No. 21-5489

IN THE SUPREME COURT OF THE UNITED STATES

JERRIS M. BLANKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

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

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner leave to file untimely pretrial motions when petitioner had expressly waived the right to file such motions, after being informed that the waiver would apply in the circumstance in which petitioner sought to avoid it.

2. Whether the district court abused its discretion by denying petitioner's motion to limit the number of child-pornography images shown at trial without viewing the images.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

United States v. Blanks, No. 16-cr-271 (Aug. 1, 2019)

United States Court of Appeals (8th Cir.):

United States v. Blanks, No. 19-2042 (Feb. 1, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-5489

JERRIS M. BLANKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 985 F.3d 1070. The order of the district court (Pet. App. 9a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2021. A petition for rehearing was denied on March 22, 2021 (Pet. App. 21a). The petition for a writ of certiorari was filed on August 19, 2021. 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 Eastern District of Missouri, petitioner was convicted on one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1), and two counts of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Am. Judgment 1. He was sentenced to 130 months of imprisonment, to be followed by 15 years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. Law-enforcement officers in St. Louis, Missouri found child pornography on a computer, a compact disc, a cellphone, and online accounts belonging to petitioner. Pet. App. 2a. They recovered "more than 1,000 images of child pornography and child erotica and fourteen videos of child pornography." Ibid. "The internet search history on [petitioner's] cellphone indicated that he had also accessed online images of child pornography and child erotica." Ibid. In 2016, a grand jury indicted petitioner on one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1), and two counts of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Superseding Indictment.

Under the Federal Rules of Criminal Procedure, certain motions "must be raised by pretrial motion if the basis for the motion is then reasonably available." Fed. R. Crim. P. 12(b)(3). A district court may "set a deadline for the parties to make

pretrial motions," and a motion made after the deadline "is untimely," but the court may consider it "if the party shows good cause." Fed. R. Crim. P. 12(c)(1) and (3). In this case, the district court (after several extensions) set August 22, 2017 as the deadline for filing pretrial motions. Pet. App. 9a. Petitioner filed a motion to dismiss and multiple motions to suppress evidence before that date. Ibid.; 4/18/2018 Tr. 7.

In April 2018, petitioner and the government reached a plea agreement. Pet. App. 2a. In accord with that agreement, at a hearing before a magistrate judge, petitioner sought to withdraw his pending pretrial motions and to waive his right to file further motions. Id. at 2a, 9a-10a. The magistrate judge asked petitioner, "do you understand that if I accept your withdrawal of motions and waiver of motions that you will not have another opportunity to bring up pretrial motions in this case?" 4/18/2018 Tr. 5. Petitioner responded, "if the next judge was to for some reason deny our [plea] agreement, then where would that put us?" Ibid. The prosecutor interjected to clarify that the parties had "a non-binding plea agreement" and that the district judge was "free to either accept the recommendation or reject it." Id. at 5-6. The magistrate judge then made clear that, "if I'm accepting your withdrawal of motions and waiver of motions then you would not be able to come back before this court and bring up pretrial motions again." Id. at 6. The magistrate judge asked whether

petitioner still wanted to withdraw the motions, and petitioner confirmed that he did. Id. at 6-7.

At the end of the hearing, the magistrate judge stated that he was "going to accept [petitioner's] waiver of pretrial motions" and that he found "that that waiver is made knowingly and voluntarily." 4/18/2018 Tr. 7. The magistrate judge then entered an order stating that petitioner "appeared with counsel and acknowledged on the record his understanding of his right to file pretrial motions; his understanding that the time for filing pretrial motions has passed; and his agreement with the decision of counsel to withdraw the previously filed pretrial motions." Pet. App. 9a. The order granted the motion to withdraw the previously filed motions. Id. at 10a.

The district court later advised the parties that it would reject the plea agreement. Pet. App. 2a. Petitioner moved for leave to refile his pretrial motions, which the court denied. Ibid.

2. Under Federal Rule of Evidence 403, a court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ibid. Invoking that rule, petitioner moved to preclude the government from showing the jury the images and videos of child pornography recovered from petitioner. Pet. App. 6a. Petitioner

argued that the government should, at most, be permitted to show six images -- one from each of the devices and online accounts on which child pornography was found. Ibid.

The government, for its part, offered to show the jury "a small representative sample" of the child pornography recovered from petitioner: 42 of the more than 1000 images and none of the 14 videos. Pet. App. 6a, 8a. The district court "expressed its surprise" at the government's decision, observing that "ordinarily all the images are -- all the videos are shown." Id. at 7a. The court denied petitioner's motion and allowed the government to introduce 42 images, but did not specifically examine the particular images the government sought to introduce. Id. at 6a-7a.

