

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

KEVIN SINGLETON
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60773
consolidated with:
Case Nos. 21-60822 and 21-60823

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by dismissing Mr. Singleton's appeal based on the waiver of appeal provisions in his Plea Agreements.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

A. Introduction.

The procedural posture of this consolidated case is somewhat complex. This appeal pertains to the following three district court cases and associated Fifth Circuit cases:

district court case nos.: Fifth Circuit case nos.:

5:18cr24 21-60773 (lead case)

5:18cr6 21-60822 (member case)

5:18cr22 21-60823 (member case)

The district court consolidated all three of the cases for sentencing purposes. As further described below, the court sentenced Mr. Singleton to a total of 420 months in prison.

Because the facts and sentences related to these three cases are interrelated, the United States Court of Appeals for the Fifth Circuit granted consolidation of the cases for appeal purposes. *See* Fifth Circuit Order entered April 1, 2022, in Case No. 21-60733.

B. Procedural history, case no. 5:18cr24 (21-60773).

A Federal Grand Jury for the Southern District of Mississippi returned the Indictment against Mr. Singleton and Mr. Bruce A. Johnson on September 7, 2018. As to Mr. Singleton, the Indictment charged:

Count 1: Conspiracy with Bruce A. Johnson to distribute and possess a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and 21 U.S.C. § 846. This count was dismissed on the Motion of the prosecution.

Count 2: Use of a communications facility (telephone) to facilitate attempted possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Mr. Singleton accepted full responsibility for his actions by pleading guilty to count 2 on August 13, 2019.¹ The court ordered the following sentence: 48 months in prison to run concurrent with the sentences in case numbers 5:15cr6 (420 months total) and 5:18cr22 (48 months). As to supervised release, the court ordered one year to run concurrent with the supervised release terms in case numbers 5:15cr6 and 5:18cr22. The court entered a Final Judgment on November 3, 2021. The Judgment is attached hereto as part of composite Appendix 1.

C. Procedural history, case no. 5:18cr6 (21-60822).

A Federal Grand Jury for the Southern District of Mississippi returned the third and final Indictment against Mr. Singleton, Mr. Sammy D. Wright and Mr. Wesley Bell on November 6, 2018. As to Mr. Singleton, the Indictment charged:

¹ The Plea Agreements in all three cases contain a waiver of appeal provision.

Count 1: Conspiracy to distribute and possess with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Count 2: Possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). This count was dismissed on the Motion of the prosecution.

Count 8: Possession with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B).

Count 9: Possession with intent to distribute 5 kilograms or more of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). This count was dismissed on the Motion of the prosecution.

Count 10: Possession with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). This count was dismissed on the Motion of the prosecution.

Count 11: Possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A).

Count 12: Felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). This count was dismissed on the Motion of the prosecution.

Count 13: Possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A).

Count 15: Possession with intent to distribute a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). This count was dismissed on the Motion of the prosecution.

Mr. Singleton accepted full responsibility for his actions by pleading guilty to counts 1, 8, 11 and 13 on April 29, 2019.² The court ordered the following sentence:

Counts 1, 8 and 11: 360 months in prison to run concurrent with sentences in case numbers 5:18cr22 (48 months) and 5:18cr24 (48 months).

Count 13: 60 months in prison to run consecutive to all other counts in all three cases.

Total prison sentence is 420 months. The court also ordered five years of supervised release and a \$1,500 fine. The court entered a Final Judgment on November 3, 2021. The Judgment is attached hereto as part of composite Appendix 1.

D. Procedural history, case no. 5:18cr22 (21-60823).

A Federal Grand Jury for the Southern District of Mississippi returned the Indictment against Mr. Singleton and Mr. Clifford Payne on September 7, 2018. Regarding Mr. Singleton, the Indictment charged:

² *See supra*, footnote 1.

Count 1: Conspiracy with Clifford Payne to distribute and possess a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and 21 U.S.C. § 846. This count was dismissed on the Motion of the prosecution.

Count 2: Use of a communications facility (telephone) to facilitate attempted possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

As in the two previously described cases, Mr. Singleton accepted full responsibility for his actions by pleading guilty to count 2 on August 13, 2019.³ The court ordered the following sentence: 48 months in prison to run concurrent with the sentences in case numbers 5:15cr6 (420 months total) and 5:18cr24 (48 months). The court also ordered one year of supervised release to run concurrent with the supervised release terms in case numbers 5:15cr6 and 5:18cr24. The court entered a Final Judgment on November 4, 2021. The Judgment is attached hereto as part of composite Appendix 1.

