No. 18-7639

IN THE SUPREME COURT OF THE UNITED STATES

CASTER DELANEY WHETSTONE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1A-2A) is unreported. The opinion of the district court (Pet. App. 4A-9A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3A) was entered on November 9, 2018. The petition for a writ of certiorari was filed on January 22, 2019. 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 District of South Carolina, petitioner was convicted of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals dismissed petitioner's appeal. Pet. App. 1A-2A.

1. In 2005, petitioner pleaded guilty to multiple felony counts of armed robbery, kidnapping, and assault with intent to kill in violation of South Carolina law and was sentenced to ten years of imprisonment for each count, all to run concurrently. Presentence Investigation Report (PSR) ¶¶ 15, 39. Petitioner was released on community supervision in October 2013. PSR ¶ 15. In May and June 2014, petitioner engaged in a series of illegal transactions with a confidential police informant that are the subject of this prosecution. PSR ¶¶ 16-32.

On May 7, 2014, petitioner sold the informant 7.13 grams of cocaine, which appeared to have been "freshly chipped-off a larger quantity of cocaine," at a home in Columbia, South Carolina. PSR ¶ 17. On May 30, petitioner sold the informant 13.76 grams of cocaine in the produce section of a grocery store in Columbia. PSR ¶ 19. On June 10, petitioner sold the informant an additional

12.58 grams of cocaine at the same store. PSR ¶¶ 21-22. And on June 24, petitioner sold the informant a .32 caliber revolver, six rounds of .32 caliber ammunition, and 14 grams of what he claimed to be cocaine (but was actually baking soda) at a bookstore in Forest Acres, South Carolina. PSR ¶¶ 23-24, 27.

2. A federal grand jury indicted petitioner on three counts of possession with the intent to distribute and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Indictment 1-3. Petitioner pleaded guilty to one of the drug counts and the felon-in-possession count pursuant to a plea agreement. Plea Agreement 1-11.

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), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). Under the ACCA's elements clause, a "violent felony" includes a felony that "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).

In his plea agreement, petitioner acknowledged that if, pursuant to the ACCA, he had at least three prior convictions for

a violent felony or serious drug offense, he would be subject to a minimum term of 15 years of imprisonment and a maximum sentence of life imprisonment. Plea Agreement 3. And, "in exchange for concessions made by the Government," petitioner agreed to waive his right to contest "either the conviction or the sentence in any direct appeal or other post-conviction action, including any proceedings under 28 U.S.C. § 2255," except for claims of ineffective assistance of counsel, prosecutorial misconduct, or future changes in the law that affected the sentence. Id. at 9.

Consistent with Federal Rule of Criminal Procedure 11, the district court conducted a plea colloquy, Plea Tr. 1-32, during which petitioner acknowledged that he understood the nature of the charges and the maximum potential penalties, id. at 13-16. Petitioner affirmed that, even if the sentence he received was "more severe than [he] expected it to be," he would "still have to be bound by [his] guilty plea" and would "have no right to withdraw [it]." Id. at 20; see id. at 21. And he affirmed that he was waiving his right to appeal on grounds other than those listed in the plea agreement. Id. at 27-28.

The Probation Office prepared a presentence report, which determined that petitioner was subject to sentencing under the ACCA because his criminal history included three qualifying predicate convictions. PSR ¶¶ 45, 71. Specifically, the report found that petitioner's two 2005 armed robbery convictions and his 2005 conviction for assault with intent to kill, in violation of

South Carolina law, each qualified as a violent felony under the ACCA. PSR ¶ 39.

Petitioner objected to his classification as an armed career criminal, arguing that his South Carolina conviction for assault with intent to kill did not qualify as an ACCA predicate. 3/26/18 Sent. Tr. 3-4. The district court overruled petitioner's objection, determining that his prior conviction qualified as a violent felony under the ACCA's elements clause, and adopting the findings in the presentence report as the findings of the court. 6/4/18 Sent. Tr. 9-10; Pet. App. 4A-9A. The court then departed downward from the advisory Guidelines range, which recommended a sentence of 188 months to 235 months of imprisonment, and sentenced petitioner to 180 months of imprisonment, followed by five years of supervised release. 6/4/18 Sent. Tr. 10-13; see PSR ¶ 103.

3. Petitioner appealed, arguing that the district court erred in classifying his conviction for assault with intent to kill as an ACCA predicate. Pet. C.A. Br. 10-27. The government moved to dismiss petitioner's appeal based on the appeal-waiver provision in his plea agreement. Gov't C.A. Mot. to Dismiss 1. The court of appeals granted the government's motion and dismissed petitioner's appeal without reaching the merits of petitioner's ACCA claim. Pet. App. 1A-2A. The court explained that petitioner had "knowingly and voluntarily waived his right to appeal" and that the issues he sought to raise on appeal "f[e]ll squarely within the compass of his waiver of appellate rights." Ibid.

