No. 19-6087

IN THE SUPREME COURT OF THE UNITED STATES

ATIF BABAR MALIK, 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 dismissed petitioner's appeal of his convictions under the Travel Act, 18 U.S.C. 1952 (2012), where, as part of a plea agreement, petitioner knowingly and voluntarily waived his right to appeal those convictions.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Md.):

United States v. Atif Babar Malik, No. 16-cr-324 (Sept. 19, 2018)

United States Court of Appeals (4th Cir.):

United States v. Atif Babar Malik, No. 18-4688 (June 20, 2019)

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OPINION BELOW

The order of the court of appeals (Pet. App. A1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2019. The petition for a writ of certiorari was filed on September 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of

conspiring to violate the Anti-Kickback Act and the Travel Act, in violation of 18 U.S.C. 371; receiving unlawful remuneration, in violation of the Anti-Kickback Act, 42 U.S.C. 1320a-7b (2012); causing the use of interstate facilities with the intent to distribute the proceeds of unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952 (2012); defrauding a healthcare benefits program, in violation of 18 U.S.C. 1347; and making false statements relating to healthcare matters, in violation of 18 U.S.C. 1035(a). Judgment 1-2. Petitioner subsequently pleaded guilty to conspiring to defraud the United States, in violation of 18 U.S.C. 371. Ibid. The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals dismissed petitioner's appeal. Pet. App. A1.

1. Petitioner was a physician specializing in pain management who practiced in New Jersey and Maryland. Pet. App. A2, at 14. During 2011 and 2012, he received over $240,000 in kickbacks from a New Jersey medical laboratory to which he agreed to refer all urine toxicology tests ordered by his practice. Id. at 15-16. In addition, petitioner also conspired with several other people to defraud the Internal Revenue Service (IRS) by underreporting his practice's income. Id. at 16-23. Over a four-year period, petitioner fraudulently underreported his taxable income by more than $3,300,000. Id. at 23.

A grand jury in the District of Maryland charged petitioner, "a resident of both New Jersey and Maryland," with one count of conspiring to violate the Anti-Kickback Act and the Travel Act, in violation of 18 U.S.C. 371; 12 counts of receiving unlawful remuneration, in violation of the Anti-Kickback Act, 42 U.S.C. 1320a-7b(b)(1)(A); four counts of causing the use of interstate facilities with the intent to distribute the proceeds of unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952(a)(1) and (3); one count of conspiring to defraud the United States by impeding the lawful functions of the IRS, in violation of 18 U.S.C. 371; six counts of healthcare fraud, in violation of 18 U.S.C. 1347; and three counts of making false statements relating to healthcare matters, in violation of 18 U.S.C. 1035(a)(1) and (2). Superseding Indictment 1-38. As to the four Travel Act counts, the indictment alleged that petitioner caused others to use facilities in interstate commerce, including the mail, email, and cellphone transmissions, with the intent to distribute the proceeds of "commercial bribery in violation of the New Jersey Commercial Bribery Statute (N.J. Stat. Ann. § 2C:21-10)." Id. at 22-23.

Before the district court, petitioner moved to dismiss all of the charges. Pet. App. A3, at 2. With respect to the Travel Act counts, petitioner argued that the underlying New Jersey bribery statute did not apply to him because, when he ordered the toxicology tests in question, he was practicing in Maryland. Id.

at 2-3. The court denied petitioner's motion to dismiss, but severed the tax-conspiracy count for a separate trial. Id. at 3. During the trial on the non-tax counts, the government dismissed one of the four Travel Act counts. Ibid. The jury returned a guilty verdict on all of the remaining counts, including the three remaining Travel Act counts. Ibid.

Petitioner subsequently pleaded guilty to the tax-conspiracy count pursuant to a written agreement. Pet. App. A2, at 1-26. As part of the agreement, petitioner waived his right to appeal his convictions on all counts -- including the counts on which he was tried -- "on any ground whatsoever." Id. at 11. During the change-of-plea hearing, the district court advised petitioner that, pursuant to the plea agreement, he was agreeing to waive his right to appeal "as to the merits of all of the counts in which he was previously convicted at trial and to bring no challenge on appeal on any grounds as to the other trial convictions." Plea Tr. 14. Petitioner confirmed that he understood. Ibid. The court accepted petitioner's guilty plea as knowingly and voluntarily made. Id. at 16-17. It sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

