

IN THE
Supreme Court of the United States

JEREMY MARTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant has a Due-Process-Clause-based right to appeal a district court's imposition of a mandatory minimum sentence in violation of the Fifth and Sixth Amendments, notwithstanding a waiver of his appellate rights contained in his plea agreement.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeremy Martin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's Order dismissing Petitioner's appeal is attached at Pet. App. 1a. The Fourth Circuit's Order denying Petitioner's Petition for rehearing and rehearing en banc is attached at Pet. App. 3a. The Mandate of the Fourth Circuit is attached at Pet. App. 4a.

JURISDICTION

The Fourth Circuit denied Petitioner's petition for rehearing and rehearing en banc on November 6, 2017. Pet. App. 3a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution provides in relevant part:

“No person shall . . . be deprived of . . . liberty . . . without due process of law.”

U.S. Const. amend. V.

INTRODUCTION

There is a typical possessor of child pornography. Jeremy Martin is not that person. He has struggled with misdiagnosed and untreated autism for his entire life. He does not remember his biological parents, who were drug abusers and sexual offenders. He and his siblings were adopted when he was four years old by a family that did their best to provide for him. But, because of his medical condition and background, Mr. Martin was both a victim and a perpetrator of sexual offenses throughout his childhood. He had to be removed from his adopted parents at age 15 when they found out that he had an incestuous relationship with his sister that started when he was 6 and she was 5. He has since lived in and out of group homes and homeless shelters.

Considering these facts, the district court described Mr. Martin's case as a “grievous set of circumstances” and expressed dismay at the 120-month statutory minimum that it felt compelled to impose in his case. The district court, however, was wrong. It did not need to impose a 120-month sentence. It erroneously applied a recidivist sentencing enhancement that changed Mr. Martin's sentencing range from 0-10 years to 10-20 years. Mr. Martin appealed that enhancement, arguing that the district court's holding violated the Fifth and Sixth Amendments because the court found facts beyond the categorical elements of Mr. Martin's prior crime.

The Fourth Circuit did not reach the merits of Mr. Martin's appeal. Instead, it dismissed it as barred by a waiver of appellate rights contained in Mr. Martin's written plea agreement. The Fourth Circuit, along with other federal circuits, holds that the Due Process Clause prevents it from enforcing a waiver against a defendant's right to appeal an "illegal" or unconstitutional sentence, defined, among other ways, as a sentence imposed above the statutory maximum for the crime. Mr. Martin argued that, after *Alleyne v. United States*, a mandatory minimum sentence that relies upon judicial fact-finding at sentencing violates the Fifth and Sixth Amendments. 133 S.Ct. 2151 (2013). Therefore, a defendant cannot waive his right to an appeal on that basis. The Fourth Circuit disagreed, dismissing the appeal. This Court's review is necessary to clarify whether a defendant can waive his right to appeal an erroneously imposed mandatory minimum sentence.

STATEMENT OF THE CASE

Petitioner Jeremy Martin was born to drug abusing and sexually offending parents. He and his sisters were adopted by a loving couple when Mr. Martin was 4 years old, but much damage had already been done. Mr. Martin suffers from untreated autism. For Mr. Martin, this means that even though he can superficially appear normal—functioning intellectually and verbally in an average to above average range—his social skills are fundamentally impaired and affect much of his interpersonal behavior, including his sexual functioning.

Troublingly, Mr. Martin was misdiagnosed as a child and, in fact, has never received the proper services to address his condition. As a result, even though Mr.

Martin could understand as an intellectual matter that he was not supposed to possess child pornography, he lacked the social intelligence to fully comprehend why possessing child pornography is wrong.

Not surprisingly considering this mental state, Mr. Martin did possess child pornography. Specifically, in 2014, agents from the North Carolina State Bureau of Investigation and the Raleigh (NC) Police Department responded to a tip that an individual had four images of child pornography on an online file sharing site. Investigation led agents to Mr. Martin, who was living in a homeless shelter at the time. Eventually, 55 images of child pornography were attributed to Mr. Martin after searching his phone and computer equipment.

In 2015, a grand jury sitting in the Eastern District of North Carolina indicted Mr. Martin on one count of receiving child pornography and one count of possessing child pornography. Mr. Martin pleaded guilty, with a plea agreement, to one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).

Congress established the punishment range for Mr. Martin's crime as 0-10 years. 18 U.S.C. § 2252(b)(2). However, if an individual "has a prior conviction . . . under the law of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," then the punishment range changes to 10-20 years. *Id.* In preparation for sentencing, the United States Probation Office prepared a presentence report that advised applying that statutory enhancement against Mr. Martin based on two prior North Carolina convictions for Solicitation of Second Degree Sex Offense. Mr. Martin objected, arguing that

Solicitation in North Carolina is a common law offense that does not have as an element any elements of the crime solicited. Accordingly, he continued, a sentencing court cannot categorically relate North Carolina Solicitation to the underlying crime without violating the prohibitions of judicial factfinding at sentencing.