ARGUMENT

Petitioner contends (Pet. 6-13) that his knowing and voluntary waiver of the right to appeal his sentence should not bar his appeal asserting that he was erroneously classified as an armed career criminal under the ACCA. The court of appeals' determination that petitioner validly waived his right to appeal his armed career criminal classification is correct, and it does not conflict with any decision of this Court or another court of appeals. Furthermore, this case would be an unsuitable vehicle for resolving the question presented because petitioner's appeal lacked merit in any event. This Court has repeatedly denied certiorari in cases presenting similar questions. See Slusser v. United States, 139 S. Ct. 1291 (2019) (No. 18-6807); Cox v. United States, 138 S. Ct. 1282 (2018) (No. 17-6690); Massey v. United States, 138 S. Ct. 160 (2017) (No. 16-9591). It should follow the same course here.

1. a. This Court has consistently recognized that a defendant may knowingly and voluntarily waive constitutional or statutory rights as part of a plea agreement. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 8-10 (1987) (waiver of right to raise a double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (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 and the courts by enhancing the finality of judgments and sentences 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, 540 U.S. 997 (2003); Teeter, 257 F.3d at 22-23.

The court of appeals correctly enforced petitioner's appeal waiver here. Because plea agreements are contractual in nature,

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[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, 377-379 (6th Cir. 2012); United States v. Woolley, 123 F.3d 627, 631-632 (7th Cir. 1997); United States v. Andis, 333 F.3d 886, 889-891 (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, 1437-1438 (10th Cir. 1998); United States v. Bushert, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

courts "begin [their] analysis as [they] would with any contract" by "examin[ing] first the text of the contract." United States v. Gebbie, 294 F.3d 540, 545 (3d Cir. 2002); see also United States v. Hahn, 359 F.3d 1315, 1324-1325 (10th Cir. 2004) (en banc) (per curiam); Margalli-Olvera v. INS, 43 F.3d 345, 351 (8th Cir. 1994). In this case, petitioner's plea agreement included an express waiver of "the right to contest either the conviction or the sentence in any direct appeal or other post-conviction action," with exceptions only for "claims of ineffective assistance of counsel, prosecutorial misconduct, or future changes in the law that affect the defendant's sentence." Plea Agreement 9.

Petitioner does not contend that his challenge to his sentence falls within any of the written exceptions to the appeal waiver. Nor does he dispute that his plea agreement, including his waiver of his right to appeal his conviction or sentence, was entered into "knowingly and voluntarily." Pet. App. 1A. Petitioner's attempt to appeal 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.

b. The court below, like other courts of appeals, limits the enforceability of appeal waivers in some circumstances. In United States v. Marin, 961 F.2d 493 (4th Cir. 1992), for example, that court stated that "a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a

constitutionally impermissible factor such as race." Id. at 496. Similarly, in United States v. Worthen, 842 F.3d 552 (2016), the Seventh Circuit concluded that "[w]hen a defendant pleads guilty to a crime and waives his 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." Id. at 554. And other courts of appeals have refused to enforce an appeal waiver in "egregious cases," where enforcement would work a "miscarriage of justice." Teeter, 257 F.3d at 25; see Hahn, 359 F.3d at 1327; Andis, 333 F.3d at 891; United States v. Khattak, 273 F.3d 557, 562-563 (3d Cir. 2001); cf. U.S. Dep't of Justice, Criminal Resource Manual § 626(1) (describing such decisions).[2]

Such limitations are inapplicable here. The clear language of the agreement forecloses any contention that petitioner implicitly reserved his right to appeal his classification as an armed career criminal or that he did not knowingly accept the possibility that he would be so classified. In paragraph one of the plea agreement, petitioner agreed that, under 18 U.S.C. 924(e), "[i]f [he] has at least 3 prior convictions for a violent felony or serious drug offense," his guilty plea would subject him to "a

[2] https://go.usa.gov/xmBNn (last visited May 1, 2019).

mandatory minimum term of imprisonment of fifteen (15) years and a maximum term of imprisonment of Life." Plea Agreement 3. He nevertheless knowingly and expressly "waive[d] the right to contest either [his] conviction or [his] sentence in any direct appeal," without reserving any right to challenge his potential classification as an armed career criminal. Id. at 9. Petitioner's acknowledgement of a possible enhanced sentence under the ACCA likewise means that enforcing petitioner's knowing and voluntary agreement to waive his right to appeal "in exchange for the concessions made by the Government," ibid., would not work a "miscarriage of justice."

