No. 20-6668

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ZAMARRIPA, 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

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeal based on the appeal waiver in his plea agreement.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Zamarripa, No. 19-cr-349 (Jan. 22, 2020)

United States Court of Appeals (5th Cir.):

United States v. Zamarripa, No. 19-51183 (July 23, 2020)

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OPINION BELOW

The order of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is available at 2020 WL 7587154.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2020. The petition for a writ of certiorari was filed on December 16, 2020. 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 on ten counts of cyberstalking, in violation of 18 U.S.C. 2261A(2)(B), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Judgment 1. The district court sentenced petitioner to 460 months of imprisonment, to be followed by lifetime supervised release. Judgment 2-3. The court of appeals dismissed petitioner's appeal. Pet. App. A1.

1. Over the course of several years, petitioner downloaded photographs of at least 14 adult women and one minor female who lived in his community of Kerrville, Texas, from social-media websites Facebook and Twitter. Plea Agreement 4-5; Presentence Investigation Report (PSR) ¶¶ 4-5. Each of the adult women and the mother of the minor were acquaintances of petitioner; some were public figures in the small community. PSR ¶ 5. Petitioner had someone else alter their photographs by superimposing the women's faces on photographs of other women engaged in explicit, and sometimes violent, sexual activities. Plea Agreement 4-5; PSR ¶¶ 5-6. Petitioner then uploaded the modified images to several pornographic websites. Ibid.

After law enforcement discovered petitioner's activities, petitioner admitted that he had been engaged in the conduct for about five years. Plea Agreement 5. He explained that it began when the husband of one of his victims fired him, causing him to

lash out at his former employer's wife. PSR ¶ 7. He stated that each of his victims had disrespected or rejected him in some way. Ibid.; Plea Agreement 5. He admitted that he had obsessive sexual fantasies about some of his victims, and that he acted out of revenge toward others. Plea Agreement 5; PSR ¶ 7.

In the course of the investigation, authorities searched petitioner's laptop and discovered folders labeled "Y" and "T" -- which petitioner acknowledged stood for "young" or "youth" and "teen." PSR ¶ 10. The "Y" folder contained 50 images (some duplicates) depicting children in inappropriate positions or provocative clothing. Ibid. Four of the images clearly depicted child pornography involving adult men and prepubescent female children. Ibid.; Plea Agreement 6-7.

2. A grand jury charged petitioner with ten counts of cyberstalking, in violation of 18 U.S.C. 2261A(2)(B). Indictment 1-7. He later pleaded guilty, pursuant to a written plea agreement, to a superseding information charging him with ten counts of cyberstalking, in violation of 18 U.S.C. 2261A(2)(B), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Superseding Information 1-8; Pet. App. C1-C11; Plea Agreement 1-19.

Petitioner's plea agreement contained an appeal waiver, which was laid out under the heading "Defendant's Waiver of Right to Appeal or Challenge Sentence." Plea Agreement 9. Under its express terms, by signing the plea agreement, petitioner agreed

that he was "aware that the Court may impose a sentence up to the maximum allowed by statute for the offense(s) to which [he] enter[ed] a plea of guilty." Ibid. He further agreed that, by entering the plea agreement, he "voluntarily and knowingly waive[d] the right to appeal the sentence on any ground, including but not limited to any challenges to the determination of any period of confinement, monetary penalty or obligation, term of supervision and conditions thereof, and including any appeal right conferred by 18 U.S.C. §3742." Id. at 9-10. And he acknowledged that he "underst[ood] that [he] c[ould]not challenge the sentence imposed by the District Court, even if it differ[ed] substantially from any sentencing range estimated by [his] attorney, the attorney for the Government, or the Probation Officer," except "on grounds of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension." Id. at 10.

The plea agreement was signed by petitioner personally, by his counsel, and by counsel for the government. Plea Agreement 19. Petitioner also initialed each page. Id. at 1-19. And he agreed that the written agreement "set[] forth the entirety of the agreement" between the parties and could not "be modified except in writing" through a modification or addendum also "signed by all parties." Id. at 18-19.

At the plea hearing, the district court counseled petitioner that he was waiving various rights by pleading guilty. Pet. App.

C6-C7. With respect to petitioner's appellate rights, the court explained:

> And you also would be giving up, generally, virtually all of your appellate -- direct and habeas corpus appellate rights, although you would retain some limited appellate rights if it were found -- of any professional misconduct by the lawyers or if the Court did something it wasn't supposed to do. But assuming we do our jobs right, then you are giving up virtually all of your rights.

Id. at C7. Petitioner stated that he understood these rights, and he pleaded guilty. Id. at C7-C8.

