

NO. _____

In The
Supreme Court of the United States

—◆—
DERRICK WENZEL SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

—◆—
PETITION FOR WRIT OF CERTIORARI
—◆—

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Dated: December 15, 2017

QUESTION PRESENTED

DID THE CIRCUIT COURT ERR IN REFUSING TO CONSIDER AS WAIVED PETITIONER'S CLAIM THAT HIS PLEA WAS INVOLUNTARY WHEN THE CIRCUIT COURT, AFTER THE FILING OF THE OPENING BRIEF, CONCLUDED THAT THE PLEA AGREEMENT SAID SOMETHING DIFFERENT THAN PETITIONER BELIEVED.

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STATEMENT OF JURISDICTION

This case resulted from an indictment followed by a superseding indictment in the District of Maryland, alleging violations of Felon in Possession of a Firearm 18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(2). Jurisdiction in the trial court therefore arose under 8 U.S.C. § 1326. This court's jurisdiction arises under 28 U.S.C. § 1291 and Rules 3 and 4(b) of the Federal Rules of Appellate Procedure. This appeal is from a final order subject to appeal. Petitioner was sentenced on September 1, 2016 with the judgment entered on September 9, 2016. The notice of appeal was filed on September 12, 2016. The undersigned was appointed pursuant to the Criminal Justice Act, and is therefore exempted from the requirement of admission to this Court pursuant to Rule 9. The Court of Appeals granted the government's partial dismissal motion on April 27, 2017 and issued its decision on August 11, 2017, and issued its order denying Petitioner's motion for rehearing on September 18, 2017. Jurisdiction for review on a Petition for Certiorari is made pursuant to Rule 10(a). Petitioner maintains that this decision, which apparently holds that a litigant cannot raise in a reply brief an issue which first arose after filing the opening brief, presents "an important question of

federal law that has not been, but should be, settled by this Court” pursuant to Rule 10(c) and represents a conflict among the circuits pursuant to Rule 10(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case resulted from an indictment in the District of Maryland, alleging violation of 18 U.S.C. § 922(g)¹ This petition involves the above-referenced statutes as well as 18 U.S.C. § 3553(a) and 18 U.S.C. § 3742(g) as well as the United States Sentencing Guidelines.

¹18 U.S.C. 922

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

ISSUE PRESENTED

- I. Did the circuit court err in refusing to consider as waived Petitioner's claim that his plea was involuntary when the circuit court, after the filing of the opening brief, concluded that the plea agreement said something different than Petitioner believed?

STATEMENT OF THE CASE

On June 3, 2016, Petitioner executed an agreement agreeing to plead guilty to the sole substantive count in the indictment. (Appendix, hereinafter Apx 15a-24a) The agreement indicated that the government's position was that Petitioner's sentencing guidelines calculation called for a sentence of 37-46 months (offense level 17, criminal history category IV). Petitioner's position was that the guidelines calculation called for a sentence 24-30 months (offense level 13, criminal history IV). The difference in the claimed offense level is attributable to the dispute over the four level adjustment at issue in this appeal. In addition, the parties agreed that Petitioner was on supervised release at the time of the crime, and that called for a consecutive sentence in a companion case under the guidelines of 12-18 months. The agreement did contain an appeal waiver, but it permitted an appeal if the sentence imposed went beyond the time the government calculated as being within the guidelines. The clause also permitted the government an appeal if the sentence were below the time Petitioner has calculated as the minimum under the guidelines.