At sentencing on March 8, 2017, the district court overruled the objection and applied the 120-month mandatory minimum. Considering the “grievous set” of mitigating circumstances discussed above, the district court did not want to have to apply the statutory minimum. As the court explained to Mr. Martin’s lawyer, “there’s nothing I can do short of a 120-month sentence.” It noted that if the Fourth Circuit were to vacate its ruling about the mandatory minimum, it would re-address the sentencing arguments made by the parties.

Mr. Martin timely appealed. After he filed his opening brief in the Fourth Circuit, the government moved to dismiss the appeal based on a waiver of appellate rights in Mr. Martin’s plea agreement.¹ Mr. Martin opposed, citing the Fourth Circuit’s due-process-based rule that prohibits the enforcement of a defendant’s waiver of his right to appeal an illegal or unconstitutional sentence. The government contended that Mr. Martin’s sentence was neither illegal nor unconstitutional because the ten-year sentence imposed fell within the 0-10 year sentencing range for his crime without the recidivist enhancement. Mr. Martin countered that, after *Alleyne*, an erroneously imposed mandatory minimum

¹ The language of the waiver can be found in paragraph 2.c of the plea agreement at Pet. App. 5a-6a.

sentence violates the Fifth and Sixth Amendments and therefore falls into the appeal waiver exception for illegal or unconstitutional sentences.

The Fourth Circuit agreed with the government and granted the motion dismissing the appeal. Mr. Martin petitioned for rehearing and rehearing en banc, which the Fourth Circuit rejected. This petition follows.

REASONS FOR GRANTING THE PETITION

This petition raises an important question deriving from *Alleyne* that would benefit from this Court's guidance: whether, for purposes of enforcement of appellate waivers, circuit courts should treat erroneously imposed mandatory minimum sentences the same as erroneously imposed sentences above the statutory maximum range. *See* Sup. Ct. R. 10(c). Because the circuit courts dismiss these cases in unpublished orders, the law regarding the post-*Alleyne* intersection of appellate waivers and mandatory minimum sentences will not develop over time. This Court's review is necessary to affirm the principle established in *Alleyne* that improperly imposed sentencing enhancements that increase mandatory minimum sentences are unconstitutional.

- A. The circuit courts already hold that the Due Process Clause prohibits them from applying appellate waivers to bar appeals of sentences imposed above the statutory maximum.**

The Constitution, of course, does not provide criminal defendants with an express right to an appeal. *See Davila v. Davis*, 137 S.Ct. 2058, 2068 (2017). It does, however, provide that the government cannot deprive anyone of liberty with providing "due process of law." U.S. Const. Amend. V. Accordingly, this Court has

recognized that “both equal protection and due process concerns” require the government to provide criminal appellants with certain minimum protections and procedural safeguards in any appeals that they do have as a matter of statutory right. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005)(quoting *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)). For example, the government must provide transcripts for an appellant who cannot afford them, *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956)(plurality opinion), and counsel for a defendant on a first appeal of right. *Douglas v. California*, 372 U.S. 353, 357 (1963).

In addition to the rights recognized by this Court, the circuit courts hold that criminal defendants also have a due-process-based right to a sentence that complies with the Constitution. As such, they will not enforce an otherwise valid waiver of a right to appeal against a claim that the sentence imposed is not merely wrong, but is instead illegal or unconstitutional.

A defendant can “waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial.” *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992)(internal quotation omitted). Accordingly, the circuit courts have no hesitation in upholding “the validity of a defendant's waiver of the statutory right to appeal a sentence when the waiver was knowingly and voluntarily made.” *Id.* These waivers bar appeals of the vast majority of errors that may occur at sentencing. “[A]n allegation that the sentencing judge misapplied the Sentencing Guidelines or abused his or her discretion is not subject to appeal in the face of a valid appeal waiver.” *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003).

Nonetheless, the circuit courts recognize “at least some due process exceptions to a waiver of appellate review.” *United States v. Adkins*, 743 F.3d 176, 192 (7th Cir. 2014). Both “fundamental fairness to the particular defendant and the fundamental legitimacy of the judicial process generally” prohibit appellate courts from enforcing appellate waivers against a defendant challenging “(1) a sentence based on constitutionally impermissible criteria, such as race; (2) a sentence that exceeds the statutory maximum for the defendant's particular crime; (3) deprivation of some minimum of civilized procedure (such as if the parties stipulated to trial by twelve orangutans); and (4) ineffective assistance of counsel in negotiating the plea agreement.” *Id.* at 192-93 (internal quotations omitted); *see also Marin*, 961 F.2d at 496 (same).