3. Before sentencing, the Probation Office prepared a presentence report that calculated a sentencing range of 63 to 78 months under the advisory Sentencing Guidelines. PSR ¶ 120. Because the statutory maximum sentence on each cyberstalking count was 60 months of imprisonment, however, the advisory Guidelines range on those counts was capped at 60 months. Ibid.

At sentencing, the district court noted that each of the cyberstalking counts "carries a five-year maximum prison term" and thus "the guidelines come out to five years," while the child pornography count "carries with it a maximum of 20 years, with the guidelines coming out to 63 months." Sent. Tr. 2-3. It further observed that "there will be an issue of concurrent or consecutive [sentences] on these matters." Id. at 3.

After hearing from the parties and two of petitioner's victims, the district court imposed sentences of 40 months on each cyberstalking count and 60 months on the child pornography count, all to run consecutively, for a total of 460 months. Sent. Tr.

40-41. The court noted that "we are in an unprecedented time" in which technology allows people to "alter where a person was, what events they attended, what they said, what they looked like and what their actions are." Id. at 35. The court observed that such technology gives criminals power to "alter the course of history, from political elections, to who has what jobs, to children or adults who are no longer accepted in certain communities because their reputation has been smeared, because everyone's perception of them is built on actions that they never did." Ibid. And it explained that petitioner's case was "just the tip of the iceberg," and that the sentence it imposed was needed to serve as a deterrent to others who might engage in similar behavior. Id. at 35-36. Petitioner's counsel unsuccessfully objected to the sentence on the basis that it was outside the guidelines range. Id. at 41-42.

4. Petitioner appealed. In his opening brief, petitioner argued that the district court (1) incorrectly believed the sentence imposed was a downward variance; (2) plainly erred by relying on victim impact statements that were not provided to petitioner before sentencing; and (3) imposed a substantively unreasonable sentence. Pet. C.A. Br. 23-48. He argued that the appeal waiver in his plea agreement was unenforceable because the district court's "narrow description of the appeal waiver" during the plea hearing "rendered [his] broad appeal waiver unknowing." Id. at 49. The government moved to dismiss the appeal, explaining that the district court's statements at the plea hearing did not

undermine petitioner's knowing and voluntary agreement to the clear written waiver. Gov't C.A. Mot. to Dismiss 5-9.

The court of appeals granted the government's motion in an unpublished, per curiam order. Pet App. A1. The court subsequently denied petitioner's request for reconsideration in the same manner. Id. at B1.

ARGUMENT

Petitioner argues that the court of appeals erred (Pet. 6-13) in enforcing the appeal waiver contained in his written plea agreement, on the theory that he did not knowingly and voluntarily agree to the waiver. The court of appeals correctly rejected that fact-bound claim. The court's unpublished, two-sentence per curiam order does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be an unsuitable vehicle for addressing the question presented because petitioner's appeal lacked merit in any event. Further review is unwarranted.

1. 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 recognized 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 explained, 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.

[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).

To ensure that an appeal waiver, like other plea-agreement provisions, are knowing and voluntary, district courts have an obligation during a plea colloquy to "inform the defendant of, and determine that the defendant understands" "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N). Courts of appeals, including the court below, have generally concluded that a court's uncorrected and unobjected-to mischaracterization of the terms of an appeal waiver during a plea colloquy can be "so misleading" as to preclude a finding that the defendant's acceptance of the waiver was "knowing and voluntary." United States v. Padilla-Colon, 578 F.3d 23, 29 (1st Cir. 2009); see, e.g., United States v. Manigan, 592 F.3d 621, 627-628 (4th Cir. 2010); United States v. Whavers, 166 Fed. Appx. 112, 113-114 (5th Cir. 2006) (per curiam); United States v. Ready, 82 F.3d 551, 557-558 (2d Cir. 1996). Those courts have reasoned that "[w]hen a district court has advised a defendant that, contrary to the plea agreement, he is entitled to appeal his sentence, the defendant can hardly be said to have knowingly waived his right of appeal." Manigan, 592 F.3d at 628.

The court of appeals correctly rejected petitioner's contention that his particular appeal waiver was unknowing in the circumstances of this case. In the written plea agreement, with the advice of counsel, petitioner unambiguously "waive[d] the right to appeal [his] sentence on any ground, including but not

limited to any challenges to the determination of any period of confinement * * * and including any appeal right conferred by 18 U.S.C. §3742," except for challenges "on grounds of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension." Plea Agreement 9-10. Petitioner further acknowledged that the district court could "impose a sentence up to the maximum allowed by statute for the offense(s)" to which he pleaded guilty. Id. at 9. He agreed that the terms of the plea agreement could not be modified "except in writing and any modification or addendum must be signed by all parties." Id. at 19. He personally signed that agreement and initialed every page. Id. at 1-19. And the district court correctly told petitioner at the plea hearing that he was "giving up, generally, virtually all" of his appellate rights. Pet. App. C7.

