IN THE SUPREME COURT OF THE UNITED STATES

JONNY SHINEFLEW,

PETITIONER,

vs.

UNITED STATES OF AMERICA

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARIA TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether an integrated plea agreement that specifically identifies Guideline offense levels and specific offense characteristics on which the parties agree and on which they agree are disputed allows the prosecutor to go outside that agreement and urge a sentencing enhancement not integrated into the Agreement?

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Petitioner, Jonny Shineflew (hereinafter Shineflew) respectfully prays that a writ of certiorari is issued to review the unpublished memorandum from the United States Court of Appeals for the Ninth Circuit entered on June 23, 2022.

OPINIOIN BELOW

On June 23, 2022, the Ninth Circuit Court of Appeals entered an unpublished memorandum affirming Petitioner's convictions on federal conspiracy to commit band fraud and aggravated identity theft offenses. The memorandum is attached in the Appendix (App.) at pages 1-4. The Ninth Circuit denied a petition for rehearing and suggestion for a hearing *en banc* on August 1, 2022. App. 5.

This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

RELEVANT STUTORY PROVISIONS

U.S.S.G. 3B1.1 provides as follows: Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

STATEMENT OF THE CASE AND RELEVANT FACTS

Mr. Shineflew is presently serving a sentence of 70 months following his guilty plea to conspiracy to commit bank fraud (18 U.S.C. § 1349) and aggravated identity theft (18 U.S.C. § 1708). Several counts of bank fraud and aggravated identity theft were dismissed. App. 6-7.

The Government and Mr. Shineflew entered a Plea Agreement where they agreed to various guidelines calculations as follows:

> 7) United States Sentencing Guideline Calculations:
> Defendant understands and acknowledges that the United States Sentencing Guidelines (hereinafter "USSG") are applicable to this case and that the Court will determine Defendant's applicable sentencing guideline range at the time of sentencing.
>
> a) Base Offense Level:
>
> The United States and Defendant agree that the base offense level for Conspiracy to Commit Bank Fraud, in violation of 18 U.S.C. §§ 1349 and 1344, is seven. *See* USSG §2B1.1(a)(1).
>
> The United States and Defendant agree that the base offense level for Mail Theft,in violation of 18 U.S.C. § 1708, is six. *See* USSG

§2B1.1(a)(2).

There is no base offense level for Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A. *See* USSG §2B1.6.

App. 20-21.

The parties in paragraph 7(b) agreed and agreed to disagree on various specific offense characteristics as follows:

b) Specific Offense Characteristics:

The United States and Defendant agree that Defendant's total offense level will be increased according to loss, as determined by U.S.S.G. § 2B1.1(b). The parties agree that the loss attributable to Defendant's conduct is at least $8,831.80.

The United States reserves the right to argue a greater loss amount applies. For example, the United States may argue that the applicable loss amount should include the value of several stolen checks referenced in Discovery, as well as the value of checks that were unsuccessfully passed by Defendant and/or co-conspirators. Defendant does not contest the foundation, amounts, or values of the checks referenced in Discovery; rather, he reserves the right to argue that they should not be included in the loss used to calculate Defendant's advisory guideline range.

The United States and Defendant agree that Defendant's offense level is further increased pursuant to USSG §2B1.1(b)(11), due to Defendant's offense involving: the possession or use of any device-making equipment or authentication feature; the production or trafficking of any unauthorized access device, counterfeit access device, or authentication feature; and the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification.

The original draft of Presentence Investigation Report (hereinafter "PSIR") at ¶ 55 did not apply the U.S.S.G. § 3B1.1(b)'s manager/enhancement. (App. 12). The government

objected to the PSIR and urged a 3-level enhancement under 3B1.1(b)[1] because Mr. Shineflew's "role in the crimes was both central and essential." (App. 116-17).

