No. 22-5111

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DOYLE HARPER, 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, where petitioner knowingly and voluntarily entered into a plea agreement that contained a waiver of appellate rights.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Harper, No. 21-cr-14 (Sept. 28, 2021)

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

United States v. Harper, No. 21-11018 (Apr. 14, 2022)

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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 (Pet. App. A1) was entered on April 14, 2022. The petition for a writ of certiorari was filed on July 13, 2022. 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 Northern District of Texas, petitioner was convicted of

possessing prepubescent child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by a lifetime term of supervised release. Judgment 2. The district court also ordered $3000 of restitution. Judgment 6. The court of appeals dismissed petitioner's appeal. Pet. App. A1.

1. In January 2020, the Federal Bureau of Investigation (FBI) began investigating a peer-to-peer file-sharing program for child pornography. C.A. ROA 218. During the investigation, FBI agents downloaded 196 videos and 470 images containing child pornography from an IP address belonging to petitioner. Ibid. A subsequent forensic search of petitioner's cellphone likewise discovered numerous images and videos of child pornography. Id. at 44, 219.

In total, the investigation revealed that petitioner possessed 218 videos and 485 images of child pornography. C.A. ROA 219. As recounted by one of the investigating agents, the child pornography that petitioner possessed included images and videos "of children committing sex acts with animals, adults committing sex acts with infants and other prepubescent children, children committing sex acts with children, and children tied up or otherwise restrained during sex acts." Ibid.

2. A federal grand jury returned an indictment charging petitioner with one count of transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1) and 2, and one count of

possessing prepubescent child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B), (b)(2), and 2. Indictment 1-2. With the assistance of counsel, petitioner agreed to plead guilty to the possession count, in return for which the government agreed to dismiss the transportation count and to bring no additional charges based on petitioner's relevant conduct. Plea Agreement 1, 5.

The plea agreement recognized that the district court could impose "restitution to victims or to the community, which is mandatory under the law, and which the defendant agrees may include restitution arising from all relevant conduct." Plea Agreement 2. And it included a waiver of petitioner's right "to appeal the conviction, sentence, fine and order of restitution or forfeiture in an amount to be determined by the district court," while reserving petitioner's right to appeal "a sentence exceeding the statutory maximum punishment" or "an arithmetic error at sentencing," his right "to challenge the voluntariness of [his] plea of guilty or th[e] waiver," and his right "to bring a claim of ineffective assistance of counsel." Id. at 6. At the plea hearing, petitioner assured the court that he understood that he was waiving his right to appeal on grounds other than those listed in the plea agreement. Plea Tr. 18.

Following petitioner's guilty plea, the Probation Office prepared a presentence report recommending that petitioner pay $3000 in restitution under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 2259. C.A. ROA 230-231. Under 18 U.S.C.

2259(b), "[i]f the defendant was convicted of trafficking in child pornography * * * the court shall order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000." 18 U.S.C. 2259(b)(2)(B). Here, the Probation Office found that petitioner possessed child pornography from several known series, including the "Jenny" series, "which is notorious for hardcore bondage, dominance, and submissions/sadomasochism (BDSM) and bestiality sex abuse images and videos." C.A. ROA 220. The presentence report attached a victim impact statement from "Jenny" and recommended $3000 in restitution, which was both the statutory minimum and the amount that "Jenny" requested. Id. at 219-220, 230-231, 236.

Petitioner objected to the restitution recommendation. C.A. ROA 255-256. Petitioner asserted that the government had not met its burden of proving that petitioner was liable for the recommended restitution amount under 18 U.S.C. 2259 and this Court's decision in Paroline v. United States, 572 U.S. 434 (2014), which provides factors for district courts to consider when determining "the relative causal significance of the defendant's conduct in producing [the child-pornography victim's] losses," id. at 460; see ibid. (listing factors, such as whether the defendant "distributed images of the victim" and "how many images of the victim the defendant possessed"); C.A. ROA 255-256.