Petitioner contends (Pet. 11-12), however, that his agreement to the waiver was rendered unknowing by the district court's suggestion that he retained a "limited" right to appeal "if the Court did something it wasn't supposed to do." Pet. App. C7. That contention lacks merit. The court may have been referring to the court of appeals' precedent holding that a valid appeal waiver does not prevent a defendant from challenging a "sentence exceeding the statutory maximum." United States v. Barnes, 953 F.3d 383, 389 (5th Cir.), cert. denied, 141 S. Ct. 438 (2020). It may also have been referring, perhaps inartfully, to the limited exceptions to the appeal waiver as specified in the written plea agreement.

But the district court's statement could not reasonably have been construed, as petitioner suggests (Pet. 12), to mean that petitioner could assert on appeal any "mistake[]" by the court during sentencing.

That interpretation would conflict with the court's contemporaneous statements that petitioner was waiving "virtually all" of his appellate rights and retained only "limited" rights. Petitioner does not contend that he misunderstood the written waiver that he signed and initialed. And if anyone at the hearing -- the government, petitioner's counsel, or petitioner -- had in fact understood the district court's description to be inconsistent with the explicit written terms of the waiver, that person could have asked for clarification. The absence of any such request suggests that, in context at the hearing, the issue was sufficiently clear. At all event, any ambiguity in the court's statement is not "so misleading," Padilla-Colon, 578 F.3d at 29, as to render petitioner's unambiguous, written, signed, and initialed appeal waiver unknowing and unenforceable against the run-of-the-mill sentencing challenges that petitioner advanced on appeal.

2. Petitioner also errs in contending (Pet. 6-10) that the court of appeals' order creates a circuit conflict that warrants this Court's review. To the contrary, consistent with petitioner's argument here, the court of appeals below has repeatedly recognized that a district court's mischaracterization of an appeal waiver in

a plea colloquy can render the waiver unknowing and therefore unenforceable. See United States v. Carpintero, 411 Fed. Appx. 693, 694 (5th Cir. 2011) (per curiam); United States v. Rodriguez-Perez, 184 Fed. Appx. 451, 453 (5th Cir. 2006) (per curiam); Whavers, 166 Fed. Appx. at 114; United States v. Hernandez Flores, 155 Fed. Appx. 745, 746 (5th Cir. 2005) (per curiam). Petitioner cited a number of those cases in his brief to the court of appeals. Pet. C.A. Br. 49-50. The court's two-sentence, unpublished order here neither rejected that unanimous -- albeit unpublished -- authority, nor is it inconsistent with it. The order simply reflects a case-specific finding that petitioner's plea was, in fact, knowing and voluntary in light of all of the circumstances of his particular case.

Petitioner argues (Pet. 7-8) that the court of appeals' decision also conflicts with a separate line of cases "holding that 'a statement made by the sentencing court during the colloquy can create ambiguity where none exists in the plain text of the plea agreement,'" which must be construed against the government. Pet. 7 (quoting United States v. Saferstein, 673 F.3d 237, 243 (3d Cir. 2012)). It is far from clear that those cases articulate a distinct theory, separate and apart from the requirement that the district court describe a waiver during a colloquy, for declining to enforce a waiver of appellate rights. See Saferstein, 673 F.3d at 243 ("[A] plea colloquy that fails to meet the requirements of Rule 11(b)(1)(N) can prevent a defendant from knowingly and

voluntarily waiving his appellate rights."); Pet. 8-9 (citing some of the same cases for both theories). But even if they did, petitioner did not present them as such below; the court of appeals did not reject them; and its unpublished order cannot create a circuit conflict with them that would warrant this Court's review.

3. In any event, this case would be a poor vehicle for addressing the question presented, because even if petitioner's claims were not barred by his plea agreement, they lack merit.

a. Petitioner's first argument in his dismissed appeal was that the district court "incorrectly believed a 460-month sentence was a downward variance from the Guidelines range of 63 to 78 months' imprisonment." Pet. C.A. Br. 23. To support that contention, petitioner relied primarily on the statement of reasons attached to his judgment, in which the court checked boxes saying the sentence was "below the guideline range" and was based on a "defense motion for a variance to which the government did not object." Statement of Reasons 3. The court was incorrect in checking those boxes. Although the 40 months of imprisonment the court imposed for each cyberstalking count was below the advisory Guidelines range for those individual counts, the aggregate sentence of 460 months was an upward variance from the overall advisory Guidelines range of 63 to 78 months. See PSR ¶ 120; Sentencing Guidelines § 5G1.2 (addressing sentencing on multiple counts). That clerical error on the statements of reasons, however, does not indicate that the court misunderstood the

Guidelines. Cf. United States v. Rivas-Estrada, 906 F.3d 346, 350 (5th Cir. 2018) ("We have repeatedly held that if a written judgment clashes with the oral pronouncement, the oral pronouncement controls."); United States v. Martinez, 250 F.3d 941, 942 (5th Cir. 2001) (similar).

