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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

DANIEL RAY METSINGER
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. 22-60553

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Thomas Creager Turner, Jr. (MB # 99695)
Research & Writing Specialist
Office of the Federal Public Defender

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by dismissing Mr. Metsinger's appeal based on the waiver of appeal provision in his Plea Agreement.

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 Federal Grand Jury for the Southern District of Mississippi indicted Mr. Metsinger for failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). The Grand Jury returned the Indictment on July 13, 2021.

Mr. Metsinger took responsibility for his actions by pleading guilty to the failure to register charge. The plea was under a Plea Agreement entered by Mr. Metsinger and the prosecution. The Plea Agreement contained a waiver of appeal provision.¹ The court sentenced him to time served, and five years' supervised release. The court filed a Final Judgment on September 30, 2022. A copy of the Judgment is included as Appendix 1 to this Petition.

Mr. Metsinger filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on October 14, 2022. The Fifth Circuit case number is 22-60553. The Fifth Circuit dismissed the appeal based on the waiver of appeal provision in the Plea Agreement. It filed the Order dismissing the case on July 13, 2023. The court filed a Judgment on the same day. The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 2.

¹ The Plea Agreement contains a waiver of appeal provision. As presented in detail below, the defense does not believe that the appeal waiver is enforceable because the prosecution did not abide by all its obligations under other terms of the Plea Agreement. *See United States v. Gonzalez*, 309 F.3d 882, 886 (5th Cir. 2002) (holding, “where the government has breached or elected to void a plea agreement, the defendant is necessarily released from an appeal waiver provision contained therein.”).

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on July 13, 2023. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, 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

While no specific provisions of the Constitution are invoked herewith, the subject issue involves the critically important right of a defendant to rely on the prosecution to abide by the terms of a plea agreement.

IV. STATEMENT OF THE CASE

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

This case arises out of a criminal conviction entered against Mr. Metsinger for failing to register as a sex offender, in violation of 18 U.S.C. § 2250. 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. Metsinger arose from the laws of the United States of America.

B. Statement of material facts.

1. Mr. Metsinger's background.

Mr. Metsinger, who is over 75 years old, was born on February 25, 1948. At birth, his mother was only 14 years old. Mr. Metsinger's grandmother was his primary caretaker as a child, and he never knew his father.

Mr. Metsinger had to drop out of school after the tenth grade so he could work and provide for himself. Nevertheless, he did earn a GED. He worked odd jobs as a day laborer when he could.

Unfortunately, Mr. Metsinger has been homeless for most of his life. He suffers from Type 2 diabetes and high cholesterol, and is blind in his left eye. His only income is a monthly disability check for \$794, which he began receiving in 2013.

A few years ago, Mr. John Smith saw Mr. Metsinger outside on a very cold day in Meridian, Mississippi. Mr. Smith gave Mr. Metsinger a place to live in exchange for caring for his property and animals. Mr. Smith used the building that Mr. Metsinger was allowed to live in as a storage facility. A locked gun cabinet was in the storage area, but Mr. Metsinger did not have a key to it.²

2. Mr. Metsinger's admitted crime.

Mr. Metsinger pled guilty to failing to register as a sex offender. Two prior convictions triggered Mr. Metsinger's duty to register. In 1975, when Mr. Metsinger was 27 years old, he was arrested and convicted of rape. That crime occurred about 47 years before the subject plea hearing. In 1995, when Mr. Metsinger was 46 years old, he was arrested and convicted of attempted rape. That crime occurred about 27 years before the subject plea hearing.

Mr. Metsinger admits that he did not register as a sex offender in Meridian, Mississippi. He did not register because he was embarrassed about his prior crimes. At the plea hearing, he stated:

I finally met some nice people up there [in Meridian], nice friends, and they were helping me and I was doing good. And I was just -- I am not proud of it. I was embarrassed. I don't wear something like that as a badge of honor; it is an embarrassment to know. And I didn't want them people to know. But

² The Indictment charged a second count – felon in possession of a firearm – but the court dismissed that count on the prosecution's motion because the guns belonged to Mr. Smith and because they were in a locked gun cabinet. Also, dismissal of the felon in possession count was part of the Plea Agreement.

after all was said and done and I went on and registered, they found out anyway. And I should have done it, but I was embarrassed. I was ashamed.

