

No. 17-7734

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IN THE SUPREME COURT OF THE UNITED STATES

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JORGE MARTIN MENDOZA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's knowing and voluntary waiver of his right to appeal his sentence precluded petitioner's appeal asserting ineffective assistance of counsel at sentencing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. G1-G2) is not published in the Federal Reporter but is reprinted at 706 Fed. Appx. 620.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2017. The petition for a writ of certiorari was filed on February 12, 2018. 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 Middle District of Florida, petitioner was convicted of conspiracy with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a), 70506(a) and (b), and 21 U.S.C. 960(b)(1)(B)(ii). Pet. App. B1. The district court sentenced petitioner to 168 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals dismissed petitioner's appeal. Id. at G1-G2.

1. On August 31, 2015, petitioner and others were found by the United States Coast Guard transporting approximately 6845 kilograms of cocaine through international waters in a self-propelled semi-submersible vessel. Pet. App. A17-A18; Presentence Investigation Report (PSR) ¶¶ 12-13. The master of the vessel informed the Coast Guard that the group was "smuggling drugs" and had departed from Colombia. PSR ¶ 13. The master claimed no nationality for the vessel, rendering the vessel subject to the jurisdiction of the United States. Ibid.; Pet. App. A17-A18.

2. A grand jury in the Middle District of Florida returned a two-count indictment charging petitioner with conspiring to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United

States, in violation of 46 U.S.C. 70503(a), 70506(a) and (b), and 21 U.S.C. 960(b)(1)(B)(ii); and possessing with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a), 70506(a), and 21 U.S.C. 960(b)(1)(B)(ii). Indictment 1-4. Petitioner pleaded guilty to the conspiracy count pursuant to a written plea agreement. Pet. App. A1-A18.

In the plea agreement, petitioner admitted that, on August 31, 2015, he and others were transporting over 6000 kilograms of cocaine for delivery to others on a semi-submersible vessel with no claimed nationality. Pet App. A17-A18. He agreed to plead guilty to conspiring to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States. Id. at A1. In exchange, the United States agreed to dismiss the remaining count against petitioner. Id. at A2. The government also agreed that it would recommend a sentence within the advisory Sentencing Guidelines range for petitioner's offense, as determined by the district court, and would not oppose petitioner's request for a sentence at the low end of that range. Id. at A3-A4.

As part of the agreement, petitioner also waived his right to appeal his sentence "on any ground," except for claims that (a) the

sentence exceeded his advisory Guidelines range, as determined by the district court; (b) the sentence exceeded the statutory maximum penalty; or (c) the sentence violated the Eighth Amendment. Pet. App. A15. The parties also agreed that petitioner would be released from his waiver if the government exercised its right to appeal the sentence imposed. Ibid.

A magistrate judge held a plea hearing and questioned petitioner at length about his conduct and his understanding of the charge, his rights, and the plea agreement. Change of Plea Hr'g Tr. 1-30. The magistrate judge verified that petitioner understood his appeal waiver, id. at 17-18, and was "fully satisfied with the advice and representation [he] ha[d] received in the case," id. at 9; see also id. at 10-11. Following those exchanges, petitioner informed the magistrate judge that he was pleading guilty to the conspiracy charge in the indictment. Id. at 28. Stating that he was "fully satisfied" that petitioner was "competent to enter a plea of guilt," that petitioner's plea was "being entered knowingly, intelligently and voluntarily," and that the plea was "supported by an independent factual basis for each of the essential elements," the magistrate judge recommended to the district court that it accept petitioner's guilty plea. Id. at 29. The court accepted petitioner's guilty plea in accordance with that recommendation. D. Ct. Doc. 65 (Dec. 9, 2015).

3. The Probation Office prepared a presentence report that assigned petitioner a base offense level of 38 under Sentencing Guidelines § 2D1.1 (2015) based on the quantity of drugs involved in his offense. PSR ¶ 19. The report recommended a two-level enhancement under Sentencing Guidelines § 2D1.1(b)(3)(B) because petitioner had unlawfully imported or exported a controlled substance under circumstances involving the use of a semi-submersible vehicle. PSR ¶ 21. The report also recommended a three-level reduction for acceptance of responsibility, PSR ¶¶ 27-28, and a two-level reduction under the safety-valve provision in Sentencing Guidelines § 5C1.2, PSR ¶ 20. Those calculations yielded a total offense level of 35. PSR ¶ 29. The report further reported that petitioner had no criminal history, PSR ¶¶ 31-33, and thus assigned him a criminal history category of I and calculated an advisory Guidelines range of 168 to 210 months, PSR ¶¶ 35, 63. The report noted that petitioner would be removed from the United States after the completion of any term of imprisonment. PSR ¶ 48. The PSR also reported that petitioner was 41 years old and had worked for several years as an auto mechanic in Mexico. PSR ¶¶ 40, 58.

Petitioner's counsel filed several written objections to the report in advance of sentencing. See Response to PSR 1-5. Among other things, counsel argued that petitioner should be held

accountable for only five kilograms of cocaine because he had no knowledge of the quantity of drugs aboard the semi-submersible vessel. Id. at 1-2. Counsel also objected to the two-level enhancement for the use of a semi-submersible vessel on the ground that petitioner did not have any knowledge or role in the selection of the type of vessel that would be used. Id. at 2. Finally, counsel argued that petitioner should receive a two-level reduction under Sentencing Guidelines § 3B1.2 because he played a minor role in the offense. Response to PSR 2-3. With those changes, counsel argued, petitioner's advisory Guidelines range would be 46 to 57 months. Id. at 3. Counsel contended that a sentence within that range would be "more than adequate[]" punishment. Ibid. Counsel also noted petitioner's efforts to cooperate with the government and asked the district court to consider petitioner's statement of remorse, his lack of a criminal record, his "hard and difficult life in Mexico City prior to this offense," and the potential danger he faced upon returning home in light of his cooperation with authorities. Id. at 3-4.