This exception to appeal waiver enforcement “is an extremely narrow exception” limited to the examples noted above. *Andis*, 333 F.3d at 892. Importantly for purposes on this Petition, the circuit courts agree that a defendant cannot waive her right to appeal a sentence that “exceeds the permissible statutory penalty for the crime or violates the Constitution.” *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). These errors affect both the fundamental fairness and legitimacy of the entire sentencing proceeding. *Accord* Fed. R. Crim. P. 52(b) (allowing courts to consider errors “that affect[] substantial rights” even if they were “not brought to the court’s attention”).

B. Erroneous mandatory minimum sentences violate the Fifth and Sixth Amendments and, therefore, fall within the appeal waiver exception recognized by the circuit courts.

Mr. Martin appealed his sentence, arguing that the district court violated the Fifth and Sixth Amendments by applying a recidivist sentencing enhancement against him, resulting in a mandatory minimum sentence that should not have applied. Mr. Martin's appeal raised only this narrow legal issue. He did not contend that the district court miscalculated the Sentencing Guidelines or that it otherwise abused its discretion in sentencing him.

The government nonetheless moved to dismiss the appeal, citing the appeal waiver provision in Mr. Martin's written plea agreement. It argued that the 120-month sentence imposed did not fall within the narrow exception to enforcing appeal waivers because the district court still imposed a sentence within the 0-10 year range authorized by the statute without the disputed mandatory minimum. Accordingly, the government contended, the sentence was neither illegal nor unconstitutional.

The Fourth Circuit agreed and dismissed the appeal. Because the Fourth Circuit's Order did not provide any reasoning, it adopted the government's position. The Fourth Circuit's holding is wrong and contrary to this Court's recent case law.

Prior to 2013, this Court had agreed with the Fourth Circuit's position. In 2002, in *Harris v. United States*, this Court held that fact-finding at sentencing to impose a mandatory minimum sentence did not implicate the Sixth Amendment. 536 U.S. 545 (2002). That changed in 2013 when *Alleyne v. United States* overruled

Harris. 133 S.Ct. 2151, 2163 (2013). For purposes of the Fifth and Sixth Amendments, “there is no basis in principle or logic to distinguish fact that raise the maximum from those that increase the minimum.” *Id.* Improperly finding facts at sentencing violates the Fifth and Sixth Amendments both when it increases the statutory maximum and when it increases the statutory minimum.

Therefore, after *Alleyne*, for purposes of the permissible scope of an appeal waiver, an improperly imposed mandatory minimum sentence is no less “illegal” or “unconstitutional” than an improperly increased statutory maximum sentence. Mr. Martin’s case illustrates this position because the mandatory minimum drove his sentence. The district court expressly stated in response to Mr. Martin’s sentencing mitigation arguments, “there’s nothing I can do short of a 120-month sentence.” Even though the sentence imposed happened to fall within the un-enhanced statutory range, the district court would not have imposed it but for facts that it found at sentencing. Mr. Martin is spending more time in prison than he should based solely on judge-found facts made by a preponderance of the evidence. That enhanced sentence violates the Fifth and Sixth Amendments and implicates the fundamental fairness of the sentencing proceedings. Due process provides Mr. Martin with the narrow right to appeal this error notwithstanding any waiver purporting otherwise.

This Court should grant review to affirm the principle established in *Alleyne* that improperly imposed sentencing enhancements that increase mandatory minimum sentences are unconstitutional.

C. This case provides an excellent vehicle to address this question.

Delaying addressing this question will not allow for the law to further develop in the circuit courts because of the procedural posture in which this issue arises. As this case demonstrates, the government moves to dismiss appeals based on the waiver. The defendant opposes the motion, and the circuit court dismisses the case in a short order. Unlike issues that will result in published opinions after briefing, this issue will remain undeveloped in the circuit courts, requiring this Court's intervention to affirm the principle established in *Alleyne*.

Mr. Martin's appeal raises only a constitutionally based challenge to the mandatory minimum sentence. He preserved this issue in the district court by objecting to it both in writing and at the sentencing hearing. No material factual disputes were ever present in this case. Accordingly, this petition does not invoke any issues related to waiver of the question presented or any other disputed legal or factual issues that might prevent this court from cleanly reaching the question presented.

Finally, the district court sentenced Mr. Martin to a mandatory minimum sentence of 120 months. It indicated that it would have imposed a lower sentence but for the mandatory minimum sentence imposed. And 120 months was the maximum sentence allowed by the crime of conviction without the sentencing enhancement. This petition, therefore, allows this Court to address both whether the Due Process Clause protects a criminal defendant's right to appeal an unconstitutionally imposed mandatory minimum sentence and whether that

protection extends to cases in which the sentence imposed nonetheless falls within the unenhanced statutory range for the crime of conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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