The PSIR Addendum adopted the Government's objections as follows:

> **Objection No. 2: (paragraph 55)** The government objects to the absence of a 3-level increase, arguing the defendant was a leader or organizer within the conspiracy, and was involved in various roles in the conspiracy.
>
> **Response:** In review of the evidence and the various aspects in which this particular defendant was involved, as well as his apparent recruitment and assistance of others in negotiating fraudulent checks, the undersigned officer concurs and applied a 3-level increase at this paragraph. The total offense level has now increased to 15. The applicable guidelines throughout the presentence report were amended to reflect this increase.

(App. 171).

The change in the PSIR increased Mr. Shineflew's Guideline range from 33-41 months (App. 157) to 41-51 months (App. 207). Mr. Shineflew was also subject to a 24-month consecutive sentence for the aggravated identity theft count.

It is this advocacy by the Government Defendant's objection to have the PSIR adopt the § 3B1.1(b) enhancement that breaches ¶ 7(d) of the Plea Agreement, which provides,

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[1]/ U.S.S.G. 3B1.1 provides as follows: Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

d) Guideline Adjustments:

> Other than what is stated is this Agreement, the United States and Defendant have no further agreements concerning the application or calculation of the applicable advisory Guidelines range. The parties are free to support or oppose any Guideline calculations contained in the Presentence Investigative Report, other than as governed by this Agreement.

(App. 22).

The first sentence of ¶ 7(d) is reasonably read to say that all agreements on the application of the advisory guidelines are stated in the agreement. The second sentence limits the parties "to support or oppose any Guideline calculations contain in the Presentence Investigative Report, other than as governed by this Agreement." App. 22. If either party could argue for another guideline enhancement, such as the manager/supervisor role enhancement, this limiting provision becomes meaningless, an illusion that serves no purpose.

REASONS FOR GRANTING REVIEW

Mr. Shineflew bargained for an agreement that limited the Government from going outside the agreement of the parties as contained in the plea agreement and the PSIR guideline calculations.

If the agreement is ambiguous then the Government, as the drafter of the plea agreement, must bear responsibility for any lack of clarity. *United States v. De la Fuente,* 8 F.3d 1333, 1338 (9th Cir. 1993). "Construing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise." *Id.* "Focusing on the *defendant's* reasonable understanding also reflects that proper constitutional focus on what induced the *defendant* to plead guilty." *Id.*, at note 7, citing *Mabry v. Johnson,* 467 U.S. 504, 507-11 (1984) (emphasis in the original).

The district court ruled that the plea agreements "leaves open the fact that the government can argue for any lawful sentence, which would include calculations of the guidelines, even if the parties didn't agree to an agreement as to the guidelines." App. 84. But the parties did come to an agreement on how the guidelines could be dealt with. This has nothing to do with letting the parties be "free to recommend any legal sentence." App. 22. A legal sentence does not have to be tethered to a guideline's calculation. Which is what the Government did here by recommending a 144-month sentence. App. 123.

A legal sentence is anything up to the maximum sentence authorized by statute. Here, Count 1, conspiracy to commit bank fraud in violation of 18 U.S.C. § 1344 has a maximum sentence of not more than 30 years. Any sentence up to 30 years is a legal sentence. See *United States v. Johnson,* 988 F.2d 941, 943 (9th Cir. 1993) (holding that an illegal sentence is one "not authorized by the judgment of conviction...in excess of the permissible statutory penalty for the crime").

The district court applied the § 3B1.1(b) enhancement and used it to arrive at and increase Mr. Shineflew's guideline sentencing range. App. 84-85.