E. Procedural history in the Fifth Circuit.

Mr. Singleton filed a Notice of Appeal in district court case number 5:18cr24 (Fifth Cir. case no. 21-60773) on October 6, 2021. On October 26, 2021, he filed Notices of Appeal in district court case numbers 5:18cr6 (Fifth Cir case no.

³ See *supra*, footnote 1.

21-60822) and 5:18cr22 (Fifth Cir. case no. 21-60823). As described above, the Fifth Circuit consolidated all three of Mr. Singleton’s cases for appeal purposes.

Mr. Singleton filed his Appellant’s Brief with the Fifth Circuit on April 22, 2022. He presented the following three arguments to the Fifth Circuit:

- 1) Whether the district court erred by increasing Mr. Singleton’s offense level under U.S.S.G. § 3B1.1(a) because he purportedly organized and led a criminal activity involving five or more people.
- 2) Whether the district court erred by increasing Mr. Singleton’s offense level under U.S.S.G. § 2D1.1(b)(16)(E) because he purportedly committed the subject offenses as part of a pattern of criminal conduct engaged in for a livelihood.
- 3) Whether the district court erred by increasing Mr. Singleton’s offense level under U.S.S.G. § 2D1.1(b)(12) because he purportedly maintained a premises for the purpose of distributing drugs.

The prosecution did not file an Appellee’s Brief. Instead, on May 16, 2022, it filed a Motion to Dismiss, or in the Alternative, for Summary Affirmance. Through this Motion, the prosecution sought to enforce the waiver of appeal provisions in each of the three Plea Agreements. The specifics of the waiver of appeal provisions are set forth below.

On June 3, 2022, Mr. Singleton filed his Response to Prosecution's Motion to Dismiss, or in the Alternative, for Summary Affirmance. The prosecution filed a Reply supporting its Motion on June 7, 2022.

Rather than consider the merits of Mr. Singleton's appeal, the Fifth Circuit agreed with the prosecution's Motion to Dismiss. The Fifth Circuit filed its Opinion dismissing the case on September 13, 2022. It also filed Judgments in all three cases on the same day. The Fifth Circuit's Opinion and its three Judgments are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgments in this case on September 13, 2022. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgments, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

“No person shall be … deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V, Due Process Clause.

“No State shall … deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, Equal Protection Clause.⁴

⁴ “This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” *Schweiker v. Wilson*, 450 U.S. 221, 227 n.6, 101 S. Ct. 1074, 1079 n.6 (1981) (citations omitted).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of criminal convictions entered against Mr. Singleton for violations of 21 U.S.C. §§ 841 and 846, and 18 U.S.C. § 924. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Singleton arose from the laws of the United States of America.

B. Statement of material facts.

1. Facts about Mr. Singleton's background.

Mr. Singleton was born and raised in Natchez, Mississippi. His parents separated when he was young, and his father died when Mr. Singleton was only 12. His mother and maternal grandparents raised him.

Mr. Singleton has three children. He voluntarily paid \$400 per month in child support prior to his incarceration.

While Mr. Singleton admits that he smoked marijuana in the past, there is no evidence that he used or abused any other kind of illegal or prescription drugs. Also, he is not affiliated with a street gang.

Mr. Singleton graduated from high school and attended some college. He has a Commercial Driver's License and a welding certification. He opened KDS

Trucking in 2015, a business that his wife and son currently operate. From 2010 through 2018, he owned and operated Singleton's Lawn Care in Natchez. Clearly, Mr. Singleton has a solid work history in the law-abiding community.

The district court noted positive aspects about Mr. Singleton. The district judge stated:

I do recognize and believe that Mr. Singleton is remorseful today. No question about it. He has many good qualities evidenced by the letters that have been sent to me by many people, some of whom, as I said, I know. He has the support of his family – many members are here today – and his friends.

