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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

ELBERT SILAS
Petitioner

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. 22-60351

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Mr. Silas's due process rights were violated by the enforcement of the appeal waiver when Mr. Silas was not advised and did not know that he was agreeing to waive his right to appeal an alleged mistake in the application of the sentencing guidelines.

LIST OF PARTIES

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

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I. PETITION FOR WRIT OF CERTIORARI

Elbert Silas ("Mr. Silas"), an inmate currently incarcerated at FCI Pollock, through appointed counsel, petitions the Court for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit granting the government's motion to dismiss Mr. Silas's appeal based on the appeal waiver in his plea agreement.

II. OPINIONS BELOW

The Court of Appeals issued an unpublished opinion granting the government's motion to dismiss. (Appendix A).

III. JURISDICTIONAL STATEMENT

The opinion was filed on February 7, 2023. This Petition for Writ of Certiorari is filed within 90 days after entry of the opinion, 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).

IV. 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.

V. STATEMENT OF THE CASE

On January 25, 2019, Elbert Silas and others were indicted on a ten-count indictment. The government subsequently brought a superseding indictment charging the defendants on eight counts. Mr. Silas was specifically charged in Counts 1 and 8 for conspiracy to distribute controlled substances and Counts 2, 5, and 6 for possession of a controlled substance with the intent to distribute. Mr. Silas ultimately pled "guilty" to Count 1 of the superseding indictment conspiracy.

The sentencing for Mr. Silas was on June 3, 2022. Among other objections, Mr. Silas objected to the two-level sentencing enhancement provided in [U.S.S.G. § 2D1.1\(b\)\(5\)](#) proposed by Probation Services. The district court overruled this objection, and Mr. Silas received a within-guideline sentence of 300 months.

Mr. Silas believes that the district court committed error when it applied the two-level importation enhancement, and that as a result, his guideline range was higher than it should have been. Mr. Silas timely appealed. Rather than responding to the merits of his appeal, the government filed a motion to dismiss based on the appeal waiver. The pertinent appeal waiver language states that:

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 ... 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...

The 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. Silas reserved the right to assert ineffective assistance of counsel on appeal. The Court of Appeals subsequently granted the government's motion to dismiss.

VI. REASONS FOR GRANTING THE WRIT

Because the court of appeals found that Mr. Silas's appeal of his sentence was barred by the appeal waiver, the court never reached the merits of his appeal. For a defendant to waive his statutory right to appeal, the government must show that (1) the "waiver is knowing and voluntary" and (2) "the waiver applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006). In making this determination,

standard principles of contract interpretation are used. *Id.* Importantly, appeal waivers are to be narrowly construed against the government. *Id.*

Mr. Silas submits that the court of appeals erred in finding that he knowingly waived his right to appeal an error in the application of the sentencing guidelines. Mr. Silas seeks to have this Court recognize a distinction between a defendant waiving the right to appeal an appeal of the exercise of the sentencing judge's sentencing discretion versus a mistake by the sentencing judge when applying the sentencing guidelines. While the appeal waiver language is very broad, Mr. Silas contends that a reasonable person in the same situation would not know or understand from the specific waiver language that he is waiving his right to appeal an actual error in the application of the sentencing guidelines. Without being specifically told: (1) that a mistake is possible; and (2) that if such a mistake is made, the defendant will have to live with the consequences, there can be no knowing waiver. Mr. Silas submits that when defendants agree to a plea deal, they are unaware that there is even the potential for a mistake. Defendants assume that the guideline range will be calculated accurately.

A closer look at the waiver language reveals that it is not as broad as it first appears. The plea agreement provides that the defendant is waiving his right to appeal "the manner in which the sentence was imposed." The word "manner" commonly means "a characteristic or customary mode of acting."¹ Mr. Silas suggests that erroneous applications are not customary. Therefore, Mr. Silas contends that the mistaken application of the importation enhancement is not the customary mode of acting.

Similarly, the broad language waiving the right to appeal "on any ground whatsoever" is not as straightforward as it initially appears. A sentence imposed on "any ground" presumably refers to the legal justification for the sentence. Or, in other words, the rational basis for the sentence. Again, there is no basis for concluding that Mr. Silas understood that he was waiving his right to appeal a sentence based on erroneous or irrational legal grounds. This conclusion is consistent with the requirement that appeal waiver language is to be construed strictly against the government. For these reasons, when Mr. Silas agreed to waive his right to appeal his sentence in exchange for the dismissal of

¹ <https://www.merriam-webster.com/dictionary/manner>

other charges, he was not knowingly waiving his right to appeal actual errors resulting in an erroneously higher guideline range.

The rules of contract interpretation also support this conclusion. Under Mississippi law, unambiguous contract provisions are to be enforced as written. *Clark v. State Farm Mut. Auto Ins. Co.*, 725 So.2d 779, 781 (Miss. 1998). If the contract provision is ambiguous, then the ambiguity will be construed against the party that drafted the agreement. *See Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 352–53 (Miss. 1990). Based on the plain language at issue, the appeal waiver does not apply to the circumstances in this case. For the appeal waiver to cover this situation, the plea agreement should expressly tell the defendants, such as Mr. Silas, that how the sentence is imposed includes those situations where the District Court makes a mistake or error in determining the guideline range.

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." Accordingly, the Court should exercise its "judicial discretion" and grant certiorari because the subject issue involves an important constitutional issue under the Due Process Clause of the Fifth

Amendment. The concurrence opinion in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992) well articulates the constitutional concerns in the waiver of appeal context.

Melancon involved the question of whether an appeal waiver provision in a plea agreement was 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. December 6, 1991) [951 F.2d 345 (Table)]." *Id.* at 570. He went on 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). Mr. Silas suggests that there is a narrow but important distinction between his argument and Judge Parker's reasoning. And that is that Judge Parker appears to assume that the defendant actually knows there is a risk of an error. So, Mr. Silas presents this Court with an even narrower issue than the one Judge Parker raised.

Judge Parker also opined 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 accepts 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.

Turning back to the specific facts in Mr. Silas's case, based on the appeal waiver language and the reasoning articulated by Judge Parker, this Court should find that Mr. Silas's appeal waiver was not broad enough to deprive him of his constitutional right to appeal based on these

facts, and that as a result Mr. Silas was denied due process under the law. Mr. Silas further submits that the specific issues raised by this appeal are of national importance given that federal defendants are faced with similar applications of identical appeal waiver language every day.

VII. CONCLUSION

Mr. Silas has shown compelling reasons for the Court to grant certiorari, and to further find that enforcing the waiver of appeal provision against him under the circumstances unconstitutionally infringes on his due process rights.

Respectfully submitted,

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