2. Petitioner filed a notice of appeal. D. Ct. Doc. 425 (Sept. 23, 2018). The government moved to dismiss petitioner's appeal based on the appeal waiver in the plea agreement. See Pet. App. A3, at 1-24. In response, petitioner did not dispute that

his appeal waiver was knowing and voluntary. Instead, petitioner argued that the waiver was unenforceable as to his convictions under the Travel Act because "the district court never had jurisdiction over" those offenses. Pet. App. A5, at 1. In particular, petitioner argued that it was "legally impossible" for him to have violated the New Jersey commercial bribery statute as alleged in the indictment because, at the time he made the relevant referrals to the New Jersey lab, he was practicing in Maryland. Id. at 2. The court of appeals granted the government's motion and dismissed petitioner's appeal in an unpublished order, finding "[u]pon review of the record" that petitioner "knowingly and voluntarily waived his right to appeal," and that the issues he sought to raise on appeal fell "squarely within the compass of the valid and enforceable appeal waiver." Pet. App. A1, at 1-2.

ARGUMENT

Petitioner contends (Pet. 9-13) that the court of appeals erred in enforcing his appeal waiver, on the theory that his argument that the indictment alleged conduct outside the scope of the Travel Act is jurisdictional (and therefore not waivable). But that contention is foreclosed by this Court's decision in United States v. Cotton, 535 U.S. 625, 631 (2002). The court of appeals correctly rejected it, and its unpublished decision does not warrant further review. This Court has denied review of other petitions that, like this one, allege a conflict over the meaning of this Court's decision in Cotton. See Masilotti v. United

States, 574 U.S. 1078 (2015) (No. 14-565); Scruggs v. United States, 571 U.S. 889 (2013) (No. 13-206); Stewart v. United States, 538 U.S. 908 (2003) (No. 02-1165). The same result is warranted here. And even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for such review.

1. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (upholding plea agreement's waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389-392 (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 recognized that a defendant's voluntary and knowing waiver in a plea agreement of the right to appeal is enforceable.*

* 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);

Nothing suggests that the right to appeal in a criminal case, which is "purely a creature of statute," Abney v. United States, 431 U.S. 651, 656 (1977), is exempt from normal waiver doctrines. As the courts of appeals have recognized, appeal waivers benefit a defendant by providing consideration for concessions by the government in plea negotiations. And they benefit the government and the courts by enhancing the finality of judgments and sentences and by 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); United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001).

The court of appeals correctly enforced petitioner's appeal waiver here. Because plea agreements are contractual in nature, 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), cert. denied, 555 U.S. 891 (2008). In this case, petitioner's plea agreement included a waiver of "all right, pursuant to 28 U.S.C. § 1291 or otherwise, to appeal [petitioner's]

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. 1051 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

conviction as to * * * any of the counts on which [petitioner] was convicted at trial * * * on any ground whatsoever." Pet. App. A2, at 11. The court of appeals correctly determined that petitioner's challenge on appeal to the Travel Act counts on which he was convicted at trial "falls squarely within the compass" of that waiver. Pet. App. A1, at 2.

Petitioner argues (Pet. 9-10) that the challenge to his Travel Act convictions cannot be waived, on the theory that an assertion that the "alleged conduct falls outside the scope of the charged statute" is a non-waivable challenge to the jurisdiction of the district court. Pet. 9 (capitalization altered). But this Court "some time ago departed from [the] view that indictment defects are 'jurisdictional.'" Cotton, 535 U.S. at 631; see Lamar v. United States, 240 U.S. 60, 64-65 (1916); United States v. Williams, 341 U.S. 58, 66 (1951). As the Court explained in Cotton, the term "'jurisdiction' means today * * * 'the courts' statutory or constitutional power to adjudicate the case.'" Cotton, 535 U.S. at 630 (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998)), and "defects in an indictment do not deprive a court of its power to adjudicate a case." Ibid.

Petitioner suggests (Pet. 9-10) a distinction between "indictment omissions" (which he acknowledges are not jurisdictional) and other defects in an indictment (which he argues may be jurisdictional). Pet. 9. That purported distinction does not withstand scrutiny. In Cotton, this Court noted that, in Lamar

v. United States, supra, it had "rejected the claim that 'the court had no jurisdiction because the indictment does not charge a crime against the United States.'" 535 U.S. at 630 (quoting Lamar, 240 U.S. at 64). In Lamar, Justice Holmes had "explained that a district court 'has jurisdiction of all crimes cognizable under the authority of the United States . . . [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case.'" Cotton, 535 U.S. at 630-631 (quoting Lamar, 240 U.S. at 65) (brackets in original).

