NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

_____

JACKIE L. MADORE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

_____

On Petition For a Writ of Certiorari
to the United States Court of Appeals for the First Circuit

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

_____

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April 27, 2019

QUESTIONS PRESENTED

I. Whether the Supreme Court of the United States should review appellate waivers in criminal cases under principles of contract law. A concatenation of events post-signing of petitioner's signing of her plea agreement constituted a quantum of vagaries which the parties could not have contemplated on the date of signing so as to obviate the plea waiver and allow petitioner-defendant an opportunity to appeal.

II WHETHER petitioner's sentence was procedurally flawed in that the sentencing court created sentencing disparity among similarly situated defendants pursuant to 18 U.S.C. § 3553(a)(6).

III. Whether the First Circuit Local Rule of Appellate Procedure 27.0(c) is fundamentally unfair and violative of due process under the Fifth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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JACKIE L. MADORE respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated January 28, 2019, affirming her sentence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in *United States v. Jackie L. Madore*, No. 16-2295 (1st Cir. January 28, 2019)

appears at Appendix A to this petition (hereinafter cited "A-_"). The opinion of the United States District Court for the District of Maine in *United States v. Jackie L. Madore*, No. 1:15-cr-0040 (JAW) (D.Me. September 22, 2016), consisting of the oral findings of the district court at the sentencing hearing, appears at Appendix B and is unpublished. A-2.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on January 28, 2019. No petition for rehearing was filed in this case. This Petition is filed within ninety (90) days after entry of judgment. *See* Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY 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....

U.S. Const. amend. V.

STATEMENT

Following a plea hearing in the United States District Court for the District of Maine, petitioner was convicted of the following: one count of Conspiracy to Distribute and Possess with Intent to Distribute 280 Grams or More of Cocaine Base in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(c), a Class C Felony. On September 22, 2016, Judge John A. Woodcock, Jr. sentenced the petitioner to a term of 110 months, followed by three years of supervised release.

1. On appeal. Petitioner had argued to the court of appeals that a concatenation of events post-signing of petitioner's plea agreement constituted a quantum of vagaries which the parties could not have contemplated on the date of signing so as to obviate the plea waiver and allow appellant-petitioner an opportunity to appeal. Petitioner had argued that principles of contract law compelled the finding that post-signing events changed the context of the parties relationship to sucjh an extent that it would be inequitable for the court of appeals to enforce the plea agreement contract. The court of appeals gave petitioner's argument short shrift and summarily denied her appeal pursuant to Local Rule of Appellate Procedure 27.0(c).

II Before the Circuit court Petitioner had also argued that her sentence

was procedurally flawed in that the sentencing court created sentencing disparity among similarly situated defendants pursuant to 18 U.S.C. § 3553(a)(6). Again, the court of appeals gave petitioner's argument short shrift and summarily denied her appeal pursuant to Local Rule of Appellate Procedure 27.0(c).

III. Prior to having her appeal denied, and in view of respondent's argument for summary dismissal, Petitioner had argued to the court of appeals that First Circuit Local Rule of Appellate Procedure 27.0(c) was fundamentally unfair and violative of due process under the Fifth Amendment to the United States Constitution. Again, the court of appeals gave petitioner's argument short shrift and to petitioner's argument and failed to address the constitutional challenge to Local Rule of Appellate Procedure 27.0(c).

REASONS FOR GRANTING THE WRIT

I. The court of appeals failure to entertain the contention that plea agreements are contracts subject to principles of contract law unnecessarily delays this Court's review of a very important means to properly analyze plea agreements.

II. The court of appeals failure to address petitioner's sentencing disparity argument among similarly situated defendants pursuant to 18 U.S.C. § 3553(a)(6).

III. The court of appeals granting of appellee's motion for summary dismissal under Local Rule of Appellate Procedure 27.0(c) allows the government to control the court of appeals docket and, hence, violates appellant's due process rights guaranteed under the Fifth Amendment to the United States Constitution. Beyond this, it violates the separation of powers.