That appeal waiver was composed of a standard broad appeal waiver, but grafted onto the end was a clause indicating, *inter alia*, that Petitioner would be able to pursue an appeal if the sentence exceeded a specified length. It read as follows:

The Defendant and this Office knowingly waive all right, pursuant to 18 U.S.C. § 3742 or otherwise, to appeal whatever sentence is imposed (including the right to appeal any issues that relate to the establishment of the advisory guidelines range, the determination of the defendant's criminal history, the weighing of the sentencing factors, and the decision whether to impose and the calculation of any term of imprisonment, fine, order of forfeiture, order of restitution, and term or condition of supervised release), except as follows: (I) the Defendant reserves the right to appeal any term of imprisonment to the extent that it exceeds a sentence based upon an offense level of 17 as to Count One and a consecutive sentence within the range of 12-18 months imprisonment in Case No. PJM-09-0004; (ii) and this Office reserves the right to appeal any term of imprisonment to the extent that it is below a sentence based upon an offense level of 13 as to Count One and a consecutive sentence within the range of 12-18 months imprisonment in Case No. PJM-09-0004. (Apx 20a)

At sentencing, the Court adopted the government's claim that the four-level adjustment be imposed because the Petitioner used or possessed any firearm or

ammunition in connection with another felony offense. U.S.S.G. § 2K2.1(b)(6)(B)² As the undersigned was not the attorney at the trial level, the transcript of the proceedings seems to indicate that the Court did not find the basis for the enhancement. “Is it a fair inference based on the preponderance standard to conclude that the defendant did have – use a weapon or have it in his possession for purposed of an ongoing offense and the Court concludes that the evidence is *insufficient* for the Court to make that conclusion.” The Court indicated that it would be a fair inference or a sensible conclusion, but the Court made no finding of facts by a preponderance of evidence. (Apx. 118a)

The court then imposed a sentence of 108 months, well above what all agreed was the appropriate guidelines sentence, as well as an additional 12 months consecutive in the companion supervised release case.

In the instant appeal, Petitioner invoked the exception to the appeal waiver and challenged the sentence as well as its basis, including the disputed four-level enhancement.

Following service of the Petitioner’s opening brief, the Government, on December 5, 2016, filed a motion to partially dismiss the appeal, arguing that the first clause of the appeal waiver still had viability and prevented Petitioner from

²U.S.S.G. 2K2.1(b) Specific Offense Characteristics...

(6) If the defendant--

(A) Possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) Used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

challenging the guidelines calculation. The government did agree, however, that Petitioner could proceed in his challenge to the sentence itself. Thus, the Government argued that one provision of the first clause of the appeal waiver was enforceable while another was not. The argument was that Petitioner could not challenge the guidelines calculation but he could appeal the actual resulting sentence.

Petitioner responded by claiming that if the exception cited in the second clause of the waiver clause applied, and the sentence exceeded the specified length, the first clause simply didn't apply, and Petitioner could pursue any sentencing issue.

In granting the motion, the Court concluded that the provisions of the first clause of the appeal waiver applied even though the conditions of the second clause exception were met. The Court essentially concluded that Petitioner's understanding of the appeal waiver was incorrect, but then the Court went on to observe that Petitioner's entry into the appeal was knowing and voluntary.

This is the crux of the matter. Petitioner had no reason to claim that his entry into the plea was anything other than knowing and voluntary until the court concluded that Petitioner's understanding of the appeal waiver was incorrect. It meant something other than what he believed. There is nothing in the plea agreement or the transcript of the plea colloquy which clearly show Petitioner's interpretation to be baseless.

Faced with the Court's interpretation of the appeal waiver, Petitioner raised for the first time in his Reply Brief the issue of voluntariness created by the Court's interpretation of the waiver.

In response, the Government filed a motion to strike, claiming that the voluntariness issue could not be raised at that point. (The Government did suggest an alternative remedy, that being providing the Government an opportunity to argue the issue.)

The court denied the motion but ultimately refused to consider the voluntariness issue. In reaching that conclusion, the Court apparently found that it had no power to consider the argument or the circumstances compelling its first being raised in the reply brief “(W)e do not consider the substance of the Simmons’ novel arguments, as they have been forfeited. United States v. Rosen, 557 F.3d 192, 196 n.6 (4th Cir. 2009) (‘We are unable to consider a claim raised for the first time by way of a reply brief.’)” (Apx. at 3a.).