Following a trial, the jury found petitioner guilty on all counts. Am. Judgment 1. The district court sentenced petitioner to 130 months of imprisonment, to be followed by 15 years of supervised release. Id. at 2-3.

3. The court of appeals affirmed. Pet. App. 1a-8a.

The court of appeals first rejected petitioner's contention that the district court abused its discretion by denying leave to file pretrial motions after the rejection of the plea agreement. Pet. App. 3a-5a. The court of appeals found the record "unambiguous" that "[t]he magistrate judge warned [petitioner] that the district court might reject the plea agreement and that, in those circumstances, [petitioner] would not be permitted to re-

file his pretrial motions." Id. at 4a. The court of appeals observed that petitioner "acknowledged that he understood that risk and decided to withdraw his motions and waive his right to re-file." Id. at 5a. The court rejected petitioner's contention that he had "good cause" for his failure to file his pretrial motions on time. Ibid. The court explained that petitioner "accepted the plea agreement rejection as a known risk at the time he executed the waiver" and that "the district court's rejection of the plea agreement * * * does not alone create good cause in light of his acceptance of that risk." Ibid.

The court of appeals also rejected petitioner's argument that the district court abused its discretion in denying petitioner's motion to limit the government's evidentiary presentation to only six images of child pornography. Pet. App. 6a-8a. The court of appeals explained that, "[a]lthough it might well have been a better practice to examine the images" that were admitted, the district court was not required to do so. Id. at 6a. And the court of appeals found that the images were not "unfairly prejudicial [or] needlessly cumulative." Id. at 7a. It observed that those images "helped * * * prove that [petitioner] had knowingly received and possessed child pornography on a variety of different devices and mediums, including his computer and cellphone, a CD, and the internet." Ibid. The court also noted that "the government and [district] court took steps to limit the images' prejudicial effect," such as warning prospective jurors

during voir dire, striking for cause prospective jurors who expressed concern about being able to view the images objectively, and introducing only 42 of the more than 1000 images and none of the 14 videos recovered from petitioner. Ibid.; see id. at 7a-8a.

ARGUMENT

Petitioner renews his contentions (Pet. 13-29) that the district court abused its discretion by denying him leave to file untimely pretrial motions and by denying his motion to limit the government's evidentiary presentation of the thousands of images of child pornography found in his possession to six images without examining the 42 images that the government sought to admit. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioner's fact-bound claims do not warrant any further review.

1. Federal Rule of Criminal Procedure 12 provides that certain defenses, objections, and requests -- specifically, those concerning "a defect in instituting the prosecution," "a defect in the indictment or information," "suppression of evidence," "severance of charges or defendants," and "discovery" -- "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). Rule 12 further provides that the district court may "set a deadline for the

parties to make pretrial motions." Fed. R. Crim. P. 12(c)(1). If a party misses the deadline, "the motion is untimely," but the court "may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3).

A defendant may, in addition, waive his right to file pretrial motions. "[W]aiver is the 'intentional relinquishment or abandonment of a known right,'" United States v. Olano, 507 U.S. 725, 733 (1993) (citation omitted), and this Court has explained that the rights accorded by "the Federal Rules of Criminal Procedure" are "presumptively waivable," United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Nothing in the text of Rule 12 overcomes that presumption with respect to the right to file pretrial motions, and petitioner has not argued otherwise.

In this case, the court of appeals correctly determined that petitioner's pretrial motions were barred. Pet. App. 3a-5a. The district court set August 22, 2017 as the deadline for filing pretrial motions; petitioner filed several motions before that date but withdrew them in April 2018 after reaching a plea agreement with the government. Id. at 9a. Petitioner argued that the district court's later rejection of the agreement provided good cause for permitting him to refile the motions, but "[t]he record is unambiguous" that "[t]he magistrate judge warned [petitioner] that the district court might reject the plea agreement and that, in those circumstances, [petitioner] would not be permitted to re-file his pretrial motions." Id. at 4a; see

4/18/2018 Tr. 5 ("[D]o you understand that if I accept your withdrawal of motions and waiver of motions that you will not have another opportunity to bring up pretrial motions in this case?"); id. at 6 ("[I]f I'm accepting your withdrawal of motions and waiver of motions then you would not be able to come back before this court and bring up pretrial motions again.").

The court of appeals correctly determined that, because petitioner "accepted the plea agreement rejection as a known risk," the district court did not abuse its discretion by determining that the rejection did not amount to good cause. Pet. App. 5a. As the court of appeals recognized, petitioner's withdrawal was accompanied by a deliberate waiver of later refiling, even accounting for the explicitly contemplated circumstance in which the district court declined to accept the plea agreement.

