No. 18-6807

IN THE SUPREME COURT OF THE UNITED STATES

LARRY M. SLUSSER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

WILLIAM A. GLASER
Attorney

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

QUESTION PRESENTED

Whether the court of appeals correctly enforced petitioner's knowing and voluntary waiver of his right to collaterally attack his sentence.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6807

LARRY M. SLUSSER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 895 F.3d 437. The order of the district court (Pet. App. 12a-15a) is not published in the Federal Supplement but is available at 2016 WL 6892757.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2018. A petition for rehearing was denied on August 22, 2018 (Pet. App. 4a). The petition for a writ of certiorari was filed on November 20, 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 Eastern District of Tennessee, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-3a.

1. In May 2011, a confidential informant under the supervision of law enforcement in Jefferson County, Tennessee, purchased a shotgun from petitioner, who had 18 prior felony convictions. Presentence Investigation Report (PSR) ¶¶ 10-13. A grand jury in the Eastern District of Tennessee charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), in which he and the government agreed that the court would be bound to impose a sentence of 180 months of imprisonment, followed by a term of supervised release, if it accepted the plea agreement. Plea Agreement 4.

The default statutory sentencing range for violating Section 922(g)(1) is zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," the Armed Career Criminal Act of 1984 (ACCA) requires a sentencing range of

15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include any offense that is punishable by a term exceeding one year of imprisonment that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i) (the elements clause); (2) "is burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. 924(e)(2)(B)(ii) (the enumerated offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another," ibid. (the residual clause).

In his plea agreement, petitioner agreed that he was an armed career criminal under the ACCA and that the low end of the ACCA's sentencing range, 15 years of imprisonment, was "the appropriate disposition of []his case." Plea Agreement 4; see id. at 1. "In consideration of the concessions made by the United States," petitioner agreed to waive his right to appeal except "the right to appeal a sentence imposed above the sentencing guideline range or any applicable mandatory minimum sentence (whichever is greater) determined by the district court." Id. at 6. And petitioner agreed to "knowingly and voluntarily waive the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255 or to collaterally attack [his] conviction(s) and/or resulting sentence," except for a motion claiming "ineffective assistance of counsel or prosecutorial misconduct not known to [him] by the time of the entry of judgment." Ibid.; see Pet. App. 1a.

The Probation Office prepared a presentence report, observing that petitioner's criminal history included, among other things, a 1994 conviction for Tennessee burglary, a 1999 conviction for Tennessee aggravated assault, a 2001 conviction for delivery of .5 grams or more of cocaine, and five separate convictions for Tennessee aggravated burglary in 1999 and 2007. PSR ¶¶ 36, 38-41. Based on that criminal history, the Probation Office determined that petitioner was subject to sentencing under the ACCA. PSR ¶¶ 25, 72. The district court agreed, specifically identifying petitioner's convictions for burglary in 1994, delivery of cocaine in 2001, and aggravated assault and aggravated burglary in 1999. Pet. App. 1a-2a. The court sentenced petitioner to 180 months of imprisonment, to be followed by four years of supervised release. Id. at 1a; Judgment 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. 2a.

2. In 2012, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 based on alleged ineffective assistance of counsel and prosecutorial misconduct. Pet. App. 2a. The district court denied the motion. The court of appeals declined to issue a certificate of appealability. This Court denied certiorari. See 37 S. Ct. 1216.

After this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the residual clause of the ACCA is unconstitutionally vague, petitioner obtained authorization for, and filed, a second or successive Section 2255 motion, in which he

argued that several of his prior convictions no longer qualified as ACCA predicate offenses. Pet. App. 1a. The government observed in response that petitioner had voluntarily waived his right to collaterally attack his sentence under Section 2255 as part of his plea agreement. Resp. to Pet. Successive 28 U.S.C. 2255 Mot. 3. The government also contended that petitioner continued to have at least three ACCA predicates, notwithstanding Johnson. Id. at 3-7. Specifically, it argued that petitioner's drug-trafficking conviction continued to qualify as a "serious drug offense"; that petitioner's five aggravated burglary convictions, as well as his Class D burglary conviction, qualified as "violent felon[ies]" under the enumerated offenses clause; and that his Tennessee aggravated assault convictions qualified as "violent felon[ies]" under the elements clause. Id. at 5-7.

