

**In The
Supreme Court of The United States**

DEWAYNE ERIC SEYMORE,

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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QUESTIONS PRESENTED

Whether the appeal waiver in the plea agreement signed by Petitioner and regularly imposed in the Eastern District of North Carolina violated the Due Process clause of the United States Constitution where it resulted in the Fourth Circuit Court of Appeals refusal to consider significant sentencing errors by the trial court.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Dewayne Seymore - Petitioner

Vs.

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

The Petitioner, Dewayne Seymore (herein “Mr. Seymore” or “Petitioner”), respectfully prays that a writ of certiorari issue to review the judgment and order of dismissal of the United States Court of Appeals for the Fourth Circuit in Case No. 17-4258, entered on 19 October 2017. Rehearing was denied 28 November 2017.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit did not enter an opinion in this matter, having granted the government’s motion to dismiss the appeal based on the “appeal waiver” utilized by the government in its plea

agreement in this case. The issues raised on the appeal to the Fourth Circuit, were errors in the trial court's application of the United States Sentencing Guidelines to Mr. Seymore's sentence.

JURISDICTION

The Court of Appeals entered its judgment on 19 October 2017. The Court of Appeals denied petitioner's request for rehearing on 28 November 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In this Petition, Mr. Seymore respectfully invokes the Due Process Clause of the Fifth Amendment of the United States Constitution: "...nor be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

A criminal complaint was filed by the government on 12 August 2015 alleging Mr. Seymore's involvement in a multi-state conspiracy to kidnap the father of a North Carolina Assistant District Attorney from the state of North Carolina, and transport that individual to the state of Georgia. It was alleged in the complaint that "*Seymore agreed to accept \$100 per day in exchange for allowing the kidnappers to use the New Town Apartment during the period from April 5, 2014 through April 10, 2014 .*" (The Original Criminal Complaint with Emphasis added).

On 24 September 2015, the government filed a criminal information against Mr. Seymore alleging one count of conspiracy to commit kidnapping. In the criminal information, the government asserted "*SEYMORE agreed to allow the*

kidnappers to keep the Victim in the New Town Apartment in exchange for payment of \$100 per day.” (Criminal information with emphasis added).

On 30 November 2015, the government filed a subsequent criminal information against Mr. Seymore alleging one count of conspiracy to commit kidnapping. The language of the initial criminal information was modified in the subsequent criminal information to state: “*SEYMORE agreed to allow the use of the New Town Apartment in exchange for the payment of \$100 per day.*” Thus, eliminated in the charge was his knowledge of the use of the New Town apartment by the alleged –co-conspirators. At the sentencing hearing, the Assistant United States Attorney (“AUSA”) stated that: “We don’t dispute that he thought it was prostitution originally...” The sentencing judge also found that “[t]here is this agreement where initially he is thinking [a c-conspirator] is going to prostitute herself out of the apartment...” The AUSA also said “[the AUSA] was initially skeptical about [the] claim that [Seymore] thought it was prostitution until [he] finally found this message which sort of corroborate[d] what [Seymore] said.”

On 11 November 2015, a Memorandum of Plea Agreement (“Plea Agreement”) was filed in which Mr. Seymore agreed to plead guilty to conspiracy to kidnap in violation of 18 U.S.C. § 1201(c). The Plea Agreement contained language which stated that Mr. Seymore was “[t]o waive knowingly and expressly the right to appeal the conviction and *whatever sentence is imposed on any ground...*” (the Plea Agreement with Emphasis added).

For the prosecution of the active members of the kidnapping conspiracy, Mr. Seymore was debriefed on multiple occasions and later testified as a government’s

witness in two trials. These trials resulted in two convictions, one of which was the principle conspirator/ring leader of the kidnapping who had coordinated the kidnapping from prison using cell phones and had actually sought to kidnap the District Attorney that had prosecuted him in State Court in North Carolina.

On 5 April 2017, Mr. Seymore was sentenced before the Honorable Chief Judge James C. Dever, III. Mr. Seymore had a Guideline Range calculated in the Presentencing Investigation Report (“PRS”) at 39, but the trial court allowed the objection of the AUSA, and overruled the application of the minor participant role of U.S.S.G. § 3B1.2(b), finding a Level 41 was appropriate. Mr. Seymore did receive a U.S.S.G. § 5K1.1 motion from the government, and was ultimately sentenced by the court to 252 months.

Mr. Seymore filed a timely notice of appeal from the trial court’s judgment. The government moved to dismiss Mr. Seymore’s appeal after the briefing schedule and submission of Mr. Seymore’s opening brief and joint appendix. The government motion to dismiss was granted on 19 October 2017, and the Court of Appeals denied Mr. Seymore’s petition for rehearing on 28 November 2017. While the Court of Appeals provided no grounds for the dismissal of the appeal, the only basis put forth by the government was the appeal waiver in the plea agreement.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT INCORRECTLY APPLIED THE UNITED STATES SENTENCING GUIDELINES IN THIS MATTE--FAILING TO GRANT A MINOR ROLE REDUCTION PURSUANT TO 3B1.2(b) AS WAS RECOMMENDED IN THE PRESENTENCING INVESTIGATION REPORT, AND FAILING TO APPROPRIATELY CONSIDER THE 5K1.1 FACTORS AT SENTENCING.