Similarly, in United States v. Williams, supra, the Court "held that a ruling 'that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.'" Cotton, 535 U.S. at 631 (quoting Williams, 341 U.S. at 66). And the Court has more recently reiterated in the civil context that "to ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question," not a jurisdictional question. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 254 (2010). Accordingly, petitioner's challenge to his convictions based on the alleged scope of the Travel Act, or the underlying New Jersey law on which those counts were based, does not implicate the jurisdiction of the district court. It is therefore waivable and foreclosed by the broad terms of the appeal waiver.

2. Petitioner asserts (Pet. 10-13) that the Court should grant review to resolve a circuit conflict as to the scope of this

Court's holding in Cotton. Any disagreement in the courts of appeals, however, is narrow and does not warrant the Court's review in this case.

The vast majority of the courts of appeals to have considered the issue have properly read Cotton as broadly holding that any defects in an indictment "do not deprive a court of its power to adjudicate a case," Cotton, 535 U.S. at 630, without distinguishing between whether the alleged defect was an omission or some other failure to properly state a claim. See United States v. George, 676 F.3d 249, 259-260 (1st Cir. 2012); United States v. Rubin, 743 F.3d 31, 36-38 (2d Cir. 2014); United States v. Scruggs, 714 F.3d 258, 262-264 (5th Cir.), cert. denied, 571 U.S. 889 (2013); VanWinkle v. United States, 645 F.3d 365, 368-369 (6th Cir. 2011); United States v. Velasco-Medina, 305 F.3d 839, 845-846 (9th Cir. 2002), cert. denied, 540 U.S. 1210 (2004); United States v. De Vaughan, 694 F.3d 1141, 1147 (10th Cir. 2012), cert. denied, 569 U.S. 976 (2013); United States v. Delgado-Garcia, 374 F.3d 1337, 1341-1342 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005); cf. Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999) ("Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231," and that is "the beginning and the end of the 'jurisdictional' inquiry.").

Although petitioner characterizes the alleged defects in some of those cases as omissions, the courts of appeals' decisions do not rest on that distinction and several expressly reject it. See

Rubin, 743 F.3d at 36 (rejecting the argument that "Cotton stands for the limited proposition that indictment omissions, such as a missing element or an inadequate factual basis, do not deprive a district court of subject-matter jurisdiction"); Scruggs, 714 F.3d at 264 (declining to "limit the Supreme Court's holding [in Cotton] to defects based on omissions"); De Vaughn, 694 F.3d at 1158 (refusing to distinguish between "an 'omission in the indictment,'" and "an allegation the indictment charged conduct 'outside the sweep of the charging statute'") (citation omitted).

In United States v. Peter, 310 F.3d 709 (2002) (per curiam), the Eleventh Circuit determined that a claim that -- in light of a subsequent decision of this Court -- an indictment failed to charge an offense was a "jurisdictional claim" cognizable in a petition for a writ of coram nobis. Id. at 713 (citation omitted). The government had argued that the defendant was not entitled to relief because he had procedurally defaulted and because he did not meet the standards for excusing that procedural default. Id. at 711. The court disagreed, concluding that because "[t]he district court had no jurisdiction to accept a plea to conduct that does not constitute" a federal offense, "the doctrine of procedural default therefore d[id] not bar" the claim. Id. at 715. The Eleventh Circuit distinguished this Court's decision in Cotton on the ground that Cotton did not include a claim "that the indictment consisted only of specific conduct that, as a matter of law, was outside the sweep of the charging statute." Id. at 714.

And on that basis, the court concluded that it was bound by pre-Cotton circuit precedent concerning the jurisdictional nature of such a claim. Id. at 713-715.

As the Tenth Circuit has observed, however, the Eleventh Circuit's reasoning in Peter is inconsistent with this Court's reasoning in Cotton and "overlooks the cases Cotton relied on for its holding -- Lamar and Williams." De Vaughan, 694 F.3d at 1148. And every court of appeals to subsequently consider the issue has disagreed with the Eleventh Circuit's narrow reading of Cotton. See ibid. ("We are not persuaded by Peter's overly narrow reading of Cotton."); Scruggs, 714 F.3d at 264 ("We join the Tenth Circuit in holding that Peter was wrongly decided and cannot be squared with Cotton."); Rubin, 743 F.3d at 36 (rejecting the argument "that Cotton stands for the limited proposition that indictment omissions, such as a missing element or an inadequate factual basis, do not deprive a district court of subject-matter jurisdiction"); United States v. Lowe, 512 Fed. Appx. 628, 630 (7th Cir. 2013) ("A claim that the indictment is defective because it does not state an offense is nonjurisdictional.") (citing De Vaughn approvingly and Peter disapprovingly).