The district court denied petitioner's Section 2255 motion. Pet. App. 12a-15a. The court did not decide whether the motion was barred by petitioner's collateral-attack waiver, but instead concluded that "at least three of [petitioner's] prior convictions categorically qualify as ACCA predicate offenses independent of the now-defunct residual clause." Id. at 13a. The court concluded that, in addition to his drug-trafficking conviction, petitioner's prior conviction for Tennessee Class D burglary "categorically qualifies as a predicate conviction under the enumerated-offenses clause" based on "[b]inding Sixth Circuit precedent." Ibid. And the court concluded that petitioner's conviction for Tennessee

aggravated assault fell within the ACCA's elements clause because the Tennessee statute is divisible into separate crimes and the judgment indicated that petitioner was convicted under a subsection of the statute that categorically satisfied the elements clause. Id. at 14a.

3. The court of appeals granted a certificate of appealability and affirmed. Pet. App. 1a-3a. The court did not reach the merits of petitioner's Johnson claim, but affirmed on the alternative ground that petitioner had expressly waived his right to collaterally attack his conviction and sentence. Id. at 2a. The court rejected petitioner's argument that the collateral-attack waiver was inapplicable because his sentence exceeded the statutory maximum that would apply if he were not an armed career criminal. Ibid. The court observed that "[a] voluntary plea agreement 'allocates risk,' and '[t]he possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.'" Id. at 3a (quoting United States v. Morrison, 852 F.3d 488, 490 (6th Cir. 2017)) (second set of brackets in original). The court accordingly explained that petitioner "waived his right to collaterally attack his sentence, including his designation as an armed career criminal," and "[t]he subsequent developments in this area of the law 'do[] not suddenly make [his] plea involuntary or unknowing or otherwise undo its binding nature.'" Id. at 3a (quoting United States v. Bradley,

400 F.3d 459, 463 (6th Cir.), cert. denied, 546 U.S. 862 (2005)) (second and third sets of brackets in original).

ARGUMENT

Petitioner renews his contention (Pet. 14-17) that his knowing and voluntary waiver of the right to challenge his sentence on collateral review should not be enforced to bar his collateral challenge to his sentencing as an armed career criminal. The court of appeals correctly determined that petitioner validly waived his right to collaterally attack his armed career criminal classification, and that determination does not conflict with any decision of this Court or another court of appeals. In any event, this case would be an unsuitable vehicle for resolving the question presented because the Court's recent decision in United States v. Stitt, 139 S. Ct. 399 (2018), establishes that petitioner's 2255 motion lacked merit. This Court has repeatedly denied certiorari in cases presenting similar questions, and it should follow the same course here. See Cox v. United States, 138 S. Ct. 1282 (2018) (No. 17-6690); Massey v. United States, 138 S. Ct. 160 (2017) (No. 16-9591).

1. a. This Court has recognized that a defendant may knowingly and voluntarily waive statutory or constitutional rights as part of a plea agreement. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 8-10 (1987) (upholding plea agreement's waiver of right to raise a double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's

waiver of right to file an action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. Ibid.

In accord with those principles, the courts of appeals have uniformly held that a defendant's voluntary and knowing waiver in a plea agreement of the right to appeal is enforceable.[1] As the courts of appeals have recognized, appeal waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001). Appeal waivers correspondingly benefit the government by enhancing the finality of judgments and discouraging meritless appeals. See, e.g., United States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied,