2. Petitioner contends that his appeal falls "outside the scope" of his waiver because he is subject to "an illegal ACCA sentence." Pet. 6 (capitalization omitted). He argues (Pet. 8, 10-11) that an illegal sentence is one that is "greater than the statutory maximum," and that "he was sentenced in excess of the statutory maximum because he was wrongly deemed an armed career criminal." But that is an argument about the merits of a potential appeal, not an argument about the enforceability of the plea agreement in which petitioner agreed not to appeal his sentence in return for governmental concessions. Petitioner was aware of the possibility of an ACCA sentence when he signed the appeal waiver, and his suggestion that his waiver should not be enforced because he would prevail on the merits "is entirely circular." Worthen, 842 F.3d at 555 (holding that defendant's plea agreement precluded

an argument on appeal that his predicate offense for an 18 U.S.C. 924(j) conviction was not a crime of violence). Under petitioner's proposed approach, "the 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 * * * [otherwise] appeal waivers would lose all effect." Ibid.

Contrary to petitioner's contention (Pet. 6-13), no conflict exists in the courts of appeals on whether a defendant can waive a claim that he was wrongly classified as an armed career criminal. As petitioner notes (Pet. 6-9), 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." Guillen, 561 F.3d at 531; see, e.g., Hahn, 359 F.3d at 1327; Teeter, 257 F.3d at 25 n.10; pp. 8-9, supra. The courts of appeals, however, have generally recognized that challenges to ACCA enhancements do not fall within this exception. See Slusser v. United States, 895 F.3d 437, 440 (6th Cir. 2018), cert. denied, 139 S. Ct. 1291 (2019) (appeal waiver precluded collateral attack on ACCA classification); United States v. Carson, 855 F.3d 828, 830-831 (7th Cir.) (per curiam) (challenge to ACCA classification did not qualify under that circuit's 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); United States

v. Sampson, 684 Fed. Appx. 177, 182 (3d Cir.), cert. denied, 137 S. Ct. 2147 (2017) (enforcement of appeal waiver against a defendant's ACCA challenge "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 a challenge to a career offender classification under the Sentencing Guidelines).[3]

3. In any event, this case would be an unsuitable vehicle for resolving the question presented, because the district court correctly found that petitioner's prior conviction for assault with intent to kill under South Carolina law qualified as a "violent felony" under the ACCA's elements clause. To qualify as a violent felony under that clause, a crime must have "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). This Court has explained that "physical force" means "force capable of

[3] Although not cited by petitioner, in DeRoo v. United States, 223 F.3d 919 (2000), 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." Id. at 923, 926. But DeRoo contains no indication that the defendant there, like petitioner here, expressly acknowledged the possibility of the enhancement in both the plea agreement and colloquy. 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 892, would necessarily apply it outside the context of a sentencing error so plain as to require sua sponte correction even when the defendant did not raise it on appeal, see DeRoo, 223 F.3d at 926-927. Petitioner does not claim otherwise.

causing physical pain or injury to another person." Stokeling v. United States, 139 S. Ct. 544, 553 (2019) (citation omitted). The South Carolina Supreme Court has defined the elements of assault with intent to kill as: "(1) an unlawful attempt; (2) to commit a violent injury; (3) to the person of another; (4) with malicious intent; and (5) accompanied by the present ability to complete the act." State v. Burton, 589 S.E.2d 6, 8-9 (2003) (citation omitted). Given that attempted violence is an element of South Carolina assault with intent to kill, a conviction under that law will always include, as an element, the "attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i).

Petitioner argued below that assault with intent to kill did not constitute a violent felony because the Supreme Court of South Carolina has held that the elements of assault with intent to kill can be satisfied by placing a person in fear of bodily harm, for example, by pointing a toy gun at someone or withholding life-saving medication. Pet. C.A. Br. 15-16 (citing State v. Sutton, 532 S.E.2d 283, 285-286 (S.C. 2000)). But intentionally placing a person in fear of bodily harm requires at least the threatened use of "force capable of causing physical pain or injury," Stokeling, 139 S. Ct. at 553, even if the perpetrator does not have a present ability to bring about the threatened harm. See United States v. Doctor, 842 F.3d 306, 309 (4th Cir. 2016) ("There is no meaningful difference between a victim feeling a threat of

bodily harm and feeling a threat of physical pain or injury."), cert. denied, 137 S. Ct. 1831 (2017). And that remains true even if the threatened harm would be accomplished through indirect means. See United States v. Castleman, 572 U.S. 157, 171 (2014) (holding in construing related definition of "physical force" that it "does not matter" that "the harm occurs indirectly [e.g., by poisoning], rather than directly (as with a kick or punch)"). Petitioner would therefore not be entitled to relief in this case even in the absence of the appeal waiver.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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