At sentencing, the district court acknowledged that, because of the statutory-maximum sentences for each offense, "the guidelines come out to five years" on the cyberstalking counts and to "63 months" on the child pornography count. Sent. Tr. 3. At the same time, the court correctly observed it was still within its authority to impose the permissible sentences "concurrent[ly] or consecutive[ly]." Ibid.; see ibid. (government noting that "the Court is well within the statutory bounds to stack the sentence for each of those counts because, certainly, each of these victims will endure the impact and the effect and the harm for the rest of their life"). There is no indication that the district judge -- who had been on the federal bench for 25 years -- was under the impression that, when he decided to run the sentences consecutively to deter others from engaging in reprehensible conduct like petitioner's, the resulting aggregate 460-month sentence was below the Guidelines range. Indeed, when petitioner's counsel objected that the sentence "based on it being outside the guidelines," Sent. Tr. 41-42, the district court noted the objection without any suggestion that the court believed it was based on a mistaken premise. And the error in the statement of

reasons alone provides no basis for vacating petitioner's lawful sentence. See United States v. Maturino, 887 F.3d 716, 725 n.44 (5th Cir.) (explaining that the statement of reasons' "inadvertent mention of a downward variance was but a trifling misstep, and a harmless one at that"), cert. denied, 139 S. Ct. 240 (2018).

b. Petitioner's second argument on appeal was that the district court erred "by relying on victim impact statements not provided to or summarized for [petitioner] before sentencing." Pet. C.A. Br. 29. Petitioner, however, failed to object to the introduction of the victims' statements before the district court. And although some courts have discerned an "implicit" right in Federal Rule of Criminal Procedure 32 to review before sentencing any information relied on, United States v. Meeker, 411 F.3d 736, 741 (6th Cir. 2005), petitioner cannot meet the burden of demonstrating plain error on that ground here. See Fed. R. Crim. P. 52(b); Puckett v. United States, 556 U.S. 129, 135 (2009). Indeed, the same decisions on which petitioner relied below make clear that such an error is not prejudicial -- as here -- where essentially the same information is contained in the presentence report, United States v. Berndt, 127 F.3d 251, 260 (2d Cir. 1997), or where there is "little [the defendant] could have done to effectively rebut the heart-wrenching descriptions of his victims' emotional distress that were recounted in many of the letters," Meeker, 411 F.3d at 742.

Here, the presentence report stated that each victim "described the emotional distress to include anxiety, sleeplessness, fear and humiliation as a result of [petitioner's] actions" and that "several of the women have suffered hardship in their businesses and relationships, causing additional emotional distress." PSR ¶ 5. The report observed that "[s]ome of the victims stated they will not be present in court because they are afraid [petitioner] will seek retribution and further victimize them." PSR ¶ 14. And it quoted an email from one victim discussing her fear of being targeted "when [petitioner] gets out" and explaining how "mortifying" it was that her name might somehow "get out there." Ibid. Those statements provided petitioner with notice of the substance of the victim impact statements introduced at sentencing. And, even if his appeal were allowed to proceed, he could not show that advance notice of these statements would have resulted in a different outcome.

c. Petitioner's final argument on appeal was that his 460-month sentence was substantively unreasonable. A court reviewing an upward variance, however, "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Gall v. United States, 552 U.S. 38, 51 (2007). The court of appeals "defer[s] to both upward and downward variances so long as the district court provides an explanation tailored to the statutory sentencing factors that is not outside the bounds of reasonableness." United States v.

Hoffman, 901 F.3d 523, 560 (5th Cir. 2018), cert. denied, 139 S. Ct. 2615 (2019). The district court's sentence in this case was not "outside the bounds of reasonableness." Ibid. In addition to the minor victims involved in the child pornography charge, petitioner's reprehensible conduct had a direct and significant adverse effect on the lives of at least 15 women. The district court explained that its sentence was necessary based on the seriousness of the offense and the need to provide adequate deterrence. Sent. Tr. 35-36; see 18 U.S.C. 3553(a)(2)(A)-(B). Petitioner provides no sound basis for disturbing its judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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