IV. This Court's intervention is warranted to correct the court of appeal's failure to address these important questions of federal constitutional law.

A. The Court of Appeals Erred By Not Entertaining Petitioner's Argument That Plea Agreements are contracts and that events post-contract Formation May Render a Contract Unenforceable.

Jackie Madore had averred before the court of appeals that her plea agreement's appellate waiver is unenforceable because 1) the Plea Agreement was rendered a nullity when the probation officer granted then withdrew acceptance of responsibility; changes in the definition of "career offender" which occurred pending sentencing; changes in the fine provisions brought up by the probation officer at sentencing; and Jackie's difficulty in assessing how the court would assess county jail write-ups pending her sentencing. To enforce the waiver in this case, therefore, would constitute a miscarriage of justice.

The First Circuit recently summarized the status on the law of plea

agreements and appellate waiver as follows:

> A plea agreement's appellate-waiver provision "is valid if it was knowingly and voluntarily executed, and if enforcement would not result in a miscarriage of justice." United States v. Santiago-Burgos, 750 F.3d 19, 22 (1st Cir. 2014). "But '[e]ven a knowing and voluntary appeal waiver only precludes appeals that fall within its scope.'" Id. at 22-23 (alteration in original) (*quoting* United States v. McCoy, 508 F.3d 74, 77 (1st Cir. 207). When determining such a provision's scope, "we rely on basic contract interpretation principles, construing the agreement where possible to give effect to every term and phrase, and construing any ambiguities in favor of allowing the appeal." Id. at 23 (citations omitted).

United States v. Sanchez-Colberg, 856 F.3d 180, 183 (1st Cir. 2017).

The starting point concerning enforce ability of an advance appellate waiver provision in a plea agreement is the pre-Booker First Circuit case United States v. Teeter. United States v. Teeter, 257 F.3d 14 (1st Cir. 2001). Plea agreement "waivers are meant...not to leave acquiescent defendants totally exposed to future vagaries." Id. at 25. The focus of the inquiry is the level of scienter possessed by the acquiescing defendant at the time of the signing of the agreement. Id. at 26-27. The question might become, did a defendant receive a benefit from the agreement or "by appealing after promising not to do so," did a defendant "risk giving the government an option to disclaim a plea agreement, if it wishes to do so." Id. at 26. Because Teeter "analogized plea agreements to contracts," scienter involves a certain quantum of intentional, knowing and volitional conduct. Id. at 28, 24-25. Post-Booker, In Sotirion, the First Circuit digressed from an analysis of

defendant's scienter to ascertain appellate waiver validity, to a mechanical review of Rule 11(b)(1)(N) during the Rule 11 colloquy, yet retained appellate review for defendants exposed to future vagaries. United States v. Sotirion, 617 F.3d 27, 34-36 (1st Cir. 2010). Routine error, such as a court's miscalculation of guideline range, however, did not amount to a future vagary sufficient to allow appellate review. Id. at 39.

Footnotes 9 and 10 of the Teeter opinion lists possible examples of future vagaries which might constitute a "miscarriage of justice" sufficient to obviate an otherwise valid appellate waiver provision, although the "category is infinitely variable." Teeter, supra, at n. 9 and n. 10. To this list, appellant wishes to add confusion generated by a concatenation of conditions which affected her sentencing including the probation officer's granting and then withdrawing acceptance of responsibility, changes in the definition of "career offender" which occurred pending sentencing, changes in the fine provisions brought up by the probation officer at sentencing, and Jackie's difficulty in assessing how the court would assess county jail write-ups pending her sentencing. This concatenation of conditions, petitioner submits, should constitute a quantum of post-agreement vagaries which the petitioner could not have entertained on the date of signing of the agreement sufficient to allow her appeal to go forward.

Beyond this, what any defendant might "know" at the time of the signing of a plea agreement is undermined when one considers that plea agreements are analyzed under principles of contract law, and there exists a substantial inequality in bargaining power between these parties at the time of contract formation. Most defendants are presented with boilerplate form contracts in the nature of adhesion contracts to which they might suggest alterations. Boilerplate language was presented to Jackie as is evidenced by the use of the word "his" in paragraph 3 of the Agreement under review, to wit:

> if, at any time between his execution of this Agreement and sentencing, the defendant (a) fails to admit a complete factual basis for the plea, (b) fails to truthfully admit her conduct in the offense of conviction, (c) engages in conduct which results in an adjustment under U.S.S.G. § 3C1.1; (d) falsely denies or frivolously contests relevant conduct for which the defendant is accountable under U.S.S.G § 1B1.3; or (e) engages in new criminal conduct. Defendant understands that she may not withdraw the guilty plea if, for any of the reasons listed above, the government does not recommend that she receive a reduction in Offense Level for acceptance of responsibility.

(emphasis added). And an indication that this plea agreement was in the nature of an adhesion contract was that only the defendant could cause a breach. Paragraph 5 of the Agreement lists consequences of breach by defendant only, and not by the government. If a plea agreement is considered an adhesion contract, then any provision should be construed against the government. In this case, the waiver provision should be construed against the government.

B The Court of Appeals Erred By Not Entertaining Petitioner's Argument That the Sentencing Court Erred by Sentencing Disparity Among Similarly Situated Defendants Pursuant to 18 U.S.C. § 3553(a)(6)

Jackie Madore had averred before the court of appeals that her sentence was procedurally flawed in that the court neglected to avoid unwarranted sentencing disparity among similarly situated defendants, and that her sentence was substantively flawed in that her sentence far exceeded that imposed on Fern Dowling and other defendants who were arguably equally culpable.

She had argued that the applicable standard on review before the circuit court was abuse of discretion. It is important to note that "abuse of discretion" is the standard of review for both procedural reasonableness and substantive reasonableness in this circuit court. The First Circuit "will review the district court's discretionary judgments for abuse of discretion, its findings of fact for clear error, and its conclusions of law de novo." United States v. Reyes-Santiago, 804 F.3d 453, 467-468 (1st Cir. 2015).

The First Circuit in United States v. Vargas-Garcia noted

> Appellate review of federal criminal sentences employs a binary mechanism: a reviewing court must first examine claims relating to the procedural aspects of the sentence and then examine claims relating to its substantive reasonableness.... Throughout, review is for abuse of discretion.

United States v. Vargas-Garcia, 794 F.3d 162, 165 (1st Cir. 2015)(internal citations

and quotation marks omitted).

B1. Analysis ~ Co-Defendant Fern Dowling

Jackie Madore had averred before the court of appeals that she and co-defendant Fern Dowling were "similarly situated" defendants. Both were Maine woman who dated the creator-leader-organizer of this conspiracy – Christian Turner. Both were drug addicts. Both drove Christian Turner on drug deliveries. According to Amended Sentencing Order, Fern Dowling had a Total Offense Level of 35, whereas Jackie Madore had a Total Offense Level of 27 as determined by the court at sentencing. See Amended Sentencing Order at Docket 1:15-cr-86 (Doc 45); S at 39. Both had received acceptance of responsibility. Fern Dowling was criminal history category II, Jackie Madore was criminal history category VI. Fern Dowling's advisory guideline range was 188-235, Jackie Madore's was 130-162. Fern Dowling received 66 months or 35% of the low-end of her advisory guideline range. Jackie Madore received 110 months or 85% of the low-end of her advisory guideline range. In her Presentence Report, Fern Dowling was assessed a two-level enhancement for possession of a dangerous weapon under U.S.S.G. §2D1.1(b)(1). Jackie Madore had been deemed a minor participant at her sentencing.

With respect to the sentencing disparity between Jackie Madore and Fern Dowling, the court stated that it "is always concerned about unwarranted sentencing disparities, but the fact of the matter is the defendant faces a much longer time in prison than other local defendants because she – primarily because she has a much worse criminal history than the other defendants." S at 55. The court stated that unlike defendant Fern Dowling, whose 66 month sentence was the longest of all of the other defendants sentenced to date,[2] Jackie "did not voluntarily quit the drug life....[s]he stopped because she was arrested." Id. As a consequence, the court stated that it had "factored in the need to avoid unwarranted sentencing disparities as part of the Court's calculation." Id.

Where "the rationale offered by the district court for the substantial disparity between...[one defendant's] sentence and the sentence of others above him in the conspiracy's hierarchy is unsupported by the record" the First Circuit will "remand" the "case to the district court for reconsideration" of defendant's sentence. United States v. Reyes-Santiago, 804 F.3d 453, 457 (1st Cir. 2015). In Reyes-Santiago, the First Circuit vacated defendant's sentence because it was disproportionate to sentences meted-out to co-defendants. Id. The First Circuit

[2] Defendant Jermaine Mitchell received 260 months after trial, Akeen Ocean 120 months after trial, Wendell White 60 months after plea.

stated, "[i]n fashioning an appropriate sentence, judges are directed by statute to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." Id. at 467 *citing* 18 U.S.C. § 3553(a)(6). Because of a need to compare only apples to apples, "there may be reason for concern if two identically situated defendants receive different sentences from the same judge." Id. (internal quotation marks omitted). The issue for the First Circuit was that Reyes-Santiago's "objection is that his sentence is substantively unreasonable because it far exceeds the sentences imposed on equivalently culpable co-defendants without any justifiable rationale for the greater severity." Id. at 468. The question for the First Circuit was whether "the court has provided a plausible explanation [for its sentence], and [is] the overall result is defensible." Id. Because Reyes did not play "a uniquely prominent role in the conspiracy" the First Circuit could "find no rationale articulated by the court, and supported by the record, that justifies the uniquely harsh" result. Id. 469, 472-473. The First Circuit stated that "this case...presents the unusual circumstance of a sentence that is substantively unreasonable and, hence, an abuse of discretion, because of its substantial disparity with the sentences given to co-defendants and the absence of any identified, supportable basis for the inconsistency." Id. at 473. Importantly, the First Circuit noted that "there are

significant differences in criminal histories among the co-defendants" in the Reyes case. Id. at 472. Reyes had a criminal history category IV, whereas "[m]ost of the others had less substantial criminal backgrounds." Id.

Like Reyes-Santiago, Jackie Madore did not play a uniquely prominent role in her conspiracy, and while her receipt of 85% of her total offense level represents a benefit to her, Fern Dowlings receipt of only 35% of her total offense level created a substantial disparity between the two. Fern Dowling received a lesser sentence, had possessed a higher total offense level, and, while she had a lower criminal history category, Jackie was deemed a minor participant. For these reasons, Jackie's sentence was substantively unreasonable.

B2. Analysis ~ Other Co-defendants

Where known, the sentence listed in months, the criminal history category (CHC), the Total Offense Level (TOL), and whether the defendant took a plea or went to trial, of each of the other defendants in this conspiracy are listed below:

Defendant	CHC	TOL	Sentence	Plea or Trial,	Notes
Jeffrey Benton	not sentenced at time of appeal				
Christian Turner	V		300	Plea	f/a count
Jermaine Mitchell			260	Trial	
Willie Garvin	not sentenced at time of appeal				
Torrence Benton	IV		36	Plea	
Jeremy Ingersoll-Meserve	II	25	41	Plea	f/a count
Jackie Madore	VI	32	110	Plea	
David Chaison	III	29	60	Plea	
Akeen Ocean			120	Trial	
Burke Lamar	IV		34	Plea	
Wendell White			60	Plea	Premises
Fern Dowling	II	35	66	Plea	f/a count

Notes: Four of the defendants faced a fire arm count. Torrence Benton's sentence was reduced 34 months to reflect time served on a state charge considered part of this conspiracy. Torrence Benton was not in the conspiracy as long as the other defendants. Jackie Madore also was not in the conspiracy for as long as the others and she pled to a reduced drug quantity. Burke Lamar's criminal history was accrued in a short amount of time.

The Court provided a rationale for the sentences received by these defendants as follows: defendant Ingersoll-Meserve was a category II, total offense level of 25, and he received a 41 month sentence. S at 24. Ingersoll-Meserve also "had cut his ties with the conspiracy and had stopped using drugs on his own...before he was arrested." Id. Defendant Chaison was a criminal history category III, total offense level of 29, and he received a sentence of 60 months. Id. "By stark contrast," Jackie had a criminal history category of VI and a total offense level of 32. Id. The court stated that a criminal history category of VI is "a

criminal history category that's usually reserved only for the most hardened repetitive criminals," and Jackie "has had 23 prior convictions." Id. at 24-25. Ingersoll-Meserve and Chaison each had only six prior convictions. Id. at 25. Additionally, Jackie previously had been sentence to 75 months in jail, whereas Chaison had been sentenced to 100 days and Ingersoll-Meserve had served no time in jail prior to this case. Id. Beyond this, the Jackie had a prior drug trafficking conviction, and joined the present conspiracy shortly after her release from jail following that conviction. Id. Finally, the court noted that a criminal history category VI begins with 13 points and Jackie had 16 points. Id. at 26.

The court did not factor in the presence or absence of a fire arm count with respect to any defendant's sentence. The court also did not factor in that Jackie Madore was not in the conspiracy for as long as the others and that she pled to a lower drug quantity than the rest.

For these reasons, petitioner avers that her sentence was procedurally flawed under 18 U.S.C. § 3553(a)(6).

C. The Court of Appeals Erred By Allowing the Government to Control it's Docket Through the Use of Local Rule of Appellate Procedure 27.0(c).

After petitioner had filed her brief before the court of appeals, the government filed a motion for summary dismissal, pursuant to Local Rule of

Appellate Procedure 27.0(c). In response, Jackie Madore had averred that were the court of appeals to grant respondent's motion for summary dismissal, it would be violative of due process under the Fifth Amendment to the United States Constitution, as well as be fundamentally unfair to Jackie.

Jackie had argued that she did not file an Anders Brief. See Anders v. California, 386 U.S. 738 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); United States v. Figueroa-Ocasio, 805 F.Ed 360, 367 (1st Cir. 2015). Given this assertion, Jackie Madore argued that her appeal should go forward and the government should address her sentencing disparity argument.

On April 30, 2015 and June 12, 2015, at the time of the signing of her plea agreement and at the time of her plea hearing, Jackie Madore was susceptible to career offender status. APP-1-App-4[3]. At the time of her initial Pre-Sentence Report, September 14, 2015, Jackie was assessed career offender status pursuant to U.S.S.G. § 4B1.1(b)(3). Pre-Sentence Report at ¶22 at APP-11-APP-13. As late as May 27, 2016, at the time of her Revised Pre-Sentence Report, Jackie Madore was again assessed career offender status pursuant to U.S.S.G. §4B1.1(b)(3). Revised Pre-Sentence Report at ¶22 at App-38.

[3] Designations "APP" refer to the Appendix filed with Brief for Appellant. Designation "A" refers to Addendum to the current Response.

At a Pre-Sentence Conference held on July 13, 2016, counsel for Jackie Madore asked the Court to take notice of a change in the law eliminating burglary as a predicate offense to career offender status. A-1. The sentencing judge agreed to proceed as though Jackie were not a career offender, even though her resultant guideline range remained the same. A-1-A-3. Jackie's counsel suggested that arrival at the particular guideline range by a different method "carries less of a burden for the defense in arguing for a lower sentence." A-2. Counsel's argument is consistent with First Circuit precedent in United States v. McGhee. United States v. McGhee., 651 F.3d 153 (1st Cir. 2011). In McGhee, a sentencing court found career offender status but disagreed with it's applicability to that defendant, and disregarded it in it's decision-making process. Even though the sentencing court disregarded it, the First Circuit stated that the erroneous presence of the career offender status tainted the proceeding. The First Circuit, therefore remanded because "the designation can be influential even if not treated as controlling." Id. at 159. The government had argued harmless error in McGhee, but the First Circuit stated the erroneous finding of career offender, even though the sentencing court granted a downward variance, left an impermissible cloud on the proceedings. The First Circuit stated, "McGhee's sentence might well have been the same regardless of the career offender designation, but we are not certain enough to find harmless

error." Id. at 158. The First Circuit, therefore, remanded the case to the district court for re-sentencing free from the faulty designation.

If the First Circuit in McGhee can remand to the district court in a situation where a career offender designation was erroneously considered at sentencing, Jackie Madore had suggested that the First Circuit could remand her case to the district court where her plea agreement was signed and her plea hearing was held at a time when a career offender designation was erroneously in effect. In both instances, the designation was found retrospectively to be in error. The plea agreement contemplated that Jackie would waive her right to appeal a sentence that does not exceed 120 months. APP-2. Jackie was sentenced to 110 months, but Jackie posits that it cannot be said that at the time of her signing her plea agreement,120 months would have been the chosen number for waiver absent the career offender issue, and it cannot be said that 110 months would be the court's chosen sentence absent the career offender issue.

In United States v. Teeter, the First Circuit wrote that plea agreement "waivers are meant...not to leave acquiescent defendants totally exposed to future vagaries." In United States v. Teeter 257 F.3d 14, 25 (1st Cir. 2001). As argued in her brief, Jackie Madore had stated that the focus of the inquiry is the level of scienter possessed by the acquiescing defendant at the time of the signing of the

agreement. Id. at 26-27. The erroneous designation of career offender status presented defense counsel, the probation officer and the court with a distracting issue which clouded Jackie's sentencing. In addition, the probation officer's granting and then withdrawing acceptance of responsibility, and Jackie's difficulty in assessing how the court would assess county jail write-ups pending her sentencing, constitute a quantum of post-agreement vagaries which the petitioner could not have entertained on the date of signing of the agreement and which are sufficient to allow her appeal to go forward.

The probation officer granted and then rescinded acceptance of responsibility, because "the defendant objected to every paragraph included in the offense conduct section of the report, and contested every paragraph regarding drug quantity calculations." ¶14A Revised Pre-Sentence Report APP-36. Jackie Madore found this posture by the probation officer to be distracting to her ability to argue for what she considered a reasonable sentence. The court stated at the June 30, 2016 Pre-Sentence Conference with respect to these same objections, that "[i]t strikes me that some of these things may seem more important than they really are. And there are some issues that,...when you actually look at them, there is no real disagreement." A-4-A-5. Jackie Madore, however, had to address the probation officer's concerns.

Thus, after signing her plea agreement, both Jackie Madore and the court were presented with serious issues which easily could have influenced the court's final sentence determination. To dismiss her appeal at the circuit level would be unfair to Jackie despite the government's bold assertions that her concerns are meritless. Jackie Madore had asserted before the circuit court that the government's motion for summary disposition should be denied and the government should address the her sentencing disparity issue which Jackie Madore asserts is a genuine issue.

Beyond this, Jackie Madore had asserted that utilization of Local Rule 27.0(c) to replace existing procedure is fundamentally unfair and violative of due process under the Fifth Amendment to the United States Constitution. She argued that there already exists a procedure by which an appellate court can dismiss an appellant's brief in a criminal case should that appellate court, after responsible review, determine that an appellant's brief lacks merit. The process in place is to treat appellant's brief as an Anders Brief. Alternatively, she posited. if the government had been attempting to incorporate civil procedure dismissal into the criminal courts, then such an attempt is inapposite to customary criminal procedure. In that event, case law developed in civil cases would unnecessarily be transmogrified to fit criminal process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Dated: April 27, 2019