(citations omitted).

In Docket 1:19-cr-134-LEW, the government filed a document entitled "Government's Opposition to Defendant's Motion to Suppress," (ECH #283), to which was appended the two transcripts of interviews with co-defendant Angela Doody, referenced by Ryan Hayes in his Sentencing Memorandum. See App. D. Ryan Hayes co-defendant, Angela Doody, had filed a motion to suppress, which motion was denied by Judge Lane E. Walker, Mr. Hayes's sentencing judge. In this document the government stated that Angela Doody had "been in the conspiracy a long time," and that she had admitted that she possessed a backpack containing conspiracy-related drug money which did not belong to her. Id. at 3. She had taken this money intending to keep it for herself, and that she had collected it in furtherance of the conspiracy. Id. at 3-4.

In the second transcript appended by the government, Angela Doody stated that she had gone to school with Ryan Hayes and stayed with him "for a couple of weeks" sometime between November 2016 and January 2017, because she was homeless after having been punched in the mouth by her boyfriend Taylor Lovely, another co-defendant. Id. at pp 7-8, 1 of EH# 283-4. In the first transcript, law enforcement asked Angela Doody about packages she had mailed and received as follows:

> "We know about all of the packages. You were behind that, you were having these packages sent to you, right?...There were packages going to you, to your place, to your house....[Other members of the conspiracy would say] She was receiving packages. She was arranging. She gave me meth for paying me money for me to use her address. (ECH #283-3 at 2-3).
> Your were Brian's right hand." (ECH #283-3 at 4).

(ECH #283-3 at 2-4). Brian Holmes was the leader of the conspiracy.

Law enforcement stated that Angela's name was on the packages. (ECH #283-3 at 6), and that she signed for the packages when they were delivered. (ECH #283-3 at 7). Angela also stated that she collected money to buy more meth (ECH #283-3 at 8), and that initially "Brian gave me a package [to send] because he was working."(ECH #283-3 at 10). Law enforcement stated that Angela had been a member of the conspiracy for twenty months from January 2017 to August 2018. (ECH #283-3 at 7).

In the interviews law enforcement was interested in a backpack containing

drug proceeds located at Angela's residence. ECH 283 in passim. Angela stated that this amount was $2,000 in the first interview (ECH 283-3 at 13), and $30,000 in the second interview (ECH 283-6). She explained that "I just wanted to keep some money for myself." (ECH 283-3 at 14).

Pre-sentencing, the government responded to Mr. Hayes's request for role reduction by raising four points from the PSR. Government's Memorandum (ECF# 420) at 3. These four facts were: a) "the defendant aided the conspiracy by permitting packages of methamphetamines to be delivered to his home from the out-of-state source;" b) these packages were "intended for distribution amongst those involved in the conspiracy in Aroostook County;" c) "[b]etween April and August of 2016, the defendant received an ounce of methamphetamine per week primarily intended for resale by him;" and d) the defendant was involved in the conspiracy for 40 weeks." Id. The government noted that while "the defendant...does not dispute the facts contained in the Second Revised Presentence Report (PSR)," he "disputes the conclusions drawn by the PSR author regarding the defendant's role in the conspiracy based on those facts." Id. at 1.

At sentencing the defense requested a role adjustment consisting of a two-point reduction for minor participant. Id. at 12-14. The government countered that that they did not know how the Doody transcripts "plays into corroborating Mr.

Hayes' involvement in the conspiracy." App B at 16. The Government urged the Court to "look at the prosecution version of the offense, which Mr. Hayes agreed to, and said that was accurate, that he allowed packages of methamphetamine to be sent to his home, [and] that he distributed methamphetamine." Id.

Referencing the parties arguments and submissions in aid of sentencing, the Maine District Court summarily ruled against the defense request. Id. at 13-14. Nothing more was elucidated by the Maine District Court

C. Analysis Underscoring Mr. Hayes's Claims of Unreasonableness

Before the First Circuit Ryan Hayes had averred that his sentence was procedurally unreasonable because the Maine District Court sentencing judge did not elucidate sufficient reasons for setting a sentence or for denying a role reduction. With respect to both procedural and substantive reasonableness, Mr. Hayes had averred that he should have been assessed a minor role in the conspiracy and that his case should have been remanded to the Maine District Court for clarification.

With respect to procedural reasonableness, the First Circuit has annunciated the following general paradigm of analysis based on United States Supreme Court precedent:

> ...18 U.S.C. § 3553(c)...obligates a sentencing court to 'adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing,' Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586, L.Ed.2d 445 (2007).....[T]he sentencing court need only identify the main factors behind its decision.....The court need not be precise to the point of pedantry....[While] a sentencing court may have a duty to explain why it chose a particular sentence, it has no corollary duty to explain why it eschewed other suggested sentences.

United States v. Vargas-Garcia, 794 F.3d 162, 166 (1st Cir. 2015) (internal citations and quotation marks omitted).