The court of appeals also correctly determined that, quite apart from Rule 12, petitioner had "waived his right" to refile. Pet. App. 3a. The magistrate judge "accept[ed] [petitioner's] waiver of pretrial motions" and expressly found "that th[e] waiver [wa]s made knowingly and voluntarily." 4/18/2018 Tr. 7. And the court of appeals found it "clear" from the record that petitioner "'voluntarily and knowingly agreed to withdraw his pretrial motions with prejudice.'" Pet. App. 5a (citation omitted).

Contrary to petitioner's contention (Pet. 14-22), the decision below does not conflict with the decision of any other court of appeals. Petitioner's assertion of a conflict rests on

the mistaken premise (Pet. 14) that the court of appeals adopted a "blanket rule" that, once a defendant waives the right to file pretrial motions, the party loses the right to file such motions "regardless of the circumstances." But rather than adopting a categorical rule, the court focused on the facts of this case, finding that "[t]he fact that the district court's rejection of the plea agreement was beyond [petitioner's] control does not alone create good cause in light of his acceptance of that risk at the time of the waiver." Pet. App. 5a (emphases added). Petitioner's contrary reading rests (Pet. 14) on the following parenthetical in the court's opinion: "See United States v. Bloate, 534 F.3d 893, 901 (8th Cir. 2008) (concluding that a party cannot show good cause exists when he knowingly and voluntarily waived his right to file), rev'd in part on other grounds, 559 U.S. 196 (2010)." But the parenthetical does not use the terms "blanket rule" or "regardless of the circumstances." Pet. 14. Further, "[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of the [opinion]." Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001) (citation omitted). At a minimum, it is far from clear that the decision would bind the court of appeals to reject any claim of good cause under Rule 12(c) whenever any waiver is present.

Petitioner errs in contending (Pet. 18-19) that the decision below conflicts with the Fourth and Fifth Circuits' decisions in United States v. Chavez, 902 F.2d 259 (4th Cir. 1990), and United

States v. Jones, 619 F.2d 494 (5th Cir. 1980). Each of those cases involved the mere failure to file pretrial motions before the deadline set by the court, not (like this case) the affirmative waiver of the right to file such motions. See Chavez, 902 F.2d at 263-264; Jones, 619 F.2d at 497. In addition, the defendant in each of those cases, unlike petitioner here, obtained the information that formed the basis of the motion only after the deadline had passed. See Chavez, 902 F.2d at 263–264; Jones, 619 F.2d at 497; see also Fed. R. Crim. P. 12(b)(3) (requiring objections to be raised by pretrial motion only "if the basis for the motion is then reasonably available"). And since Chavez, the Fourth Circuit has clarified that a decision to withhold a suppression motion in order to gain a strategic advantage in plea negotiations "does not amount to good cause for purposes of Rule 12." United States v. Mathis, 932 F.3d 242, 257 (2019), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019).

Petitioner likewise errs in contending (Pet. 17-18) that the decision below conflicts with the Seventh Circuit's decision in United States v. Salahuddin, 509 F.3d 858 (2007). As the court of appeals observed in this case, the defendant's waiver of his right to file pretrial motions in Salahuddin was a product of "the parties' mutual mistake of law regarding the applicability of a prior offense." Pet. App. 6a n.3. Specifically, the government and defendant both mistakenly believed (and the government affirmatively represented) that the defendant would not be

considered an armed career criminal subject to enhanced statutory penalties. Salahuddin, 509 F.3d at 859-860. It was not until after the defendant waived his right to file pretrial motions that he learned that the district court might rule differently. Id. at 859-863. This case, by contrast, involves no comparable mistake; at the time of the waiver, petitioner was fully aware of the risk that the district court might reject the plea agreement.

Finally, petitioner errs in contending that the decision below conflicts with the Eighth Circuit's own prior decisions in United States v. Bloate, 534 F.3d 893 (2008), rev'd on other grounds, 559 U.S. 196 (2010), and United States v. Garrido, 995 F.2d 808, cert. denied, 510 U.S. 926 (1993). In each of those cases, the Eighth Circuit affirmed a district court's denial of leave to file untimely pretrial motions. See Bloate, 534 F.3d at 901; Garrido, 995 F.2d at 815. In any event, any intra-circuit conflict between different decisions of the Eighth Circuit does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

At bottom, petitioner's claim is that, on these particular facts, the district court abused its discretion in declining to find good cause for his untimely filing. That factbound contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."); United

States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so given that the court of appeals and the district court both rejected petitioner's argument. See Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when the district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

2. The court of appeals also correctly determined that the district court did not abuse its discretion in denying his motion to limit the government to introducing only six of the thousands of images of child pornography found in petitioner's possession. Federal Rule of Evidence 403 provides that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The government here showed only "a small representative sample" of the child pornography recovered from petitioner: 42 of the more than 1000 images and none of the 14 videos. Pet. App. 6a, 8a. The government and district court also "took steps to limit the images' prejudicial effect," including "warn[ing] prospective jurors during voir dire about the nature of the images" and "str[iking]

for cause prospective jurors who expressed concern about being able to view the images objectively." Id. at 7a.