2. The subject charges.

The charges alleged against Mr. Singleton are set forth above in detail. In summary, the three cases allege the following charges:⁵

case no. 5:18cr24 (21-60773):

- one count of use of a telephone to facilitate attempted possession with intent to distribute illegal drugs.

case no. 5:18cr6 (21-60822):

- one count of conspiracy to possess with intent to distribute cocaine;
- one count of possession with intent to distribute heroin;
- one count of possession with intent to distribute methamphetamine; and
- possession of a firearm in furtherance of a drug trafficking crime.

⁵ This summary does not include the counts dismissed on the prosecution's Motion.

case no. 5:18cr22 (21-60823):

- one count of use of a telephone to facilitate attempted possession with intent to distribute illegal drugs.

3. Facts about the defendants' sentences.

The district court sentenced Mr. Singleton to a total prison term of 420 months, or 35 years. According to the Bureau of Prisons' website, his earliest possible release date is January 15, 2048. Mr. Singleton is now 46 years old. That means that he will be 71 years old on his earliest possible release date.

In contrast to Mr. Singleton's 420-month sentence, the longest sentence received by any of his co-defendants is 168 months, which Mr. Wright must serve. Mr. Johnson's prison sentence is only 18 months and Mr. Payne's sentence is only 14 months. Mr. Bell has not been sentenced yet.

4. Facts about the waiver of appeal provision of the Plea Agreement.

Mr. Singleton signed Plea Agreements in each of the three district court cases. Each Plea Agreement contains a waiver of appeal provision. In each case, the waiver of appeal provision states:

Defendant, knowing and understanding all of the matters aforesaid, including the maximum possible penalty that could be imposed, and being advised of Defendant's rights ... [including his right] to appeal the conviction and sentence ... hereby expressly waives ... the right to appeal the conviction and sentence imposed in this case, or the manner in which that sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever....

Each Plea Agreement contains a further waiver of “the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255.” Mr. Singleton reserved the right to assert ineffective assistance of counsel on appeal.

V. ARGUMENT:
Review on certiorari should be granted in this case.

As described above, the Fifth Circuit never reached the merits of Mr. Singleton’s appeal claims because it ruled that they are barred from consideration by the waiver of appeal provision in the Plea Agreement. Because the Fifth Circuit never addressed the merits of Mr. Singleton’s arguments, the only issue presented in this Petition is whether the Fifth Circuit erred in its analyses and conclusions regarding the waiver of appeal issue. If this Court grants certiorari and rules that the waiver of appeal provision is unenforceable, then the case must be remanded to the Fifth Circuit for consideration of Mr. Singleton’s arguments on the merits.

The prosecution successfully argued to the Fifth Circuit that the appeal should be dismissed because Mr. Singleton’s Plea Agreement contains the waiver of appeal provision described above. We ask this Court to grant certiorari and reverse the Fifth Circuit’s ruling. Certiorari is warranted under Rule 10 of the Supreme Court Rules, which states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.”

The Court should exercise its “judicial discretion” and grant certiorari because the subject issue involves important constitutional issues under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The concurrence opinion in *United States v. Melancon*,

972 F.2d 566 (5th Cir. 1992) articulates these constitutional concerns in the waiver of appeal context.

Melancon involved the same issue before the Court in Mr. Singleton’s case – whether a waiver of appeal provision in a plea agreement is enforceable. 972 F.2d at 567. On the prosecution’s motion to dismiss the appeal, the *Melancon* Court held “that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence.” *Id.* at 568. Accordingly, the Court granted the prosecution’s motion to dismiss *Melancon*’s appeal. *Id.*

Judge Robert M. Parker authored a lengthy and well-reasoned concurring opinion in *Melancon*. 972 F.2d at 570-80. He began by stating, “I concur specially because I cannot dissent. This panel is bound by the unpublished, *per curiam* opinion, *United States v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)].” *Id.* at 570. He went on to state “I write separately to express why I think the rule embraced by this Circuit in *Sierra* is illogical and mischievous – and to urge the full Court to examine the ‘*Sierra* rule,’ and to reject it.” *Id.*

Judge Parker reasoned that “[t]he rule articulated in *Sierra* is clearly unacceptable, even unconstitutional policy: the ‘*Sierra* rule’ manipulates the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law.” *Melancon*, 972 F.2d at 571. “I do not think that a defendant can

ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a ‘waiver’ is inherently uninformed and unintelligent.” *Id.*

Judge Parker acknowledged that waivers can be valid in a number of scenarios in criminal cases. However,

[i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (citations omitted). But “[t]he situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence.” *Id.* at 572. “**This right cannot come into existence until after the judge pronounces sentence**; it is only then that the defendant knows what errors the district court has made – i.e., what errors exist to be appealed, or waived.” *Id.* (emphasis added; citation omitted).

