

No. 17-6690

IN THE SUPREME COURT OF THE UNITED STATES

VON SKYLER COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH 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 collaterally attack his sentence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 695 Fed. Appx. 851. The order of the district court dismissing petitioner's motion under 28 U.S.C. 2255 (Pet. App. 18-21) is not published in the Federal Supplement but is available at 2016 WL 552350. The order of the district court denying reconsideration (Pet. App. 5-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2017. A petition for rehearing was denied on August 4, 2017 (Pet.

App. 4). The petition for a writ of certiorari was filed on November 1, 2017. 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 Eastern District of Tennessee, petitioner was convicted of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 18. The district court dismissed petitioner's motion for relief from his sentence under 28 U.S.C. 2255 and denied a certificate of appealability (COA). Id. at 18-21. The court subsequently denied reconsideration of its ruling but granted a COA. Id. at 5-17. The court of appeals affirmed. Id. at 1-3.

1. In September 2011, petitioner -- an admitted felon -- "was caught trying to trade a revolver for a camper." Pet. App. 18; see Presentence Investigation Report (PSR) ¶¶ 7-8. Based on other firearms discovered within petitioner's possession, some of which were stolen during a home robbery, see PSR ¶ 11, a grand jury in the Eastern District of Tennessee returned an indictment charging petitioner with three counts of unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and one count of possessing a stolen firearm, in violation of 18 U.S.C.

922(j)). Indictment 1-2.¹ Petitioner pleaded guilty to one of the felon-in-possession counts pursuant to a plea agreement with the government. Plea Agreement 1-7.

2. 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 ACCA requires a sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include any offense that is punishable by a term exceeding one year of imprisonment that (1) "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) (the elements clause); (2) "is burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. 924(e)(2)(B)(ii) (the enumerated offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another," ibid. (the residual clause).

In his plea agreement, petitioner agreed that he was an armed career criminal under the ACCA and that the ACCA's mandatory-minimum sentence of 15 years of imprisonment was "the appropriate disposition of [his] case." Plea Agreement ¶¶ 3(d), 5. Petitioner also agreed that he "knowingly and voluntarily waive[d] the right

¹ For the stolen-firearm count, the indictment cited 18 U.S.C. 922(l) rather than 18 U.S.C. 922(j).

to file any motions or pleadings pursuant to 28 U.S.C. § 2255 or to collaterally attack [his] conviction(s) and/or resulting sentence," except for a motion claiming "ineffective assistance of counsel or prosecutorial misconduct not known to [him] by the time of the entry of judgment." Id. ¶ 10(b); see Pet. App. 18.

The Probation Office prepared a PSR, which concluded that petitioner was subject to sentencing under the ACCA because his criminal history included at least three qualifying predicate convictions: a 1988 Tennessee conviction for second-degree burglary, a 1994 Tennessee conviction for aggravated burglary, and a 2006 Tennessee conviction for evading arrest. PSR ¶¶ 10, 34, 40, 46. Based on those convictions, the district court found that petitioner was subject to the ACCA and sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 18; see ibid. (noting that petitioner also had a 1981 conviction for third-degree burglary and a 2013 conviction for aggravated burglary). Petitioner did not appeal his conviction or sentence, and his sentence became final in 2014. Ibid.

3. a. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the residual clause of the ACCA is unconstitutionally vague. Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, contending that several of his prior convictions no longer qualified as ACCA predicate offenses after Johnson. Pet. App. 19.