3. The sentencing hearings.

Even though the sentence range under the United States Sentencing Guidelines (hereinafter “Sentencing Guidelines” or “Guidelines”) was only 18 to 24 months in prison, the district court conducted five protracted sentencing hearings over a six and one-half month period. By the time he was finally sentenced, Mr. Metsinger had already been in jail for about 13 and one-half months.

As to a prison sentence, the district court ordered “time already served[.]” The court ordered Mr. Metsinger to serve five years’ supervised release. Also, the court ordered him to abide by several standard conditions of supervised release and several special conditions of supervised release.

The prison sentence and the length of the supervised release term are not at issue on appeal. At issue are three special conditions of supervised release under § 5D1.3(d)(7) of the Sentencing Guidelines, which are typically ordered for people convicted of sex crimes. Also at issue is a special condition of supervision requiring him to submit to polygraph examinations. This condition is also typically imposed in sex offense cases. The undersigned objected to imposing these special conditions of supervised release on several occasions during the sentencing hearings.

Generally speaking, the objectionable special conditions of supervised release require Metsinger to abide by the following:

- submission of his real and personal property to warrantless searches by either the probation officer or any other law enforcement officer;
- participation in an assessment specific to sex offenders;
- participation in treatment specific to sex offenders; and
- submission to polygraph examinations.

4. Facts pertaining to the Plea Agreement.

a. The waiver of appeal provision.

Mr. Metsinger's guilty plea was pursuant to a Plea Agreement entered by the parties. The Plea Agreement contains a waiver of appeal provision that states in relevant part:

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....

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. Metsinger reserved the right to assert ineffective assistance of counsel.

b. The prosecution breached its obligation under the Plea Agreement.

As presented above, Mr. Metsinger’s guilty plea was under a Plea Agreement entered by the parties. Among other things, the Plea Supplement required the prosecution to “recommend a sentence within the lower 50% of the applicable range under the United States Sentencing Guidelines (U.S.S.G.) as computed by the Court[.]”

Part H of the Presentence Investigation Report (hereinafter “PSR”) is titled “Proposed Special Conditions of Supervision Outside the Guideline Regime.” (Emphasis added). Through the PSR, the probation officer recommended five special conditions of supervision that are outside of the Guidelines regimen. Special condition 1 is at issue in the waiver of appeal context. Special condition 1 states:

You shall submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of your person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media and effects, upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by you, or by any probation officer in the lawful discharge of the officer’s supervision functions.

The prosecution agreed that special condition 1 is “outside the guideline regimen[.]” At sentencing, the probation officer also agreed that the search

condition stated in special condition 1 is broader than the standard search condition ordered in most criminal cases.

Even though the prosecutor agreed to recommend a sentence in the lower 50% of the Guidelines range, at sentencing she argued that special condition 1 should be ordered, even though it is outside of the Guidelines regime. For example, the prosecutor stated, “[t]he Government’s position at Number 1, you shall submit to a search, that provision, the government believes is relevant.” Then after stating reasons that she believed justified imposing special condition 1, she stated, “and I believe that one should remain.” The district court followed the prosecutor’s recommendation and ordered Mr. Metsinger to abide by special condition 1 during his period of supervised release.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” For the following reason, this Court should exercise its discretion and grant this Petition.

Courts recognize the sanctity of the plea process, including the plea agreement itself. In *United States v. Saling*, the Fifth Circuit held, “if a guilty plea is entered as part of a plea agreement, the government must strictly adhere to the terms and conditions of its promises.” 205 F.3d 764, 767 (5th Cir. 2000) (emphasis added; citation omitted); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971) (holding “when 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.”). When a defendant enters a plea agreement, he or she has “every right to expect that in exchange for his guilty plea the government would strongly recommend the agreed to sentence.” *United States v. Grandinetti*, 564 F.2d 723, 726 (5th Cir. 1977) (emphasis added). “This is so regardless of whether the failure of the government to strongly advocate the agreement had any effect on the sentencing judge.” *Id.*

In Mr. Metsinger’s case, the prosecution breached its obligation under the Plea Agreement by recommending supervised release conditions that fall outside

of the Guidelines. This tarnished the sanctity of the plea process, as recognized by this Court’s holdings in *Santobello*, as well as the Fifth Circuit’s holdings in *Saling* and *Grandinetti*.

Nevertheless, the Fifth Circuit found that the prosecution did not preach the Plea Agreement, and enforced the waiver of appeal provision. This Court should grant certiorari to correct the Fifth Circuit’s error.