[1] See United States v. Teeter, 257 F.3d 14, 21-23 (1st Cir. 2001); United States v. Riggi, 649 F.3d 143, 147-150 (2d Cir. 2011); United States v. Khattak, 273 F.3d 557, 560-562 (3d Cir. 2001); United States v. Marin, 961 F.2d 493, 495-496 (4th Cir. 1992); United States v. Melancon, 972 F.2d 566, 567-568 (5th Cir. 1992); United States v. Toth, 668 F.3d 374, 377-378 (6th Cir. 2012); United States v. Woolley, 123 F.3d 627, 631 (7th Cir. 1997); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); United States v. Navarro-Botello, 912 F.2d 318, 320-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); United States v. Hernandez, 134 F.3d 1435, 1437 (10th Cir. 1998); United States v. Bushert, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 947 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

540 U.S. 997 (2003); Teeter, 257 F.3d at 22. Collateral-attack waivers have the same benefits. See, e.g., DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000) ("The 'chief virtues' of a plea agreement * * * are promoted by waivers of collateral appeal rights as much as by waivers of direct appeal rights. Waivers preserve the finality of judgments and sentences, and are of value to the accused to gain concessions from the government.").

This case illustrates the mutual benefits of appeal and collateral-attack waivers. In exchange for petitioner's guilty plea, the government agreed (1) not to oppose a two-level reduction in petitioner's offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1(a) (2010), and (2) to move for an additional one-level reduction under Sentencing Guidelines § 3E1.1(b) (2010). Plea Agreement 4. And the government then expressly agreed to a sentence at the low end of the resulting Guidelines range -- 180 months of imprisonment -- as part of a Rule 11(c)(1)(C) plea agreement, which bound the court to impose that sentence if it accepted the agreement. See Fed. R. Crim. P. 11(c)(1)(C).

b. The court of appeals correctly enforced petitioner's agreement not to collaterally attack the result of this bargain. Pet. App. 2a-3a. Because plea agreements are "essentially contracts," Puckett v. United States, 556 U.S. 129, 137 (2009), courts begin their analysis of a plea agreement by "examin[ing] first the text of the contract," United States v. Gebbie, 294 F.3d

540, 545 (3d Cir. 2002). Here, the agreement expressly states that petitioner "knowingly and voluntarily waives the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255 or to collaterally attack [his] conviction(s) and/or resulting sentence," with the sole exception that petitioner "retains the right to raise, by way of collateral review under § 2255, claims of ineffective assistance of counsel or prosecutorial misconduct not known to [him] by the time of the entry of judgment." Plea Agreement 6.

Petitioner does not contend that his challenge to his sentence falls within the exception to the collateral-review waiver for claims of ineffective assistance of counsel or prosecutorial misconduct. See Pet. 15. Nor does he "challenge that his plea agreement, including his waiver of his right to collaterally attack his conviction under § 2255, was entered into knowingly and voluntarily." Pet. App. 3a. Petitioner's attempt to collaterally attack his sentence on the ground that he was improperly classified as an armed career criminal thus falls squarely within the unambiguous language of the waiver in the plea agreement.

c. Petitioner contends (Pet. 15-16) that his waiver is unenforceable. He observes (Pet. 15) that some courts of appeals have declined to enforce otherwise valid waivers if doing so would result in a miscarriage of justice, and asserts that the implicit exception "includes a claim that the sentence exceeds the statutory maximum." Petitioner's contention lacks merit.

Petitioner's 180-month sentence is the sentence that petitioner himself asked the district court to impose, see Plea Agreement 4 ("[Petitioner] and the United States agree that a sentence of one hundred and eighty (180) months of incarceration * * * is the appropriate disposition of this case."), after expressly acknowledging that he "is an armed career criminal" and that the "punishment for this offense is a term of imprisonment of at least fifteen (15) years and up to life," id. at 1. This is not a case in which the sentencing "court disregard[ed] th[e] permissible sentencing range and impose[d] a sentence exceeding that which the defendant knew was the harshest penalty he could receive." United States v. Worthen, 842 F.3d 552, 554 (7th Cir. 2016)). Far from exceeding "the harshest penalty" that petitioner "knew * * * he could receive," the court imposed the lowest possible sentence within the "sentencing range" that petitioner recognized was "permissible." Ibid.