At the sentencing hearing, the district court overruled petitioner's objections to the Probation Office's restitution recommendation and ordered $3000 in restitution. Sentencing Tr. 21-26; see Judgment 6. The district court considered and weighed each of the Paroline factors, observing that petitioner made the "Jenny" series "available to download" through "peer-to-peer sharing"; that "Jenny is continually harmed by the dissemination and receipt of these images"; and that petitioner's "contribution to the continued circulation of these images contributes to her harm, as evidenced by the psychological evaluation provided by Jenny's counsel." Sentencing Tr. 24-26. In addition to the statutory minimum of $3000 in restitution, the district court sentenced petitioner to 180 months of imprisonment, to be followed by a lifetime term of supervised release. Judgment 2.

3. The court of appeals dismissed petitioner's subsequent appeal. Pet. App. A1.

Petitioner challenged the restitution order on appeal, acknowledging that "[t]he plea agreement in this case waives appeal," but asserting that the agreement's exception for "'a sentence exceeding the statutory maximum punishment'" applied. Pet. C.A. Br. 7 (citation omitted). Petitioner did not seek to invoke any other appeal-waiver exception in his challenge to the district court's restitution order; although he cited an implicit "miscarriage of justice" exception in connection with a separate argument challenging a special assessment imposed by the district

court, id. at 16-18, he did not assert it in connection with the restitution order, id. at 7-8. On the merits, petitioner contended that the restitution order was improper because the district court had misapplied certain Paroline factors. See id. at 9-13.

The government moved to dismiss petitioner's appeal as barred by the appeal waiver in his plea agreement. Gov't C.A. Mot. to Dismiss 1-18. With respect to the restitution order, the government observed that petitioner's appeal did not fall within the plea agreement's exception for sentences exceeding the statutory maximum because it presented only "a factual dispute" about the district court's application of the Paroline factors. Id. at 14. Petitioner opposed the government's motion, again solely contending that "his appeal falls within the statutory maximum exception to his waiver," Pet. Resp. to Mot. to Dismiss 2, without invoking any implied miscarriage-of-justice exception.

The court of appeals granted the government's motion to dismiss petitioner's appeal in an unpublished summary order. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 8-12) for the first time that an implied miscarriage-of-justice exception to his appeal waiver should allow him to challenge the district court's restitution order. The court of appeals correctly dismissed petitioner's appeal of his restitution order because petitioner validly waived

his right to appeal that order. The court's unpublished disposition does not conflict with any decision of this Court or another court of appeals. And this case would be an unsuitable vehicle for resolving the question presented because petitioner forfeited any reliance on an implied miscarriage-of-justice exception and would not qualify under such an exception in any event. No further review is warranted.

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, e.g., Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389, 398 (1987) (waiver of right to file constitutional tort action). 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

[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.

courts of appeals have recognized, appeal waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001). Appeal waivers correspondingly benefit the government by enhancing the finality of judgments and discouraging meritless appeals. See, e.g., United States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); Teeter, 257 F.3d at 22.

This case illustrates the mutual benefits of appeal waivers. Under the plea agreement, the government agreed to dismiss a transportation of child pornography charge, which carried a mandatory prison term of five years. See 18 U.S.C. 2252A(b)(1). In exchange, petitioner pleaded guilty to the less serious possession charge, and waived his right "to appeal the conviction, sentence, fine, and order of restitution," except under certain

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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) (per curiam); United States v. Toth, 668 F.3d 374, 377-378 (6th Cir. 2012); United States v. Woolley, 123 F.3d 627, 631 (7th Cir. 1997); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); United States v. Navarro-Botello, 912 F.2d 318, 320-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); United States v. Hernandez, 134 F.3d 1435, 1437 (10th Cir. 1998); United States v. Bushert, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

limited circumstances that petitioner no longer suggests are applicable. Plea Agreement 6. Petitioner does not dispute that he knowingly and voluntarily entered into the plea agreement, including the appeal waiver. Accordingly, the court of appeals correctly enforced the terms of petitioner's bargain with the government. Pet. App. A1.