For the reasons thoughtfully articulated by Judge Parker, this Court should find that Mr. Singleton’s waiver of the right to appeal was made unknowingly. This finding will require the Court to deny the prosecution’s Motion to Dismiss.

Judge Parker's attack on the majority's opinion also extends to constitutional concerns. He opines that the rule adopted by the majority "reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty." *Melancon*, 972 F.2d at 577.

Unconstitutional conditions occur "when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from governmental interference. The 'exchange' thus has two components: the conditioned government **benefit** on the one hand and the affected constitutional **right** on the other."

Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.R. 1415, 1421-1422 (1989) (emphasis in original)). "With a 'Sierra Waiver,' the government grants to the criminal defendant the **benefit** of a plea agreement only on the **condition** that the defendant accept the boot-strapped abdication of his or her right to appeal." *Melancon*, 972 F.2d at 578 (emphasis in original). This is at least unacceptable, even if the government may withhold the benefit (i.e., the plea agreement) altogether." *Id.* (citation omitted).

Judge Parker recognized that to create the constitutional issue described in the previous paragraph of this Brief, there must be a constitutional right. "The right to appeal is a statutory right, not a constitutional right." *Melancon*, 972 F.2d at 577 (citation omitted). However,

[e]ven if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has

decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.

Id. (citing *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is established, due process and equal protection bar the government from infringing on the right in an improper manner.

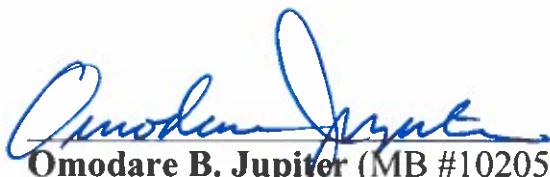
Page 3 of the Fifth Circuit’s Opinion in Mr. Singleton’s case cites *Melancon*, 972 F.2d at 567 for the proposition that “[t]he Supreme Court has repeatedly recognized that a defendant may waive constitutional rights as part of a plea bargaining agreement.” We note that *Melancon* cites *Town of Newton v. Rumery*, 480 U.S. 368 (1987) for this legal conclusion. *Rumery*, however, is clearly distinguishable from the subject case. That case involved complete dismissal of the criminal charges against the defendant, in return for the defendant’s agreement not to file a § 1983 claim against the town. *Rumery*, 480 U.S. at 390. There was no uncertainty about a future sentence in *Rumery*, as there is in Mr. Singleton’s case.

The holding in *Rumery* does not present a roadblock in the Court’s decision to grant or deny certiorari. In fact, granting certiorari will provide the lower courts needed guidance and clarity about constitutional concerns surrounding the plea process.

VI. CONCLUSION

For the reasons stated in *Melancon*'s concurring opinion, this Court should grant certiorari. Specifically, we ask the Court grant certiorari and ultimately rule that under the Due Process and Equal Protection Clauses of the United States Constitution, the subject waiver of appeal provision unconstitutionally infringes on Mr. Singleton's statutory right to appeal his sentence.

Submitted December 8, 2022 by:



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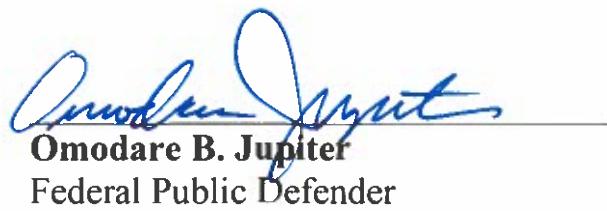
CERTIFICATE OF SERVICE

I, Omodare B. Jupiter, appointed under the Criminal Justice Act, certify that
today, December 8, 2022, pursuant to Rule 29.5 of the Supreme Court Rules, a
copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma
Pauperis was served on Counsel for the United States by Federal Express, No.
7707 1966 8808, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice

950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.


Omodare B. Jupiter
Federal Public Defender