Petitioner asserts (Pet. 6-7, 19) that his sentence exceeds the statutory maximum in light of legal developments after his conviction and sentence became final. Specifically, he suggests (Pet. 6, 19) that following this Court's decision in Johnson and the Sixth Circuit's en banc decision in United States v. Stitt, 860 F.3d 854 (6th Cir. 2017), rev'd, 139 S. Ct. 399 (2018), only one of his prior convictions is an ACCA predicate, meaning that his 15-year ACCA sentence exceeds the ten-year statutory maximum for his Section 922(g)(1) offense. See 18 U.S.C. 924(a)(2). But

that is an argument about the merits of a potential collateral attack on his sentence, not an argument about the enforceability of the plea agreement in which petitioner agreed not to collaterally attack his sentence in return for governmental concessions. Plea Agreement 6. Petitioner's suggestion that his collateral-review waiver should not be enforced because he would be entitled to relief on collateral review "is entirely circular." Worthen, 842 F.3d at 555; see ibid. ("[T]he rule would be that an appeal waiver is enforceable unless the appellant would succeed on the merits of his appeal. That cannot be the law.").

That petitioner did not foresee the favorable developments in the law that followed his guilty plea does not render his collateral-attack waiver any less enforceable. See, e.g., Sanford v. United States, 841 F.3d 578, 580 (2d Cir. 2016) (per curiam). As the court of appeals explained, "the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." Pet. App. 3a (quoting United States v. Morrison, 852 F.3d 488, 490 (6th Cir. 2017)) (brackets omitted); see United States v. Haskins, 198 Fed. Appx. 280, 281 (4th Cir. 2006) (per curiam) (similar); see also Brady v. United States, 397 U.S. 742, 757 (1970) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."). Although petitioner "may not have known at the time of his plea that the

Supreme Court would change the law in the way it did in Johnson," he nevertheless "knew at the time of his plea that § 2255 afforded him an avenue to subsequently challenge his sentence as unlawful and knowingly chose to waive his right to seek § 2255 relief except on the basis of ineffective assistance of counsel or prosecutorial misconduct." Cox v. United States, 695 Fed. Appx. 851, 853 (6th Cir. 2017), cert. denied, 138 S. Ct. 1282 (2018); cf. Sotirion v. United States, 617 F.3d 27, 36 (1st Cir. 2010) (collateral attack waiver included an exception for claims "based on new legal principles in First Circuit or Supreme Court cases decided after the date of this agreement which are held by the First Circuit to have retroactive effect"). The court of appeals therefore correctly enforced the waiver.

2. Contrary to petitioner's contention (Pet. 9-14), no conflict exists in the courts of appeals on the question presented.

As petitioner notes (Pet. 9-10 & nn.3-4), the courts of appeals have generally recognized an exception to the enforceability of appellate and collateral-review waivers for sentences that "exceed[] the statutory maximum." United States v. Guillen, 561 F.3d 527, 531 (D.C. Cir. 2009); see, e.g., United States v. Hahn, 359 F.3d 1315, 1328 (10th Cir. 2004) (per curiam); Teeter, 257 F.3d at 25 n.10. The rationale for that premise is that "[w]hen a defendant pleads guilty to a crime and waives his to right to an appeal, he acquiesces to the court's discretion to impose a sentence that he knows will fall within a specified

statutory range. * * * But if the court disregards that permissible sentencing range and imposes a sentence exceeding that which the defendant knew was the harshest penalty he could receive, then there is no knowing and intelligent waiver at all." Worthen, 842 F.3d at 554.