The district court observed that petitioner had knowingly and voluntarily waived his right to file a Section 2255 motion in his plea agreement, but stated that it was “far from clear that this waiver can be enforced to bar him from challenging a sentence in excess of the maximum authorized by law.” Pet. App. 19 n.1. The court found it unnecessary to resolve that question, however, because the court concluded that petitioner had failed to show that his sentence was unlawful. Ibid. The court concluded that petitioner’s four prior burglary convictions categorically qualified as violent felonies under the ACCA’s enumerated offenses clause. Id. at 19-20; see 18 U.S.C. 924(e)(2)(B)(ii) (defining “violent felony” to include “burglary”). The court accordingly dismissed petitioner’s Section 2255 motion and declined to issue a COA. Pet. App. 20.

b. The district court denied petitioner’s motion for reconsideration. Pet. App. 5-17. The court determined, inter alia, that although petitioner’s conviction for evading arrest was no longer an ACCA predicate after Johnson, petitioner still had at least three other convictions qualifying as ACCA predicates. Id. at 9. The court rejected petitioner’s contention that his two aggravated burglary convictions did not count as ACCA predicates in light of the Sixth Circuit’s grant of en banc rehearing in United States v. Stitt, 860 F.3d 854 (2017), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017), and this Court’s decision in Mathis v. United States, 136 S. Ct. 2243 (2016). The

court explained that petitioner's aggravated burglary convictions were ACCA predicates based on binding Sixth Circuit precedents, Pet. App. 9-10, and that the Sixth Circuit's grant of rehearing en banc in Stitt had "no effect on the current validity" of those precedents, id. at 10. Likewise, the court explained that Mathis -- which addressed whether a statute is "divisible" and thus subject to the "modified categorical approach" under which certain materials may be consulted to determine the nature of the conviction for purposes of applying the ACCA -- did not undermine the validity of those precedents, which "make no reference to divisibility." Id. at 12-13. The court concluded, however, that reasonable minds could disagree about petitioner's ACCA designation and granted a COA. Id. at 16.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-3. The court found it unnecessary to reach the merits of petitioner's Section 2255 motion because petitioner had expressly waived his right to seek Section 2255 relief in his plea agreement. Id. at 3. The court noted that waivers of Section 2255 rights are generally enforceable; that petitioner did not contest that he knowingly and voluntarily entered into the waiver; and that Section 2255 or appeal waivers "with plain language that precludes Johnson- or Mathis-based claims are enforceable even if those waivers were entered into years before Johnson and Mathis were decided." Ibid. The court explained that while petitioner "may not have known at the time of his plea that the Supreme Court

would change the law in the way it did in Johnson, he knew at the time of his plea that § 2255 afforded him an avenue to subsequently challenge his sentence as unlawful and knowingly chose to waive his right to seek § 2255 relief except on the basis of ineffective assistance of counsel or prosecutorial misconduct.” Ibid. The court therefore found that petitioner’s “waiver in his plea agreement is enforceable and bars [petitioner’s] § 2255 motion.” Ibid.

5. The en banc Sixth Circuit subsequently held in Stitt that aggravated burglary under Tennessee law does not qualify as a violent felony under the ACCA. 860 F.3d at 856; but see id. at 876 (Sutton, J., dissenting). The government has filed a petition for a writ of certiorari in Stitt, No. 17-765.

ARGUMENT

Petitioner contends (Pet. 10-25) that his knowing and voluntary waiver of the right to challenge his sentence on collateral review should not be enforced to bar his collateral challenge to his sentencing as an armed career criminal. The court of appeals correctly determined that petitioner is bound by the plain text of the waiver in his plea agreement. That determination does not conflict with any decision of this Court or any other court of appeals. This Court recently denied certiorari in a case presenting the same question, see Massey v. United States, 138 S. Ct. 160 (2017) (No. 16-9591), and it should follow the same course here.

1. a. This Court has repeatedly 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) (upholding plea agreement's waiver of right to raise a double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (upholding plea agreement's waiver of right to file an action under 42 U.S.C. 1983). Likewise, the courts of appeals have uniformly held that a defendant's knowing and voluntary waiver of the right to appeal in a plea agreement is enforceable.² 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 likewise benefit the government by enhancing the finality of judgments and discouraging meritless appeals. Ibid. Collateral-attack waivers have the same benefits.