STATEMENT OF FACTS

On June 9, 2015, Prince George’s County (Maryland) Police Department officers located two motor vehicles in the Upper Marlboro area of Prince George’s County that had been stolen the previous night during a commercial burglary in Baltimore, Maryland. One of these vehicles, a black 2000 Ford Mustang, with Maryland license plate number 7BP0480, was observed to be parked in the parking lot of a shopping plaza in the 5700 block of Crain Highway, Upper Marlboro, Maryland. Petitioner and Clyde William Peterson were inside the stolen Ford Mustang. Petitioner and Peterson were subsequently arrested by police. Petitioner knowingly possessed an Israel Weapons Industries .40 caliber model Desert Eagle Semi-automatic pistol, serial number 38320011, loaded with 11 cartridges of .40 S&W

caliber ammunition, which was recovered by police during the arrest. Police also recovered a Smith and Wesson .357 Magnum caliber, model 27-2 revolver, serial number N166136, loaded with six cartridges of 357 Magnum caliber, CCI during the arrest.

Prior to June 9, 2015, Petitioner had been convicted of a crime punishable by more than one year of imprisonment, which prohibited him from legally possessing the above described firearm.

The loaded Israel Weapons Industries .40 caliber model Desert Eagle semi-automatic pistol, serial number 38320011, possessed by Petitioner, was a firearm as defined in 18 U.S.C. § 921(a)(3), was manufactured outside the State of Maryland, and traveled in interstate commerce before being recovered in Maryland on June 9, 2015.

On July 6, 2015, Petitioner and a co-defendant was named in a one-count indictment. Petitioner was ultimately charged with one count of Felon in Possession in violation of 18 U.S.C. § 922(g) as well as a forfeiture allegation.

SUMMARY OF ARGUMENT

The District Court erred in apparently concluding that it could not sentence below the guidelines in a remand sentencing, depriving Petitioner of the opportunity to be fully credited for factors which would justify a lower sentence.

ARGUMENT

- I. THE CIRCUIT COURT ERRED IN REFUSING TO CONSIDER AS WAIVED PETITIONER’S CLAIM THAT HIS PLEA WAS INVOLUNTARY WHEN THE CIRCUIT COURT, AFTER THE FILING OF THE OPENING BRIEF, CONCLUDED THAT THE PLEA AGREEMENT SAID SOMETHING DIFFERENT THAN PETITIONER BELIEVED.

In general practice, a Petitioner cannot raise new issues in a reply brief which weren’t raised earlier. But courts acknowledge situation in which such practice is permitted when those issues could not have been reasonably raised earlier.

This court has held that “an issue first argued in a reply brief is not properly before a court of appeals.” Cavallo v. Star Enter., 100 F.3d 1150, 1152 n.2 (4th Cir. 1996). See also United States v. Rosen, 557 F.3d 192, 196 n.6 (4th Cir. 2009) cited above by the Court of Appeals in its decision in the instant case. There is some authority, however, for the proposition that special circumstances may justify deviation from this rule. See, e.g., United States v. Valdez, 195 F.3d 544, 546 n.3 (9th Cir. 1999) (observing that court may exercise discretion to consider argument raised in reply brief when issue is purely legal or review would prevent manifest injustice); United States v. Darden, 70 F.3d 1507, 1549 n.18 (8th Cir. 1995) (stating that court would not consider issues raised in reply brief “[a]bsent some reason” why the claims were not raised earlier); cf. United States v. All Assets & Equip. of West Side Bldg. Corp., 58 F.3d 1181, 1191 (7th Cir. 1995) (holding that issue was not waived when raised at first opportunity); cf. also Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (holding that new rules of criminal procedure are

retroactively available to cases pending on direct review). U.S. v. Lewis, 235 F.3d 215, 218 (C.A.4, 2000)

The Fourth Circuit has acknowledged a possible exception to the blanket rule noted above, but it appears to represent a higher standard than the one set by other circuits. In A Helping Hand, LLC v. Baltimore Cty., MD, 515 F.3d 356 (4th Cir. 2008), (cited with approval in United States v. White, 836 F.3d 437 (4th Cir. 2016)) the court ruled that “in rare circumstances, appellate courts, in their discretion, may overlook this rule and others like it if they determine that a ‘miscarriage of justice’ would otherwise result.” *Id.* at 369. This “miscarriage of justice” standard is significantly different from the standard applied in other circuits and posed an unreasonable hurdle to Petitioner.