Mr. Shineflew appealed. The Ninth Circuit issued an unpublished Memorandum decision (App. 1-4) on June 23, 2022, affirming the district court's application of the § 3B1.1(b), and rejecting Mr. Shineflew's argument that the Government was not constrained by ¶ 7(d) of the Plea Agreement stating,

> Because Section 7(d) of the Plea Agreement gave both parties the freedom to support or oppose any Guidelines calculation that was outside of those expressly set forth in the Agreement, and because the Agreement did not expressly restrict either party from arguing for other appropriate adjustments, the government did not violate the Agreement when it sought the role enhancement. *See United States v. Ellis,* 641 F.3d 411, 417 (9th Cir. 2011)

> (holding that the government breaches a plea agreement if it attempts "to influence the district court to impose a harsher sentence than one to which the government agreed in the plea agreement to recommend" (internal quotation marks omitted) (quoting *United States v. Allen,* 434 F.3d 1166, 1175 (9th Cir. 2006))).
>
> The Plea Agreement also included an integration clause, whereby both parties acknowledged that "this document constitute[d] the entire Plea Agreement between the United States and Defendant, and no other promises, agreements, or conditions exist between the United States and Defendant." In the face of a fully integrated plea agreement, we cannot consider the prior negotiations or oral agreements that Shineflew now attempts to introduce. *See United States v. Floyd,* 1 F.3d 867, 870 (9th Cir. 1993) (treating a plea agreement as fully integrated where the agreement contained an integration clause).

That the Plea Agreement is integrated is the point. The Plea Agreement at ¶ 18 states,

> 18) Integrated Clause:
>
> The United States and Defendant acknowledge this document constitutes the entire Plea Agreement between the United States and Defendant, and no other promises, agreements, or conditions exist between the United States and Defendant concerning the resolution of this case.

App. 27-28.

Mr. Shineflew was persuaded to enter the agreement based upon the limitation that "[t]he parties are free to support or oppose any Guideline calculations contained in the Presentence Investigation Report, other than is governed by the Agreement" and that the parties had "no further agreements concerning the application or calculation of the applicable advisory Guideline range." App.22.

This provision was material to Mr. Shineflew because it had the natural tendency to influence his decision to enter the Plea Agreement and plead guilty. See *Kungys v. United States,* 458 U.S. 759, 771 (1988).

Mr. Shineflew made it clear during his allocation at sentencing (App. 93) reliance:

> Now that I pled guilty, the U.S. Attorney's Office is adding back the stuff they took out of the original plea agreement which made me believe it wasn't going to be used against me, plus added another enhancement for a manager that wasn't in the original plea, and now says that if the Court won't agree with her for the 12-point enhancement to give me another 12-point enhancement for my criminal history.
> ...
>
> I thought, believed, and understood in my mind that by taking the deal and the reason for the deal was to avoid all these enhancements and the costly trial.

Therefore, Mr. Shineflew's guilty plea was induced by the Plea Agreement. As the court observed in *Santobello v. New York,* 404 U.S. 257, 262 (1971).

> "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Mr. Shineflew bargained for how the advisory guidelines would be applied by the parties. See Sections, 7(a), (b) and (d) of the Plea Agreement. (App. 20-22). How the guidelines are calculated are an important part of every sentencing. "All sentencing proceedings are to begin by determining the applicable Guideline range." *United States v. Carty,* 520 F.3d 984, 991 (9th Cir. 2008). The guideline calculation is "the starting point and initial benchmark." *Kimbrough v. United States,* 552 U.S. 85, 108 (2007), quoting *Gall v. United States,* 552 U.S. 38, 49 (2007).

Santabello allowed a resentencing where the government would be required to fully comply with the agreement, in effect, specific performance of the plea agreement. *Id.*, 263.

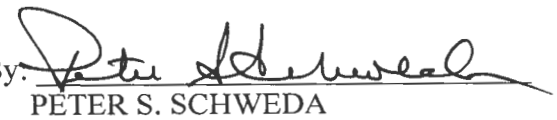
Here, that would require the freezing of the case just before the government objected to the PSIR not including the manager/supervisor enhancement under 3B1.1(b) and permit the sentencing to proceed with the original PSIR that did not include the enhancement.

CONCLUSION

Based on the foregoing, it is requested that the Court grant this Petition fore Writ of Certiorari and resolve the question presented.

RESPECTFULLY SUBMITTED this 28 day of October 2022.

WALDO, SCHWEDA & MONTGOMERY, P.S.

By: 

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