² 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); 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. 947 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009). As petitioner acknowledges (Pet. 12), "while this case involved a collateral attack waiver, circuit precedent on appellate waivers is equally applicable."

See, e.g., DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000) (“The ‘chief virtues’ of a plea agreement * * * are promoted by waivers of collateral appeal rights as much as by waivers of direct appeal rights. Waivers preserve the finality of judgments and sentences, and are of value to the accused to gain concessions from the government.”).

This case illustrates the mutual benefits of appeal and collateral-attack waivers. “In consideration of [petitioner’s] guilty plea,” the government agreed to drop three of the four counts in the indictment and to recommend the minimum sentence, 15 years of imprisonment, that was available under the statutory range contemplated in the agreement. Plea Agreement ¶¶ 1(b), 5. “In consideration of the concessions made by the United States,” petitioner agreed to waive appellate and collateral review challenges (with limited exceptions). Id. ¶ 10. As the PSR observed, the agreement “benefit[ed]” petitioner, because “[i]f he had been convicted of the remaining counts of the Indictment,” his guidelines range would have been 292 to 365 months -- a potential sentence more than twice as long as the 180-month sentence proposed in the plea agreement and ultimately imposed by the district court. PSR ¶ 76.

b. The court of appeals correctly enforced petitioner’s agreement not to collaterally attack his sentence. Pet. App. 3. Plea agreements are “essentially contracts,” Puckett v. United States, 556 U.S. 129, 137 (2009), and courts accordingly begin

their analysis of a plea agreement by "examin[ing] first the text of the contract," United States v. Gebbie, 294 F.3d 540, 545 (3d Cir. 2002). Here, the agreement expressly states that petitioner "knowingly and voluntarily waives the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255 or to collaterally attack [his] conviction(s) and/or resulting sentence," with the sole exception that petitioner "retains the right to raise, by way of collateral review under § 2255, claims of ineffective assistance of counsel or prosecutorial misconduct not known to [him] by the time of the entry of judgment." Plea Agreement ¶ 10(b).

Petitioner does not contend that his challenge implicates the narrow exception to the collateral-review waiver for claims of ineffective assistance of counsel or prosecutorial misconduct. See Pet. App. 3. "Nor does [petitioner] contend that he unknowingly or involuntarily entered into the plea agreement." Ibid. Petitioner's attempt to collaterally attack 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 and "bars [petitioner's] § 2255 motion." Ibid.

c. Petitioner contends (Pet. 12-14) that his waiver is unenforceable because some courts of appeals have held that "even valid waivers cannot bar a challenge to an illegal sentence, a miscarriage of justice, or a sentence in excess of the statutory maximum." Pet. 14. But petitioner's 180-month sentence is the

sentence that petitioner himself asked the district court to impose, see Plea Agreement ¶ 5 (“[Petitioner] and the United States agree that a sentence of 180 months imprisonment * * * is the appropriate disposition of this case.”), after expressly acknowledging that he “is an Armed Career Criminal” and that the “maximum punishment for” his offense “is a term of imprisonment not less than fifteen (15) years and up to life,” id. ¶ 1(a).

Unlike the precedents cited by petitioner, this is not a case in which the sentencing “court disregard[ed] th[e] permissible sentencing range and impose[d] a sentence exceeding that which the defendant knew was the harshest penalty he could receive.” Pet. 14 & n.2 (quoting United States v. Worthen, 842 F.3d 552, 554 (7th Cir. 2016)). Far from exceeding “the harshest penalty” that petitioner “knew * * * he could receive,” the court imposed the lowest possible sentence within the “sentencing range” that petitioner recognized was “permissible.” Ibid. (citation omitted); cf. United States v. Sampson, 684 Fed. Appx. 177, 182 (3d Cir.), cert. denied, 137 S. Ct. 2147 (2017) (enforcement of appeal waiver where defendant failed to object to armed career criminal classification “work[ed] no miscarriage of justice”).