Furthermore, the Eleventh Circuit itself, in United States v. Brown, 752 F.3d 1344 (2014), described its holding in Peter as limited to the "specific and narrow circumstances" in which the alleged conduct "undoubtedly fell outside the sweep of the [charged] statute" -- as in Peter itself, which relied on an

intervening decision of this Court -- such that the indictment cannot be said to have even "invoke[d] the district court's statutory authority under 18 U.S.C. § 3231 over 'offenses against the laws of the United States.'" Id. at 1353 (citation omitted). In light of Brown and the consistent holdings of other courts of appeals, any conflict regarding this Court's holding in Cotton has become increasingly narrow and does not warrant the Court's review in this case.

3. Finally, even if the Court were inclined to reexamine whether certain defects in an indictment are jurisdictional, this case would be not be a suitable vehicle for doing so. As an initial matter, the question was not addressed in the court of appeals' unpublished decision. Although the court of appeals enforced petitioner's appeal waiver, the court did not discuss the non-jurisdictional nature of petitioner's challenge to his Travel Act convictions. Pet. App. A1, at 1-2. It did not express any view on the Eleventh Circuit's decisions in Peter or Brown or the scope of this Court's holding in Cotton. Nor does the Fourth Circuit appeared to have done so in any prior decision. Ibid.

In addition, resolution of the question presented would not likely affect the outcome of this case. Even under the narrow reading of Cotton advocated by petitioner and articulated in Peter and Brown, petitioner does not appear to raise a "jurisdictional" challenge to the indictment. As explained in Brown, the Eleventh Circuit's decision in Peter only applies where the conduct in the

indictment "undoubtedly" falls outside the scope of the charged statute. Brown, 752 F.3d at 1353; see Peter, 310 F.3d at 715 (noting that "the Government affirmatively alleged a specific course of conduct that [wa]s outside the reach of the mail fraud statute"). No situation akin to Peter -- which involved a definitive construction of a federal criminal statute by this Court -- exists here.

The superseding indictment alleged that petitioner violated the Travel Act by causing others

> to travel in interstate commerce, and * * * to use facilities in interstate commerce * * * with the intent to distribute the proceeds of an unlawful activity, that is, commercial bribery in violation of the New Jersey Commercial Bribery Statute (N.J. Stat. Ann. § 2C:21-10), and to promote, manage, establish, carry on and facilitate the promotion, management, establishment, or carrying on of the aforementioned unlawful activity, and thereafter did perform and attempt to perform an act to distribute the proceeds of, and to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of that unlawful activity.

Superseding Indictment 22. That allegation relies upon a "valid federal statute in the United States Code" and "tracks the [relevant] statutory language" of the federal statute "in its entirety." Brown, 752 F.3d at 1353; see 18 U.S.C. 1952(a)(1) and (3).

Petitioner argues (Pet. 5-6) that the district court lacked jurisdiction because when he accepted the bribes in question, he was practicing in Maryland and therefore was purportedly exempt from his New Jersey duty of fidelity. But the superseding

indictment alleges that petitioner "was a resident of both New Jersey and Maryland," Superseding Indictment 1, and that he practiced "from offices located in central New Jersey * * * [and] Maryland," id. at 2. The business that was alleged to have accepted the bribes was "a Maryland limited liability company with its principal place of business" in Maryland, id. at 1, and petitioner was alleged to have "typically" practiced in Maryland for that business, id. at 2. But the superseding indictment does not allege that the unlawful bribes were exclusively solicited or accepted in Maryland and, indeed, the employee who was alleged to have used the interstate facilities to distribute the unlawful proceeds was himself a "resident of New Jersey." Id. at 3. Thus, even if petitioner is correct that the New Jersey statute only proscribes bribes solicited or accepted while in the State of New Jersey, the conduct alleged in the superseding indictment would not fall outside the scope of that statute -- much less "undoubtedly" so -- and therefore petitioner's claim would not be jurisdictional even under the Eleventh Circuit's view.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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