

No. _____

In the Supreme Court of the United States

October Term, 2017

MAJESTI WILLIAMS, *PETITIONER*,

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Whether the right to appeal a sentence can knowingly be waived, when the purported waiver occurs before the right to appeal accrues.

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Petitioner, Majesti Williams asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 11, 2017.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The order of the United States Court of Appeals for the Fifth Circuit dismissing Williams’s appeal is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered its order dismissing Williams’s appeal on October 11, 2017. This petition is filed within 90 days after entry of the order. *See* Sup. Ct. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]”

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury. . . .”

STATEMENT

Majesti Williams pleaded guilty, pursuant to a written plea agreement, to escape, in violation of 18 U.S.C. § 751, based her leaving a half-way house without permission. The plea agreement that Williams signed stated that she was waiving her right to appeal the sentence that would be imposed.

In preparation for sentencing, a probation officer prepared a presentence report. The officer recommended a base offense level of 13, pursuant to guideline §2P1.1(a)(1). The officer noted that the four-level decrease, in §2P1.1(b)(3), for offenses involving an escape from a “halfway house,” would not be applied because, after her escape, Williams committed a felony evading arrest with a motor vehicle offense, for which she was sentenced to six years custody. The officer also relied on Williams’s evading-arrest conduct to increase her offense level by two, under guideline §3C1.2, based on her recklessly creating a substantial risk of death or serious bodily injury to another person. With a two-level reduction for acceptance of responsibility, the total adjusted offense level was 13.

The probation officer determined that Williams’s prior convictions placed her in criminal history category VI. The offense level of 13 combined with the Criminal History Category VI to produce an advisory Guidelines range of 33 to 41 months’ imprisonment.

At sentencing, Williams’s counsel asked the district court for a 33-month sentence, but argued that her sentence should “date back to when she first came into custody for that evading arrest offense, and should be run concurrently to that offense. Counsel argued that the provisions of guideline §5G1.3(b) applied and required the escape sentence to run concurrently to an undischarged

sentence that resulted from relevant conduct to the instant offense. Counsel explained that Williams's evading arrest offense constituted relevant conduct that was factored into her escape guideline.

The Government argued that the evading arrest offense was not relevant conduct because it did not "come into play" when she fled from federal authorities, only when she later fled from state authorities.

The district court rejected Williams's argument that the sentence for the escape offense must "date back" to the time served on the evading arrest offense, and that the escape sentence must be ordered to run concurrently to the undischarged term. The court, however, imposed a downward variance from the Guidelines range and sentenced Williams to 24 months' imprisonment.

Williams appealed. She argued that the district court erred, Under Guideline §5G1.3(b), by failing to run her escape sentence concurrently to her undischarged evading arrest sentence, and by failing to adjust her escape sentence to account for the time already served on the undischarged term.

The Government filed a motion to dismiss Williams's appeal, arguing that her challenge to her sentence was barred by the appeal waiver. The United States Court of Appeals for the Fifth Circuit agreed and dismissed the appeal. App.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide Whether Williams's Sentence Appeal Waiver Can Be Enforced.

The right to appeal a criminal sentence is guaranteed by statute. See 18 U.S.C. § 3742. Plea bargains in federal court now commonly include provisions that require defendants to waive that right. These waiver agreements are entered into long before any potential sentencing error occurs and are often made with no agreement between the parties regarding the sentence the defendant might face. This Court has never decided whether the right to appeal from a sentence can knowingly be waived. The Court's precedent suggests it cannot, because rights cannot knowingly be waived before they accrue.

In apparent disregard of this precedent, the courts of appeals have enforced appeal waivers, under differing standards. In recognition of the courts' general acceptance of the provisions, the Federal Rules of Criminal Procedure were amended to regulate their use. But neither the federal rules nor this Court has specifically approved sentence-appeal waivers. This case presents the Court with the opportunity to decide whether appeal waivers are consistent with constitutional principles governing waiver and, if they are, to determine under what circumstances they can be enforced.

II. This Court Should Grant Certiorari to Determine Whether, and Under What Circumstances, Appeal Waivers Can Be Entered Into Knowingly.

The Fifth Circuit held that Williams’s challenge to her sentence was barred because her plea agreement contained a sentence-appeal waiver provision. The court first approved sentence-appeal waivers in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992), reasoning that, since defendants can waive constitutional rights by pleading guilty, they may also waive statutory rights, including the right to appeal a sentence. *Melancon*, 972 F.2d at 566–67. Other courts of appeals have approved waiver provisions under the same reasoning. *See, e.g., United States v. Khattack*, 273 F.3d 557, 560 (3d Cir. 2001); *United States v. Wiggins*, 905 F.2d 51, 52–54 (4th Cir. 1990); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

The analogy the courts have drawn between a sentence appeal waiver and the waiving of constitutional rights by pleading guilty is flawed. The constitutional rights waived by a guilty plea are known at the time they are waived: “[O]ne 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 (Parker, J., concurring). Due process is satisfied because the waiver is an intentional, knowing “relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also United States v. Olano*, 507 U.S. 725, 732 (1993); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

There can be no waiver without knowledge of the right to be waived. *Cf. Newton v. Rumery*, 480 U.S. 386, 390–91 (1987) (approving waiver of right to bring civil suit for false arrest and imprisonment, when right to sue had already accrued). That is the flaw with sentence-appeal waivers. Because they are made at the time of the plea, they lack the essential prerequisite for waiver: the defendant cannot know what is being relinquished at the time the “waiver” occurs, because no right has come into existence.

The right to appeal a sentence arises only when specific errors occur in imposing sentence. *See* 18 U.S.C. § 3742 (setting forth sentences that may be appealed). But the “waiver” of sentence-appeal rights occurs long before error occurs, before sentence is even imposed. It is unreasonable to expect that a defendant can anticipate errors that might be made in calculating his sentence. A defendant cannot have concrete knowledge of what he cedes when he waives the right to appeal his sentence.

For some courts, the validity of waivers is also demonstrated by the adoption of Federal Rule of Criminal Procedure 11(c)(6). *See United States v. Redmond*, 22 F.App'x 345, at *1 (4th Cir. 2002) (unpub. op.); *United States v. Palmer*, 7 F.App'x 667, at *1 (9th Cir. 2001) (same); *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001) (passage of Rule 11(c)(6) is one of several reasons waivers are enforceable). That provision directs district courts to advise defendants of the existence and the terms of appeal waivers during the plea colloquy. Fed. R. Crim. P. 11(c)(6). But it does not state that compliance with the rule renders a defendant's waiver knowing and voluntary. To the contrary, the Advisory Committee explicitly reserves opinion on the question whether appeal waivers are constitutional: [T]he Committee takes no position on the underlying validity of [appeal] waivers." *Id.*, Advisory Committee Notes (1999 Amendments). Whether appeal waivers are enforceable under this Court's precedent regarding knowing waiver remains an open question, and this Court should grant certiorari to answer it.

CONCLUSION

FOR THESE REASONS, Williams prays this Honorable Court will grant certiorari, vacate the judgment, and remand this case for further proceedings.

Respectfully submitted.

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