The United States Attorney's Office in the Eastern District of North Carolina as a matter of course and apparent policy requires any defendant wishing to enter into an agreement with the government to waive their appellate rights. While this is a common sense waiver in terms of an appeal as to guilt or innocence of the defendant, it becomes violative of a defendant's Due Process rights where it exposes, as it did in the case at bar, a defendant to incorrect application of the United States Sentencing Guidelines or application of the 18 U.S.C. § 3553(a) factors. In this case, the appeal waiver has barred Due Process review of the trial court's application of the United States Sentencing Guidelines. While the guidelines are advisory, their anchoring effect is well known to the Court. Thus, correct application of the guidelines is generally the starting point for any sentencing consideration pursuant to 18 U.S.C. § 3553(a), and other motions for departure under the sentencing guidelines. In Mr. Seymore's case—considering his very limited and generally pawn-like role in the conspiracy as well as his substantial cooperation to redress the limited knowledge he ultimately had—correct application of the guidelines should have resulted in a substantially lesser sentence than that imposed by the trial court.

At every phase in the proceedings of this case, Mr. Seymore was adamant as to his reduced culpability and the circumstances by which he found himself in this conspiracy. Thus, the government went through a criminal complaint and two criminal informations to finally and accurately detail Mr. Seymore's role in this offense and his lack of knowledge of the kidnapping conspiracy. The United States probation office agreed, and assigned a modest 2-level reduction to Mr. Seymore's guideline calculation pursuant to U.S.S.G. § 3B1.2(b) in the Final Presentencing Report ("PSR"). Moreover, while unrelated, Mr. Seymore cooperated fully throughout the course of two separate trials and at a clear and present risk to his personal safety. Mr. Seymore's cooperation was met by the government objecting to the probation office's position as to the role reduction, and using the same objection as a vehicle to dampen the "substantial" nature of Mr. Seymore's cooperation and proffer to the court inappropriate considerations for its U.S.S.G. § 5K1.1 analysis.

Thus, before the Court of Appeals, Mr. Seymore raised two distinct but related issues on appeal: 1) that the district court misapplied U.S.S.G. § 3B1.2(b); and 2) that the district court misapplied U.S.S.G. § 5K1.1. He did not appeal his conviction and he did not appeal his "sentence" for reasonableness. Rather, he appealed his judgment where it was the result of misapplication of the law in reaching that sentence. Thus, it is Petitioner's position that such issues on appeal should fall outside of the government's plea agreement waiver to protect Due Process at sentencing, and the Court of Appeals therefore had jurisdiction to review the issues under the appropriate standard of review to reach the merits. It is

respectfully asserted herein that a plea waiver cannot subvert Due Process at sentencing, or cause for its waiver.

The Fourth Circuit, as recently as last year, has explained, the Court “does not have authority to review the extent to which a district court departs downward unless the departure decision resulted in a sentence imposed in violation of law or resulted from an incorrect application of the Guidelines.” *United States v. Shaw*, 313 F.3d 219, 222 (4th Cir. 2002) (internal quotation marks omitted). The Fourth Circuit cited *Shaw* in *United States v. Concha*, 861 F.3d 116, 119-20, *fn. ** (4th Cir. 2017), to address one of the very issues on direct appeal brought by Mr. Seymore—the correct application of U.S.S.G. § 5K1.1. Therefore, Mr. Seymore’s appeal as to the proper application U.S.S.G. § 5K1.1 fell squarely within precedent of the Fourth Circuit. And, while a different guideline, Mr. Seymore’s appeal on the issue of the proper application of U.S.S.G. § 3B1.2(b) was of the same quality as the issue pertaining to 5K1.1, and thus addressed by the authority of *Shaw* and now *Concha*. Both issues were therefore properly before the Fourth Circuit, having escaped the unconscionable breadth of the government’s appeal waiver forced upon many federal defendants in the Eastern District of North Carolina.

It is impossible in this case to determine what the trial court considered in allowing the motion for the U.S.S.G. §5K1.1. The trial court did not give any length of time as being awarded for Mr. Seymore’s cooperation. When he declared what the sentence was, he stated that he considered everything that was said at the sentencing hearing, and everything that should be considered by a judge in pronouncing sentence pursuant to 18 U.S.C. § 3553(a). However, there was no

assignment of how much credit Mr. Seymore received for the U.S.S.G. § 5K1.1 motion made by the AUSA. Mr. Seymore's Advisory Guideline range was 360 months to life. The Assistant United States Attorney recommended 300 months; defense counsel at sentencing suggested that 180 months would be an appropriate and not greater than necessary sentence. The court did not address any of the U.S.S.G. §5K1.1 analysis required in *Concha*: 1) the court's evaluation of the significance and usefulness of the defendant's assistance; 2) the truthfulness and completeness of the assistance; 3) nature and extent of the assistance; 4) the injury or danger of injury to the defendant or his family due to the assistance; and 5) the timeliness of the assistance. See U.S.S.G. § 5K1.1(a) (1)-(5). Instead, its 5K1.1 analysis was indistinguishably meshed with its 18 U.S.C. § 3553(a) considerations.