Petitioner contends (Pet. 23-25) that his sentence exceeds the statutory maximum in light of legal developments after his conviction and sentence became final. Specifically, he argues that this Court’s decision in Johnson and the Sixth Circuit’s en banc decision in United States v. Stitt, 860 F.3d 854 (2017),

petition for cert. pending, No. 17-765 (filed Nov. 21, 2017), removed all but two of his ACCA predicates, which means that the ACCA no longer applies and that his 15-year sentence exceeds the ten-year statutory maximum for his Section 922(g)(1) offense. See 18 U.S.C. 924(a)(2). But that is an argument about the merits of a potential collateral attack on his sentence, not an argument about the enforceability of the plea agreement in which petitioner agreed not to collaterally attack his sentence in return for governmental concessions. See Plea Agreement ¶ 10(b); accord Pet. 11 (petitioner acknowledging that he would be “entitled to Johnson relief, but-for the waiver provision”). As his own authority reflects, petitioner’s suggestion that his collateral-review waiver should not be enforced because he would be entitled to relief on collateral review “is entirely circular.” Worthen, 842 F.3d at 555; see ibid. (“[T]he 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.”).

That petitioner did not “foresee” the favorable developments in the law that followed his guilty plea does not render his collateral-attack waiver any less enforceable. Sanford v. United States, 841 F.3d 578, 580 (2d Cir. 2016) (per curiam) (citation omitted). “On the contrary, the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.” Ibid. (citation omitted); see United States v. Haskins, 198 Fed. Appx. 280, 281 (4th Cir. 2006) (per

curiam) (similar). As the court of appeals explained, petitioner “may not have known at the time of his plea that the Supreme Court would change the law in the way it did in Johnson,” but “he knew at the time of his plea that § 2255 afforded him an avenue to subsequently challenge his sentence as unlawful and knowingly chose to waive his right to seek § 2255 relief except on the basis of ineffective assistance of counsel or prosecutorial misconduct.” Pet. App. 3. The court therefore correctly enforced the waiver. Ibid.

2. Contrary to petitioner’s contention (Pet. 10-19), no conflict exists in the courts of appeals on the question presented. Several of the cases cited by petitioner involved failures to object to an ACCA enhancement, not express waivers of appeals or collateral challenges in plea agreements. See United States v. Titties, 852 F.3d 1257, 1263-1264 (10th Cir. 2017); United States v. Redrick, 841 F.3d 478, 481 (D.C. Cir. 2016), cert. denied, 137 S. Ct. 2204 (2017). Others involved plea-agreement waivers that did not bar appeal of a defendant’s status as an armed career criminal. See United States v. Torres, 828 F.3d 1113, 1123-1125 (9th Cir. 2016); United States v. Rosales-Acosta, 679 Fed. Appx. 860, 861 (11th Cir.), cert. denied, 137 S. Ct. 2280 (2017). And in the cases most like this one, courts have enforced the appellate waivers, as the court of appeals did here. See United States v. Bey, 825 F.3d 75, 83 (1st Cir.), cert. denied, 137 S. Ct. 603 (2016); Sanford, 841 F.3d at 580; Worthen, 842 F.3d at 554; United

States v. Ford, 641 Fed. Appx. 650, 651 (8th Cir. 2016) (per curiam); Pet. App. 3.³

Petitioner identifies no court of appeals that would have reached a result favorable to him. His assertion (Pet. 19-23) that some courts of appeals have reached internally inconsistent results on the question presented relies almost entirely on unpublished, nonprecedential decisions or district court rulings, and would, in any event, be appropriately addressed by those circuits in the first instance, rather than by this Court. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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³ In United States v. Emeary, 794 F.3d 526, 527-531 (5th Cir. 2015), the court of appeals did not decide whether the appeal waiver was enforceable, but revoked its initial acceptance of an Anders brief and allowed the defendant to argue the question.