2. Petitioner now contends (Pet. 8) that his appeal waiver is unenforceable under "an exception to appellate waivers for cases involving a miscarriage of justice." See Pet. i (invoking "an implied exception for judgments that represent a miscarriage of justice"). As an initial matter, petitioner failed to invoke that implied exception in his challenge to the restitution order in the court of appeals, and that court did not pass on it. Instead, petitioner relied exclusively on the asserted applicability of an express exception in his plea agreement for "a sentence exceeding the statutory maximum punishment." Pet. C.A. Br. 7 (citation omitted); see Pet. Resp. to Mot. to Dismiss 2. Petitioner no longer relies on that statutory exception, and this Court's "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). This Court can and should deny certiorari for that reason alone.

In any event, however, petitioner has failed to show that his challenge to the restitution order should proceed under an implied

miscarriage-of-justice exception. Petitioner acknowledges (Pet. 5) that the district court "undertook an admirably thorough and transparent application of the Paroline factors" to impose a mandatory restitution order of $3000 -- the statutory minimum under Section 2259(b)(2). Petitioner simply asserts that the district court "misappli[ed]" the Paroline factors to this case. Pet. 11. Even if petitioner were correct in reading an unstated miscarriage-of-justice exception into the appeal waiver, the sort of fact-bound error that he raises would not qualify as a miscarriage of justice. If it did, then it would open the door to many similar types of appellate claims, turn the unstated exception into the rule, and largely if not entirely eliminate the benefit of appeal waivers.

3. This case does not implicate any conflict in the circuits.

Petitioner suggests (Pet. 8) that some courts of appeals have concluded that a defendant may appeal despite an appeal waiver when applying the waiver would result in a miscarriage of justice. But even among those circuits, petitioner's appeal would not satisfy what he appears to consider to be the most defendant-favorable standard. See Pet. 10 (citing United States v. Adkins, 743 F.3d 176, 192-193 (7th Cir. 2014)); see Adkins, 743 F.3d at 192-193 (explaining that miscarriage-of-justice exception may apply to "a sentence based on constitutionally impermissible

criteria, such as race"; "a sentence that exceeds the statutory maximum for the defendant's particular crime"; "deprivation of some minimum of civilized procedure (such as if the parties stipulated to trial by twelve orangutans)"; or "ineffective assistance of counsel in negotiating the plea agreement") (citation and internal quotation marks omitted).

Petitioner's reliance (Pet. 11) on United States v. Gordon, 480 F.3d 1205 (10th Cir. 2007), is misplaced. The court there found that the defendant had expressly "preserved her right to appeal" an "unlawful restitution order" under the terms of her plea agreement. Id. at 1208-1209. The court did not rely on an implied miscarriage-of-justice exception. See id. at 1207-1210.[2]

[2] Petitioner incorrectly states (Pet. 10) that the Department of Justice has "advise[d] its lawyers to avoid relying on" appeal waivers. The Department of Justice's current Justice Manual states that "[p]rosecutors may incorporate waivers of appeal rights and post-conviction rights into plea agreements," observing that "[t]he use and enforcement of these waivers has been approved by the courts, and in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation." U.S. Dep't of Justice, Justice Manual § 9-16.330 (Jan. 2020). The manual cited by petitioner similarly stated that appeal waivers are generally valid and provided sample waiver language "that may be used in plea agreements." U.S. Dep't of Justice, Criminal Resource Manual § 626 (Jan. 2020). As petitioner notes (Pet. 10-11), that manual also stated that if a court were to impose "an egregiously incorrect sentence" following an appeal waiver, "the prosecutor should consider electing to disregard the waiver and to argue the merits of the appeal." Ibid. But that recommendation in no way implies that prosecutors should avoid appeal waivers in the first instance, or abstain from enforcing them in cases like this.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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