Petitioner has not identified any decision from another court of appeals, however, holding that a Johnson-based challenge to an ACCA sentence fit within that exception. To the contrary, the courts of appeals have generally recognized that challenges to an armed career criminal classification are not exempt from appellate and collateral review waivers. See United States v. Carson, 855 F.3d 828, 830-831 (7th Cir.) (per curiam) (holding that a defendant's challenge to his armed career criminal classification did not qualify under that circuit's comparable exception because it was "not possible to determine if [the defendant's] sentence as an armed career criminal [wa]s illegal (or a miscarriage of justice) without resolving the merits of his appeal"), cert. denied, 138 S. Ct. 268 (2017); see also United States v. Sampson, 684 Fed. Appx. 177, 182 (3d Cir.), cert. denied, 137 S. Ct. 2147 (2017) (determining that the enforcement of appeal waiver against a defendant's challenge to his armed career criminal classification "work[ed] no miscarriage of justice"); cf. United States v. Frazier-LeFear, 665 Fed. Appx. 727, 731-733 (10th Cir. 2016) (enforcing collateral-review waiver against Johnson-based

challenge to career offender classification under the Sentencing Guidelines).

In DeRoo v. United States, supra, the Eighth Circuit granted relief to a defendant who had been subject to a "plain[ly] erro[neous]" ACCA enhancement, reasoning that "defendants cannot waive their right to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement." 223 F.3d at 923, 926-927. But the error in DeRoo was plain based on the text of Section 924(e) and the law at the time of sentencing, not based on a development in the law that occurred after the defendant's sentence became final. Moreover, there is no indication that the defendant in DeRoo, like petitioner here, expressly acknowledged that he was properly classified as an armed career criminal and received a sentence that he agreed represented the "appropriate disposition of []his case." Plea Agreement 4; see id. at 1. It is thus unclear whether the Eighth Circuit, which has described its miscarriage of justice exception to sentencing appeal waivers as "extremely narrow," Andis, 333 F.3d at 891-892, would apply it in these circumstances.[2]

---

[2] Petitioner also contends (Pet. 13 n.8) in a footnote that his collateral-attack waiver would not have been enforceable in the Seventh and Ninth Circuits under a different exception for sentences based on an unconstitutionally permissible factor. The Seventh Circuit's decision in Cross v. United States, 892 F.3d 288 (7th Cir. 2018), however, was based on that court's interpretation of the particular language of the defendant's collateral-attack waiver, which it expressly distinguished from "exceptions that we must read into all appeal waivers." Id. at 298-299. And the Ninth Circuit's decision in United States v. Bibler, 495 F.3d 621 (9th

3. The government's decision not to invoke collateral-attack waivers in certain cases (see Pet. 17-18) also provides no basis for further review. The government's circumstance-specific decision whether to invoke a collateral-attack waiver in a particular case may take into account a variety of factors, such as the language of the waiver provision and the government's position on whether a defendant remains properly classified as an armed career criminal. In petitioner's case, the government both invoked the plea agreement's waiver provision and consistently maintained that petitioner was not entitled to relief on the merits. See Resp. to Pet. Successive 28 U.S.C. 2255 Mot. 3-7; Gov't C.A. Br. 12-22. The fact that the government has declined to invoke collateral-review waivers in other cases does not warrant review in this case.

4. Finally, this case would be an unsuitable vehicle for resolving the question presented in any event, because petitioner would not be entitled to relief even in the absence of the collateral-review waiver. Petitioner does not dispute that his 1999 conviction for delivery of cocaine is an ACCA predicate. See Pet. 5-7. And this Court's recent decision in United States v. Stitt, supra, establishes that petitioner's five Tennessee aggravated burglary convictions similarly qualify as ACCA

Cir.), cert. denied, 552 U.S. 1052 (2007), not only did not concern an ACCA enhancement, but the court in fact enforced the waiver. Id. at 624 (enforcing an appeal waiver to a claim that the district court erred in failing to apply the so-called "safety valve" in 18 U.S.C. 3553(f)).

predicates under the enumerated offenses clause, which was unaffected by Johnson. See 139 S. Ct. at 404-407 (holding that Tennessee aggravated burglary qualifies as generic burglary). Petitioner therefore had more than the three required ACCA predicates regardless of whether Tennessee aggravated assault convictions qualify as violent felonies after Johnson.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

WILLIAM A. GLASER
Attorney

JANUARY 2019