In the matter sub judice, the Maine District Court sentencing judge gave cursory reasons for its chosen sentence, which reasons did not adequately address the concerns raised by Mr. Hayes' counsel concerning minor role reduction. The cursory nature of the court's reasoning is as follows:

> In considering the nature of the crime and your history, Mr. Hayes, to arrive at a sentence that is sufficient but not greater than necessary to correspond to the need for the sentence, the criteria I find to be most important in your case are as follows: the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to provide adequate deterrence, both generally and specifically. And what I mean by that, Mr. Hayes, is to provide deterrence for you to persuade you to not commit any further crimes, that's specific deterrence, and generally deter the community who will learn about your sentence, that participating in this type of conduct in this state before me on federal charges is a very, very bad idea. I also am considering the importance to provide correctional treatment in the most effective manner possible to you.
>
> I am going to accept the Government's recommendation for the equivalent of a two-level variant sentence based on your agreement to participate in your sentencing today by video. I'm also taking into consideration, at my discretion, and as I deem appropriate a variant sentence for all of the other reasons that we have discussed on the record.

App B at 34-37.

This statement of reasons by the Maine District Court merely restates the sentencing criteria set forth in 18 U.S.C. § 3553(a)(2)(A). This section states:

> (a) Factors to be considered in imposing a sentence – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

18 U.S.C. § 3553(a)(2)(A). By matching the court's recitation of reasons with the language of this statute, it appears that the sentencing court, without embellishment, merely repeated the statute.

Mr. Hayes had argued before the First Circuit that the sentence under discussion lacked procedural reasonableness because the sentencing rationale was insufficient. He stated that a sentencing court may run afoul of procedural reasonableness if the district court failed to adequately explain the chosen sentence. United States v. Contreras-Delgado, 913 F.3d 232, 238 (1st Cir. 2019)(internal citations and quotation marks omitted).

In evaluating Mr. Hayes's place in the conspiracy hierarchy, especially vis-a-vis Angela Doody, Mr. Hayes had argued that he was mindful that "a defendant

who seeks a mitigating role adjustment bears the burden of proving, by a preponderance of the evidence, that he is entitled to the downward adjustment." Arias-Mercedes, supra at 5, *quoting* United States v. Perez, 819 F.3d 541, 545 (1st Cir. 2016). Mr. Hayes stated that he was also mindful that "absent a mistake of law, battles over a defendant's status...will almost always be won or lost in the district court, Arias-Mercedes, supra at 5, *quoting* United States v. Graciani, 61 F.3d 70, 75 (1st Cir. 1995). Beyond the Maine District Court's sparse analysis, Mr. Hayes had argued in the alternative that he should have been awarded a downward departure by a preponderance of the evidence, or that his case should have been remanded to the district court to reconvene the battle. He argued that while First Circuit "minor participant jurisprudence remains velivolant," despite promulgation of Amendment 794, "the district court still must exercise judgment to identify the universe of participants involved in the particular conduct that forms the basis of the defendant's sentence." Arias-Mercedes, supra at 6-7. When a defendant challenges the district court's exercise of that judgment, the review is for clear error. Arias-Mercedes, supra at 7, *quoting* United States v. Cortez-Vegara, 873 F.3d 390, 393 (1st Cir. 2017).

In this criminal endeavor Ryan Hayes had asserted that he was a minor participant. The Maine District Court below, under the totality of the

circumstances, did not undertake a review of the non-exhaustive list of factors the Sentencing Commission provided in U.S.S.G. § 3B1.2, cmt. n.3 (C)(i)-(v). Mr. Hayes's argument set forth in his sentencing memorandum concerning this non-exhaustive list, were not addressed by the Maine District Court. Additionally, the district court failed to consider Mr. Hayes's circumstances in tandem with those of Angela Doody. Angela Doody was the conspiracy leader's "right hand," she was in the conspiracy for 85 weeks as opposed to Mr. Hayes's 40 weeks, and she used Mr. Hayes's house to mail and receive packages in her name only because her boyfriend, another co-defendant, punched her in the mouth leaving her homeless. Mr. Hayes argued that he was being punished for his good deed of providing a residence for Angela – his high school classmate. A dearth of factual analysis by the Maine District Court had left the First Circuit bereft of the ability to draw reasonable inferences. It was clear error, therefore, for the Maine District Court to fail to make the relevant factual findings.

D. When a Sentencing Court Fails to Set Adequate Findings

It is impossible to properly deduce the Maine District Court Sentencing Judge's reasoning for not addressing Mr. Hayes's reference of the Doody transcripts. The purpose behind §3553(a) is to permit sentencing court's to go

behind mere paper conclusions and more accurately and directly assess the particular characteristics of the defendant standing in the dock. By its very title, "Mitigating Role," this section invites court's to look at "the totality of the circumstances," and make "a determination that is heavily dependent upon the facts of the particular case." U.S.S.G.§3B1.2 cmt. n. 3(C). When the Maine District Court remains silent following an argument of this kind, the proper remedy is to remand for explanation. See United States v. Bell, 371 F.3d 239 (5th Cir. 2004)(case remanded for clarification of reasoning where lack of clear understanding concerning granting of defendant's motion for criminal history category departure). See also United States v. Thorn, 317 F.3d 107 (2nd Cir. 2003)(where reviewing court unable to assess court's reasoning for granting departure, case remanded for findings).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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