Here we have a situation in which an exception clause is grafted on to a fairly standard appeal waiver clause. Petitioner, and the undersigned in viewing the waiver, reasoned that the first clause was rendered moot when events specified in the second clause triggered its application. The appeal waiver began with an unequivocal waiver of the right to appeal the conviction itself, and that is not at issue. It is the second subsection, dealing with the appeal rights regarding sentencing, which creates the current controversy.

The waiver clearly granted Petitioner the right to appeal the sentence, but the government now says there was a meeting of the minds that he could not dispute the guidelines calculation. There appears to be nothing in the appeal waiver which limits which issues within the sentencing determination Petitioner could raise.

A review of the plea agreement and the plea colloquy itself provides no indication that Petitioner knew he was giving up the right to challenge a major sentencing determination as he preserved his right to appeal the sentence itself. That he knew that he was reserving the right to appeal but agreeing that he could not challenge its basis and only pursue it with one hand tied behind his back makes no sense and finds no support in the record.

By grafting the exception onto a standard appeal waiver, a measure of ambiguity was introduced into the proceedings. Petitioner takes the position that, when the second provision applies, the first is not at all applicable. The government apparently takes the position that the first clause continues to be viable in some aspects but not others. But even this claim is confusing, in that the government has challenged Petitioner's right to appeal "any issues that relate to the establishment of the advisory guidelines range," but not his right to challenge "the weighing of the sentencing factors, and the decision whether to impose and the calculation of any term of imprisonment," both issues covered by the first clause of the sentence waiver subsection.

As is clear, it was the government which drafted the plea agreement, and so it must bear the responsibility for any ambiguity. This Fourth Circuit, applying principles of contract law as well as fundamental fairness, have placed an additional burden on the government in situations such as this.

"(B)oth constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than

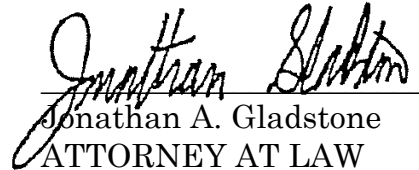
would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements. See, e.g., United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978) (plea agreement not appropriate context for “rigidly literal” construction of language); Palermo v. Warden, 545 F.2d 286, 295 (2d Cir. 1976) (government invocation of restrictive contract principles “disingenuous”); United States v. Crusco, 536 F.2d 21, 26 (3d Cir. 1976) (government’s “strict and narrow interpretation of its commitment ... untenable”); Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973) (government held to “meticulous standards of both promise and performance”). This is particularly appropriate where, as will usually be the case, the Government has proffered the terms or prepared a written agreement-for the same reasons that dictate that approach in interpreting private contracts. See generally Restatement (Second) of Contracts § 206 (1981).” U.S. v. Harvey, 791 F.2d 294, 300–01 (4th Cir. 1986) see also U.S. v. Jordan, 509 F.3d 191 (4th Cir. 2007) and U.S. v. White, 628 Fed. Appx. 848 (4th Cir. 2015).

If Petitioner cannot challenge the underpinnings of his sentence while challenging his sentence, he is not getting the benefit of the bargain from his standpoint. There was no meeting of the minds that he would be so hobbled in his reserved right to appeal. He raised the issue as soon as it materialized, so he should be able to have it considered.

CONCLUSION

For the foregoing reasons and upon the foregoing authority, the Petitioner requests that the Court grant his petition.

BY:

A handwritten signature in black ink, appearing to read "Jonathan Gladstone", is written over a horizontal line.

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