Petitioner objects not to the substance of the district court's decision to admit the images, but to the procedure that the court followed. Specifically, he argues (Pet. 22) that the court abused its discretion because it "fail[ed] first to view the evidence" before ruling it admissible. Rule 403, however, includes no requirement to examine evidence before ruling on its admissibility. When the drafters of the Rules of Evidence meant to impose procedural prerequisites to the admission of evidence, they did so. See, e.g., Fed. R. Evid. 412(c)(2) ("Before admitting evidence under this rule, the court must conduct an in camera hearing."); Fed. R. Evid. 612(b) ("If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera.").

In addition, the nature of petitioner's objection made it unnecessary for the district court to examine the images before ruling on their admissibility. Petitioner did not argue here that any specific image was especially prejudicial; nor did he ask the court to examine any specific image. Petitioner's objection instead focused on the number of images shown; the government offered to show 42 images, but petitioner believed that six images would suffice. Pet. App. 6a-7a. As the court of appeals remarked, it was possible for the district court to address that objection "even without viewing the images." Id. at 7a.

Contrary to petitioner's contention (Pet. 24-29), the decision below does not conflict with United States v. Cunningham, 694 F.3d 372, 387 (3d Cir. 2012), United States v. Loughry, 660 F.3d 965, 967 (7th Cir. 2011), and United States v. Curtin, 489 F.3d 935, 957-958 (9th Cir. 2007) (en banc). In each of those cases, the objection to the evidence turned on the inflammatory content of the evidence, and the court of appeals determined that the district court should have resolved the objection only after examining the evidence in question. See Cunningham, 694 F.3d at 387 (defendant's claim focused on assertion of "highly reprehensible and offensive content") (citation omitted); Loughry, 660 F.3d at 972 (defendant's claim focused on assertion of "highly reprehensible and offensive content"); Curtin, 489 F.3d at 957 (defendant's claim focused on assertion of "inflammatory nature and reprehensible nature of these abhorrent stories"). And the decisions rested on the particular facts of each case; contrary to petitioner's suggestion (Pet. 24-27), the courts did not adopt a categorical rule under which district courts always must examine evidence before finding it admissible under Rule 403. See Cunningham, 694 F.3d at 386 ("[S]peaking generally, a district court should personally examine challenged evidence before deciding to admit it under Rule 403. * * * The District Court's refusal here to view the video excerpts * * * was 'arbitrary.'") (emphases added; citations and footnote omitted); Loughry, 660 F.3d at 971 ("In this case, relying on the parties' descriptions

was insufficient. Few, if any, details were provided to the court when it was deciding whether to admit the evidence.") (emphasis added); Curtin, 489 F.3d at 957 ("Was the trial court in this case required to have read every word of these stories * * * ? Our answer here is in the affirmative. * * * In this context, reliance on an offer of proof simply is not enough.) (emphases added).

In this case, in contrast, petitioner did not argue that the images that the government sought to present were especially prejudicial. As discussed above, his objection focused on the quantity rather than the content of the evidence. None of the decisions petitioner cites suggests that the deciding court would have found an abuse of discretion on these facts simply because the district court had failed to examine the images before rejecting petitioner's challenge. Instead, petitioner's claim is again that, on these facts, the district court abused its discretion. For the reasons explained above, see pp. 12-13, supra, such factbound contentions do not warrant this Court's review, particularly given that the district court and court of appeals both agreed that the evidence was properly admitted.

Review also is unwarranted because the issue petitioner raises would have no effect on the outcome of this case. In Cunningham, Loughry, and Curtin, the district court's failure to examine the evidence prejudiced the defendant, because it resulted in the admission of evidence that the court likely would have

excluded had it reviewed the evidence before admission. See Cunningham, 694 F.3d at 392 ("[T]he substantive error of admitting all of the video excerpts here was prompted by the procedural error of failing to review those excerpts prior to ruling on their admissibility."); Loughry, 660 F.3d at 972 ("Without looking at the videos for itself, the court could not have fully assessed the potential prejudice."); Curtin, 489 F.3d at 957 ("Had the district court read [the exhibit], the court would no doubt have spotted [a particular passage] and required that it be edited out of the exhibit as both irrelevant and dangerously prejudicial."). In this case, in contrast, petitioner does not identify any image that the district court would have excluded if it had reviewed the image before trial. Thus, even if the court erred by failing to examine the images, any error was harmless, because the court would have admitted the images even if it had examined them. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

OCTOBER 2021