Additionally, the trial court granted the government's objection to the PSR and its application of the two-level role reduction pursuant to U.S.S.G. § 3B1.2(b). It was not clear why the trial court granted this objection, stating only that Mr. Seymore's apartment was central to the conspiracy. However, as it was uncontroverted that Mr. Seymore did not know his apartment was being used as part of any kidnapping conspiracy, the trial court erred in this regard. The government repeatedly put on evidence, using Mr. Seymore's testimony, of his minor role and using the same testimony to convict other co-conspirators. Yet, at Mr. Seymore's own sentencing, the government sought to deny him this modest guideline reduction (that was asserted and supported by U.S. Probation in preparing the PRS). There was no evidence Mr. Seymore was involved in the conspiracy until he came into the apartment and discovered that it was being used

to house the victim of a kidnapping. Mr. Seymore immediately ordered them to leave his property. His role was significantly less than any other participant.

The trial court sentenced Mr. Seymore to 252 months. Admittedly, this was a substantial cut from the advisory guideline of 360 months. However, this sentence failed to touch on the five factors of U.S.S.G § 5K1.1 in any meaningful way, and denied a warrant role reduction pursuant to U.S.S.G. § 3B1.2(b). Mr. Seymore was not materially or even knowingly involved in this crime. He was told his apartment would be used for prostitution, not to house the victim of a kidnapping. The only and ultimate culpability attributed to him was that he did not call law enforcement after he learned his apartment was being used to house a kidnapping victim. Unbeknownst to Mr. Seymore, there was a “kill order” out on him and his girlfriend when he went to the apartment to investigate strange activity at the apartment reported to his girlfriend by neighbors.¹ In preparation for his testimony at the trials of the principles in the conspiracy, Mr. Seymore gave multiple interviews and details to assist in their successful prosecution at his continued risk and peril.

Ultimately, Mr. Seymore was sentenced for his criminal background and historic gang ties. He was not, contrary to law, sentenced to this limited role in this offense, nor was he sentenced with reasonable and accurate accounting for his substantial assistance to the government in this case. Failure of the Court of Appeals to consider these issues, or to assert it was barred from hearing such issues by an unconscionable appeal waiver, is a violation of Mr. Seymore’s Due Process rights. Mr. Seymore respectfully prays this Honorable Court issue a writ in this

¹ Mr. Seymore himself was out of state during the kidnapping.

matter, or remand the matter back to the Fourth Circuit to reinstate the briefing schedule and require the government to respond to Mr. Seymore's appeal.

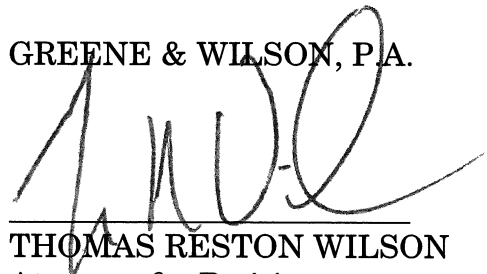
CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Dated: 26 February 2018

Respectfully submitted,

GREENE & WILSON, P.A.

A handwritten signature in black ink, appearing to read 'TRW', is written over a horizontal line.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

- Appendix A – Order Granting Appellee’s Motion to Dismiss Appeal,
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Fourth Circuit
Filed October 19, 2017 App-5

Appendix A

United States v. Dewayne Eric Seymore, No. 17-4258

Order Granting Appellee's Motion to Dismiss Appeal
of the United States Court of Appeal for the Fourth Circuit

Decided October 19, 2017

FILED: October 19, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4258
(5:15-cr-00274-D-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEWAYNE ERIC SEYMORE, a/k/a Shooter,

Defendant - Appellant.

O R D E R

Upon consideration of Appellee's motion to dismiss this direct criminal appeal and Appellant's response to the motion, we grant the motion.

At the direction of the panel: Judge Niemeyer, Judge Motz, and Judge King.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix B

United States v. Dewayne Eric Seymore, No. 17-4258

Order Denying Petition for Rehearing
of the United States Court of Appeal for the Fourth Circuit

Filed November 28, 2017

FILED: November 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4258
(5:15-cr-00274-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEWAYNE ERIC SEYMORE, a/k/a Shooter

Defendant - Appellant

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge Motz and Judge
King.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix C

United States v. Dewayne Eric Seymore, No. 17-4258

Judgment Order
of the United States Court of Appeal for the Fourth Circuit

Decided October 19, 2017

FILED: October 19, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4258
(5:15-cr-00274-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEWAYNE ERIC SEYMORE, a/k/a Shooter

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in
accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK