No. 18-6157

IN THE SUPREME COURT OF THE UNITED STATES

SEALED APPELLEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's plea agreement implicitly barred the government from appealing the district court's sentence, which was below the statutory minimum specified for his conviction.

2. Whether the government's discretionary decision to file a motion for reduced sentence under Sentencing Guidelines § 5K1.1 (2015), but not to file a motion under 18 U.S.C. 3553(e) that would have permitted a sentence below the statutory minimum, violated petitioner's rights under the Due Process Clause.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6157

SEALED APPELLEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 887 F.3d 707. The opinion of the district court (Pet. App. B1-B13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2018. The petition for a writ of certiorari was filed on June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 841 and 846. Pet. App. A1-A2. Petitioner was sentenced to 80 months of imprisonment, to be followed by five years of supervised release. Id. at A2. The court of appeals vacated and remanded for resentencing. Id. at A1-A5.

1. Petitioner was involved in a large-scale operation trafficking marijuana that had been smuggled into the United States along the southern border by the Zetas Mexican drug cartel. Plea Agreement 2. Among other things, petitioner distributed the marijuana in the United States, laundered the proceeds of the marijuana sales, and brought at least one other individual into the drug conspiracy. Ibid.

On May 6, 2015, a federal grand jury returned a multi-defendant superseding indictment charging petitioner and others with conspiracy to possess with intent to distribute and to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 841 and 846; conspiracy to import 1000 kilograms or more of marijuana, in violation of 21 U.S.C. 952(a), 960(a)(1), 960(b)(1)(G), and 963; conspiracy to distribute 1000 kilograms or more of unlawfully imported marijuana and five kilograms or more of unlawfully imported cocaine, in violation of 21 U.S.C. 959(a),

960(a)(3), 960(b)(1)(B), 960(b)(1)(G), and 963; conspiracy to possess firearms in furtherance of drug trafficking crimes, in violation of 18 U.S.C. 924(c)(1) and 924(*o*); and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i), (a)(1)(A)(ii), and (h). 5/6/15 Superseding Indictment 1-7. On April 8, 2016, petitioner pleaded guilty pursuant to a plea agreement to the marijuana-distribution conspiracy. See Plea Agreement 1-7; 4/8/16 Tr. 1-13.

The plea agreement set out the factual basis for the plea and explained that petitioner faced a statutory sentencing range of ten years to life imprisonment. Plea Agreement 1-2; see 21 U.S.C. 841(b)(1)(A). The plea agreement contained a provision, entitled "Defendant's Waiver of Right to Appeal or Challenge Sentence," under which petitioner "voluntarily and knowingly waive[d] his right to appeal his sentence on any ground." Plea Agreement 3 (emphasis omitted). In exchange for his guilty plea, the government promised to move to dismiss the remaining charges against him and to recommend a three-level reduction in petitioner's offense level under the Sentencing Guidelines for acceptance of responsibility. Id. at 5-6. The government also "reserve[d] the right to advocate in support of the Court's judgment should this case be presented to an appellate court." Id. at 6.

As part of the plea agreement, the parties executed a cooperation addendum. Addendum to Plea Agreement 1-5. In it,

petitioner agreed to cooperate with the government's efforts to investigate and prosecute individuals involved in criminal activity. Id. at 1. In return, the government agreed that if petitioner provided substantial assistance to law enforcement, the government would "consider, at the Government's option, filing a motion for a downward departure pursuant to USSG § 5K1.1 and/or" under Federal Rule of Criminal Procedure 35. Addendum to Plea Agreement 2. The addendum stated that petitioner "understands that it is within the Government's sole discretion to determine (a) if [petitioner] has provided substantial assistance under the terms of this agreement, and (b) whether to file a motion for downward departure." Ibid. The addendum also stated that "the Government reserves the right to advocate in support of the Court's judgment should this case be presented to an appellate court." Id. at 5.

At the plea colloquy, the district court confirmed with petitioner that the factual basis set out in his plea agreement was accurate, and the court ensured that petitioner understood that he was facing a statutory sentencing range of ten years to life imprisonment. 4/8/16 Tr. 3-5. The court explained that if he pleaded guilty, petitioner might benefit from relief that could enable the court to impose a sentence below the ten-year statutory minimum, see 18 U.S.C. 3553(e), but the court was clear that such relief was only a "possibility" and that "there's no promise" of it. 4/8/16 Tr. 6. In addition, the court confirmed with petitioner

that he had carefully reviewed his plea agreement with his counsel before agreeing to its terms and signing it. Id. at 8-9.

In advance of sentencing, the Probation Office prepared a presentence report calculating petitioner's recommended sentence under the Sentencing Guidelines. Applying the 2015 Guidelines, the Probation Office determined that petitioner's advisory Guidelines range was 235 to 293 months of imprisonment. Presentence Investigation Report (PSR) ¶¶ 42, 47, 68. The Probation Office also noted that petitioner was subject to a statutory sentencing range of 120 months to life imprisonment. PSR ¶ 67.

On May 15, 2017, the government moved under Sentencing Guidelines § 5K1.1 for a downward departure from the Guidelines range based on substantial assistance to law enforcement. See 5K1.1 Mot. 1-4. The government's motion stated that petitioner was cooperating with the government including, among other things, by identifying his fugitive coconspirators and agreeing to testify against them and by providing information about other law enforcement targets. Id. at 1-2. The government stated that his "information was useful to the Government, and [wa]s believed to be truthful." Id. at 2. The government further noted that its motion reflected that petitioner had withdrawn from the conspiracy. Ibid. On those bases, the government recommended a five-level downward departure, which would result in an advisory Guidelines range of 135 to 168 months of imprisonment. Ibid. The government did not file a motion under 18 U.S.C. 3553(e), which

would have allowed the district court to impose a sentence below the statutory minimum of 120 months based on petitioner's cooperation with law enforcement.

The next day, the district court granted the government's § 5k1.1 motion. 5/16/17 Order 1.

2. The district court held a sentencing hearing on May 16, 2017. At the hearing, petitioner's counsel acknowledged the government's § 5K1.1 motion but disputed the drug quantity attributed to him and argued that "a ten-year sentence or more for [petitioner] is not warranted." Sent. Tr. 16; see id. at 12-16. Petitioner's counsel asked the court to sentence petitioner below the ten-year minimum required by Section 841(b)(1)(A), but counsel acknowledged that "if they [i.e., the government] want to appeal it, Judge, I'm sorry, but you may get reversed." Id. at 25.

The district court sentenced petitioner to 80 months of imprisonment (40 months below the statutory minimum), acknowledging "the likelihood * * * that this will be appealed by the government." Sent. Tr. 29. The government asked the court to reconsider, arguing that the court had imposed "an illegal sentence," and that the sentence was unwarranted on the facts in any event. Id. at 29-30. The court declined, stating that "there are other factors that the Court is taking into account that apply to" petitioner and that "the Congress and the executive don't see what the Court sees in these cases." Id. at 30. The court also allowed petitioner to self-surrender. Ibid. The government

objected on the ground that "[t]he statute says he shall be taken into custody at this time," to which the court responded, "[w]ell, the government can appeal that also." Ibid.

The district court set out its reasons for petitioner's sentence in a post-sentencing opinion. Pet. App. B1-B13. Contrary to the recommendation of the Probation Office, the court calculated an advisory Guidelines range of 168 to 210 months of imprisonment. Id. at B3. In explaining its decision to impose a sentence well below that range, the court noted the government's § 5K1.1 motion but explained that such a motion "is not the only basis for downward departure." Id. at B4. In particular, the court referenced petitioner's voluntary withdrawal from the conspiracy, his efforts at rehabilitation, his history of non-violence, and his remorse, and the court noted that at least some of petitioner's coconspirators had received 120-month sentences even though those individuals did not demonstrate the same type of remorse and rehabilitation as petitioner. Id. at B4-B5.

As to the district court's decision to impose a sentence below the 120-month statutory minimum, the court explained that a 120-month sentence "would not give [petitioner] the benefit of his bargain with the Government that he be given credit for substantial assistance rendered." Pet. App. B11. The court also expressed its "disagree[ment] with the concept of mandatory minimum sentencing" more generally. Id. at B12. And the court determined that "a sentence of more than eighty months in this case would be

cruel and unusual and would be based on an arbitrary distinction which would violate the Due Process Clause of the Fifth Amendment." Id. at B13. For those reasons, and because of "the Government's lack of consideration of a lower Total Offense Level and other non-cooperation bases for departure and/or variance," the court "construe[d] the Government's 5K1.1 motion" as being a motion "for downward departure under 18 U.S.C. § 3553(e)" and, for that reason, determined that the court had authority to sentence petitioner below the statutory minimum. Ibid.

3. The government appealed, and the court of appeals vacated and remanded for resentencing. Pet. App. A1-A5.

As a threshold matter, the court of appeals rejected petitioner's argument "that the government 'did not retain the right' to appeal [his] sentence, because of a line in the plea agreement that 'the Government reserves the right to advocate in support of the [district] Court's judgment should this case be presented to an appellate court.'" Pet. App. A5 n.1. Although petitioner waived his own right to challenge his sentence, the court of appeals found that "[n]o similar waiver was included with respect to the government," and the government's "specific reservation of its right to support the district court's judgment" did not lead "either party to reasonably believe that the government could not itself appeal the district court's judgment." Ibid. "Thus," the court determined, "the government was within its rights in pursuing this appeal." Ibid.

On the merits, the court of appeals explained that because petitioner was convicted of conspiring to possess with intent to distribute 1000 kilograms or more of marijuana, he faced a statutory minimum sentence of ten years of imprisonment and that, "[a]bsent a statutory exception, a district court lacks authority to impose a sentence below this minimum." Pet. App. A3; see 21 U.S.C. 841(b)(1)(A)(vii). One such "exception," the court of appeals continued, is set forth in 18 U.S.C. 3553(e), which states that "'[u]pon motion of the Government, the [sentencing] court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.'" Pet. App. A3 (quoting 18 U.S.C. 3553(e)). The court of appeals observed that under the statutory text and this Court's precedent, "§ 3553(e) requires a motion by the government for a departure below a statutory minimum," which the government had not made. Ibid. (citing Melendez v. United States, 518 U.S. 120, 125-126 (1996)). The court accordingly explained that the district court was not free to sentence petitioner below the 120-month minimum unless the government's decision not to move under Section 3553(e) "'was based on an unconstitutional motive,' such as race or religion, or 'was not rationally related to any legitimate Government end.'" Ibid. (quoting Wade v. United States, 504 U.S. 181, 185-186 (1992)).

The court of appeals further determined that the government's decision not to seek a sentence-reduction under Section 3553(e) was not based on an "unconstitutional motive" or another impermissible basis. Pet. App. 4a. The court explained that the government had a rational reason to recommend a five-level reduction under § 5K1.1, while declining to file a motion under Section 3553(e) -- namely, that petitioner had not testified for the government or helped the government in its ability to charge other conspirators. Ibid. The court also explained that the recommended five-level reduction in the government's § 5K1.1 motion "was consistent with departures given to other members of the conspiracy, some less involved than [petitioner]." Ibid. The court thus found that the government's choice "was within the government's discretion." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-12) that this Court's review is necessary to resolve a circuit conflict regarding whether a defendant's waiver in his plea agreement of his own right to appeal his sentence also implicitly bars the government from appealing the sentence. Petitioner further contends (Pet. 13-16) that the government's decision not to file a Section 3553(e) motion violated his due process rights. The decision below is correct and does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. a. Consistent with general contract principles, courts cannot "imply as a matter of law a term" into a plea agreement "which the parties themselves did not agree upon." United States v. Benchimol, 471 U.S. 453, 456 (1985) (per curiam); see generally 11 Williston on Contracts § 31:5 (4th ed.) (discussing general rule that courts should not add to a contract a term to which the parties did not agree). Petitioner's contention (Pet. 7-12) that his express waiver of his own appellate rights in his plea agreement gave rise to an implicit agreement barring the government from appealing the imposition of an unlawful sentence is contrary to those well-established principles.

The plea agreement reflected the bargain into which the parties knowingly and voluntarily entered: petitioner agreed to plead guilty, to waive his appellate rights, and to cooperate with the government; in exchange, the government promised to move to dismiss the remaining charges against petitioner, to support a three-level reduction for acceptance of responsibility, and to consider his assistance in deciding whether and to what extent to recommend a downward departure. The government complied with those obligations. But the government never agreed to forgo its own right to appeal the imposition of an unlawful sentence. A waiver by the government of its appellate rights thus was not part of the bargain that the parties struck, and the court of appeals was right not to read such a missing term into the parties' agreement. See, e.g., United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001)

(rejecting contention that a defendant's appeal waiver must be "matched against a mutual and 'similar' promise" by the government); cf. United States v. Anderson, 921 F.2d 335, 337-338 (1st Cir. 1990) (argument that government waived its right to appeal sub silentio by failing to expressly preserve that right in a plea agreement "stands logic on its ear").

b. Petitioner contends (Pet. 9-11) that the decision below conflicts with the Fourth Circuit's two-paragraph decision in United States v. Guevara, 941 F.2d 1299 (1991), cert. denied, 503 U.S. 977 (1992), but that decision creates no conflict warranting this Court's review. In Guevara, the court declined to construe a plea agreement as permitting the government to appeal the district court's sentence when the defendant had expressly promised to plead guilty and to waive her own right to appeal, stating that such a deal would be "far too one-sided." Id. at 1299. The court instead determined that the agreement should be construed as including an "implicit[]" waiver by the government of its right to appeal, in parallel to the defendant's "explicit[]" waiver. Id. at 1299-1300; cf. United States v. Blick, 408 F.3d 162, 168 n.5 (4th Cir. 2005) (stating in dicta that Guevara "evened the playing field somewhat" by extending an appeal waiver to the government).

Guevara, however, cited no authority to support its rule of construction, nor did Guevara address the inconsistency between its reasoning (on the one hand) and this Court's precedent and

general principles of contract law (on the other). See United States v. Guevara, 949 F.2d 706, 707-708 (4th Cir. 1991) (Wilkins, J., dissenting) (arguing that the panel's decision was inconsistent with this Court's decision in Benchimol). Unsurprisingly, other courts of appeals have declined to follow Guevara by ruling that the government has silently waived its right to appeal simply because the defendant expressly waived his own right to appeal. See, e.g., United States v. Boucher, 905 F.3d 479, 480-481 (6th Cir. 2018) (noting that Guevara "offered no support for its unusual interpretation," and siding with other circuits that "follow customary interpretive principles about agreements, accepting waivers when waivers are made and denying waivers when waivers are not made"); United States v. Miles, 902 F.3d 1159, 1160-1161 (10th Cir. 2018) (per curiam); United States v. Powers, 885 F.3d 728, 732-733 (D.C. Cir. 2018); United States v. Hammond, 742 F.3d 880, 883-884 (9th Cir. 2014), cert. denied, 135 S. Ct. 1545 (2015); Hare, 269 F.3d at 861-862.

Moreover, subsequent Fourth Circuit precedent has made clear that Guevara did not, as petitioner seems to suggest (Pet. 9), adopt a broad rule of appellate-rights parity grounded in "due process fairness considerations." In United States v. Zuk, 874 F.3d 398 (2017), the Fourth Circuit declined "to extend Guevara and * * * hold for the first time that the waiver of appeal rights must always be reciprocal in plea bargaining, regardless of the parties' desire to negotiate otherwise." Id. at 407. Instead,

"[b]ecause there is nothing unconscionable or contrary to public policy in permitting a criminal defendant and the government to agree to terms where the defendant waives his appellate rights and the government does not," the court "refuse[d] to rewrite the parties' plea agreement * * * by striking the provision that allow[ed] the government to appeal Zuk's sentence." Id. at 408.

Guevara's practical impact has also been limited by changes to the standard language of government plea agreements used in the Fourth Circuit, which now expressly preserves the government's right to appeal notwithstanding a defendant's waiver. See, e.g., United States v. Russell, 402 Fed. Appx. 772, 773 n.* (4th Cir. 2010) (per curiam) (rejecting challenge to government appeal under Guevara because plea agreement expressly preserved government's appeal rights); United States v. Burton, 201 Fed. Appx. 186, 188 (4th Cir. 2006) (per curiam) (similar); United States v. Peebles, 146 Fed. Appx. 630, 632 (4th Cir. 2005) (per curiam) (similar). Guevara's rule of construction thus lacks prospective importance in the only jurisdiction in which it applies.

Finally and in any event, even if Guevara had required some form of reciprocity as to appeal-waiver provisions, petitioner's argument would still fail. The Fourth Circuit has determined that even valid, broadly worded appeal waivers do not foreclose a defendant from appealing a sentence that is illegal because it exceeds the statutory maximum. See, e.g., United States v. Cohen, 459 F.3d 490, 497-498 (4th Cir. 2006) (discussing United States v.

Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995)), cert. denied, 549 U.S. 1182 (2007). And "[t]he Guevara rule of reciprocity," at most, reflects an interpretive rule of parity that does not prohibit a government appeal if the defendant could have brought a similar appeal. United States v. Stubbs, 153 F.3d 724, 1998 WL 387253, at *2 (4th Cir. 1998) (per curiam) (unpublished) (Tbl.); see ibid. ("Reciprocity * * * requires that the government be able to appeal the legality" of a sentence notwithstanding Guevara, "just as a defendant would be allowed [to do so] despite a valid waiver of his right to appeal."). Therefore, because a defendant may appeal in the Fourth Circuit on the ground that his sentence "exceeded the district court's authority," the government may also appeal a criminal sentence on the ground that the district court "exceed[ed] its authority" in choosing the sentence. Ibid. Here, because the government could have taken its appeal even in the Fourth Circuit, no further review is warranted.

c. Petitioner alternatively asserts (Pet. 11-12) that, even if a defendant's appellate waiver does not impliedly constitute a reciprocal government waiver, the plea agreement here expressly waived the government's right to appeal the illegal sentence. That fact-bound argument, which would not warrant this Court's review in any event, is incorrect. Petitioner's argument is based on language in the plea agreement stating that "the Government reserves the right to advocate in support of the [district] Court's judgment should this case be presented to an appellate court."

Plea Agreement 6. But as the court of appeals correctly determined, that language cannot reasonably be read as foreclosing the government from appealing the illegal sentence imposed by the district court. See Pet. App. A5 n.1. The language on which petitioner relies followed language indicating that petitioner would not be allowed to appeal his sentence merely because he was dissatisfied with it. See Plea Agreement 5-6. The language on which petitioner relies was thus clearly tied to a potential appeal by petitioner of his sentence. It cannot reasonably be understood to constitute a waiver of the government's right to appeal an illegal sentence imposed by the court.

2. Petitioner further contends (Pet. 13-16) that this Court's review is warranted on the theory that the government's decision not to file a motion for reduced sentence under 18 U.S.C. 3553(e) violated his due process rights. Petitioner's claim lacks merit, and he identifies no court of appeals that would accept it.

"Upon motion of the Government," a district court can (under certain circumstances) impose a sentence below the statutory minimum "so as to reflect a defendant's substantial assistance" to law enforcement. 18 U.S.C. 3553(e); see Melendez v. United States, 518 U.S. 120, 125-127 (1996). But in the absence of an explicit promise by the government to make such a motion -- and here no such promise was made -- the government is not obligated to file a Section 3553(e) motion in any particular case. As this Court explained in Wade v. United States, 504 U.S. 181 (1992), "when a

defendant has substantially assisted," the government has "a power, not a duty, to file a motion" under Section 3553(e), id. at 185. See Addendum to Plea Agreement 2 (specifying that government's decision whether to seek reduced sentence rests "within the Government's sole discretion").

Although "a prosecutor's discretion when exercising" its discretion to decide whether to file a Section 3553(e) motion "is subject to constitutional limitations that district courts can enforce," Wade, 504 U.S. at 185, those limitations are implicated only in a narrow range of circumstances. Specifically, "courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," such as a motive based on "the defendant's race or religion," or if the government's "refusal to move was not rationally related to any legitimate Government end." Id. at 185-186. But "a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing." Id. at 186; see id. at 187.

In this case, the court of appeals recognized that Wade provided the applicable framework for deciding whether the district court was authorized to sentence petitioner below the statutory minimum notwithstanding the absence of a government motion under Section 3553(e). See Pet. App. A3-A4. Petitioner has never argued (and does not argue now) that the government's

decision not to file a Section 3553(e) motion rested on an unconstitutional motive. Id. at A4. And, as the court of appeals correctly noted, the government had a rational basis for that decision. Petitioner had not testified; his assistance did not result in the indictment of coconspirators; and the government's motion under § 5K1.1 resulted in a Guidelines range "consistent with departures given to other members of the conspiracy, some less involved than [petitioner]." Ibid.

Petitioner asserts (Pet. 15) that the government's motivation was "arbitrary" because the government gave insufficient consideration to "the facts of Petitioner's substantial assistance * * * , the goal of avoiding inequity in sentencing, and the existence of other factors -- including Petitioner's extraordinary voluntary withdrawal and self-rehabilitation -- that put the case outside the heartland of mandatory-minimum cases and justified a lower sentence." Those assertions, even if true, would not show that the government's decision "was not rationally related to any legitimate Government end," Wade, 504 U.S. at 186. Nor has petitioner separately shown that the government's decision would otherwise result in a "violation of Petitioner's constitutional rights," Pet. 13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

DECEMBER 2018