B. Applicable law.

“[A] plea agreement is construed strictly against the Government as the drafter.” *United States v. Roberts*, 624 F.3d 241, 245 (5th Cir. 2010) (citations omitted). “[W]here the government has breached or elected to void a plea agreement, the defendant is necessarily released from an appeal waiver provision contained therein.” *United States v. Gonzalez*, 309 F.3d 882, 886 (5th Cir. 2002) (citation omitted).

“[I]n determining whether a breach has occurred, we must consider ‘whether the government’s conduct is consistent with the defendant’s reasonable understanding of the agreement.’” *Saling*, 205 F.3d at 766 (emphasis added; citation omitted). “Although the Government has a duty to provide the sentencing court with relevant factual information and to correct misstatements, it may not hide behind this duty to advocate a position that contradicts its promises in a plea

agreement.” *United States v. Munoz*, 408 F.3d 222, 227 (5th Cir. 2005) (emphasis added).

At issue in Mr. Metsinger’s case is whether the prosecution’s recommendation of a special condition of supervision outside the Guidelines regimen constituted a breach of its contractual obligation to recommend a sentence within the lower 50% of the Guidelines range. This raises the question of whether imposing special conditions of supervision are part of a defendant’s “sentence.” In *United States v. Windless*, 719 F.3d 415 (5th Cir. 2015), this question is answered in the affirmative.

At issue in *Windless* was whether the district court improperly considered the defendant’s bare arrest record when it ordered special conditions of supervision. 719 F.3d at 417. “The district court attempted to justify its reliance [on the bare arrest records] by distinguishing between ‘special conditions’ of release and a defendant’s ‘sentence.’” *Id.* at 421. The Fifth Circuit disagreed with the district court, holding “that distinction is illusory: supervised release and its conditions are part of a defendant’s sentence.” *Id.* This holding in *Windless* makes it clear that special conditions of supervised release are part of a defendant’s sentence.

C. Application of law to the facts of Mr. Metsinger's case.

The contractually binding Plea Supplement entered by the prosecution and Mr. Metsinger required the prosecutor to "recommend a sentence within the lower 50% of the applicable range under the United States Sentencing Guidelines (U.S.S.G.) as computed by the Court[.]" It is undisputed that the prosecution recommended imposing the search condition of supervision stated in special condition 1. It is also undisputed that special condition 1 is outside of the Sentencing Guidelines regime.

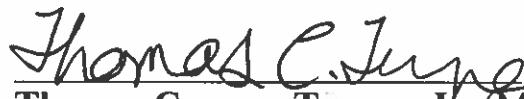
As presented above, ordering a defendant to adhere to a special condition of supervised release is part of the defendant's sentence. *Windless*, 719 F.3d at 421. When the prosecution agreed to recommend a sentence within the lower 50% of the Guidelines range, a reasonable person would assume that the prosecutor would not recommend any aspect of the sentence that is outside the Guidelines regime. *See Saling*, 205 F.3d at 766. This is especially true since, as presented above, the Plea Agreement must be strictly construed against the prosecution. *See Roberts*, 624 F.3d at 245 (citations omitted). Therefore, the prosecutor breached the Plea Agreement when she recommended and vehemently argued that Mr. Metsinger must abide by the provisions of special condition of supervision 1, a condition that all parties agree was outside the Guidelines regimen.

Applying the above law to the facts of Mr. Metsinger's case results in a conclusion that the prosecution breached if the Plea Agreement. As the Fifth Circuit held in *Gonzalez*, 309 F.3d at 886, when "the government has breached or elected to void a plea agreement, the defendant is necessarily released from an appeal waiver provision contained therein." Accordingly, the Court should grant certiorari, and ultimately hold that the waiver of appeal provision in Mr. Metsinger's case is unenforceable because the prosecution breached its obligations under the Plea Agreement.

VI. CONCLUSION

Based on the arguments presented above, Mr. Metsinger asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted October 4, 2023, by:


Thomas Creager Turner, Jr. (MB # 99695)
Research & Writing Specialist
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner

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CERTIFICATE OF SERVICE

I, Thomas C. Turner, appointed under the Criminal Justice Act, certify that
today, October 4, 2023, 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.
773626099095, 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.

Thomas C. Turner

Thomas Creager Turner, Jr. (MB # 99695)
Research & Writing Specialist
Office of the Federal Public Defender