Petitioner's counsel reiterated those arguments at petitioner's sentencing hearing. Pet. App. C1-C23; see id. at C6-C11 (reasserting objections). Among other things, counsel described petitioner as "a very hard working automobile mechanic" who agreed to one drug-smuggling trip because he was "trying to do

right by” his three children. Id. at C7. Counsel asked the district court to reduce petitioner’s total offense level by “a few levels” because the Guidelines otherwise “grossly over scored” petitioner. Id. at C11. Counsel also read a statement from petitioner in which petitioner expressed remorse for his crime, and counsel introduced letters from petitioner’s family and acquaintances, photographs of family, and report cards for his children. Id. at C11-C16. Describing petitioner as “a very good man” who “made a single mistake,” counsel asked the court “to extend to him any kindness, or mercy, or consideration that [the court] c[ould] give this case.” Id. at C16-C17.

The district court expressed skepticism of petitioner’s counsel’s arguments, stating that it was “having a hard time believing \* \* \* that a drug organization in Mexico would pick up somebody that they don’t trust to a great degree and send him down to Colombia to be a load guard.” Pet. App. C17.<sup>1</sup> The court declined to give petitioner a minor-role adjustment because it found that he was the “load guard” on the vessel. Id. at C18; see also id. at C10, C17. The court adopted the facts and Guidelines calculations set forth in the presentence report, determining that

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<sup>1</sup> A “load guard” is the person responsible for ensuring that drugs are safely delivered. United States v. Mosquera, No. 16-10261, 2018 WL 1545594, at \*8 (11th Cir. Mar. 30, 2018).

petitioner had a total offense level of 35, a criminal history category of I, and an advisory Guidelines range of 168 to 210 months. Id. at C18-C19. The court then announced that, considering the advisory Guidelines and the sentencing factors set forth in 18 U.S.C. 3553(a), it was imposing a sentence of 168 months of imprisonment to be followed by five years of supervised release. Pet. App. C19. Pursuant to the plea agreement, the court dismissed the second count in the indictment. Id. at C20.

4. Petitioner appealed and, with new counsel, argued that he was denied his Sixth Amendment right to counsel at sentencing. Pet. App. D10-D26. Petitioner asserted that his sentencing counsel was constitutionally ineffective because, according to petitioner, counsel "failed to ask the district court for a downward variance" pursuant to Sentencing Guidelines § 5K2.0 based on mitigating Section 3553(a) factors identified in the presentence report. Pet. App. D10. Petitioner argued that his appeal waiver did not bar him from appealing on that basis because it prohibited only "a direct appeal of sentence," not a challenge to the "performance of counsel during sentencing." Ibid. Accordingly, petitioner asked the court of appeals to find that he was deprived of his right to counsel during sentencing and to remand for resentencing. Id. at D11.

The government moved to dismiss petitioner's appeal. Pet. App. E1-E13. The government maintained that the appeal was precluded by petitioner's explicit waiver of his right to challenge his sentence on direct appeal and that his contentions on appeal did not fit within any of the exceptions to that waiver. Id. at E6-E8. The government further argued that, even if petitioner had not waived his right to appeal his sentence, the court of appeals should dismiss his appeal because no evidence in the record suggested that defense counsel's advocacy was deficient or that it prejudiced petitioner, and the court should therefore decline to consider petitioner's ineffective assistance claim in the context of a direct appeal. Id. at E8-E10.

The court of appeals granted the government's motion and dismissed petitioner's appeal, citing its prior decision in United States v. Bushert, 997 F.2d 1343, 1350-1351 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994), for the proposition that a "sentence appeal waiver will be enforced if it was made knowingly and voluntarily." Pet. App. G1-G2.

#### ARGUMENT

Petitioner contends (Pet. 13-16) that the court of appeals erred in enforcing his appeal waiver in the context of his appellate claim of ineffective assistance of counsel at sentencing. The court's determination that petitioner validly

waived his right to appeal his sentence on that basis is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would be a poor vehicle to address the question presented because petitioner cannot establish that he was denied the effective assistance of counsel. Further review is not 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 Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (upholding plea agreement's waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's 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.

Here, petitioner expressly waived his right to appeal his sentence "on any ground," except those grounds enumerated in the plea agreement, none of which was ineffective assistance of counsel. Pet. App. A15; see pp. 3-4, supra. The magistrate judge specifically engaged in a colloquy with petitioner about that

appeal waiver before finding that petitioner's plea was knowing, intelligent, and voluntary. Change of Plea Hr'g Tr. 17-18, 29; see p. 4, supra. And petitioner does not challenge that finding. The court of appeals thus correctly determined that petitioner's knowing and voluntary appeal waiver is valid, enforceable, and covers petitioner's challenge to his sentence on the grounds that he received ineffective assistance of counsel at sentencing. Pet. App. G1-G2.

Petitioner contends (Pet. 13) that his appeal waiver does not bar a direct appeal of his sentence based on a claim that he received ineffective assistance of counsel because, according to petitioner, such a claim is "collateral" and does not constitute a "direct" challenge to his sentence. But petitioner asked the court of appeals to vacate his sentence and to remand for resentencing based exclusively on the alleged ineffectiveness of his sentencing counsel. Pet. App. D27. That request was unambiguously an appeal of his sentence covered by petitioner's express waiver of the "right to appeal [his] sentence on any ground" except those listed in the plea agreement. Id. at A15. Indeed, "every Circuit to have addressed the issue has held that a valid sentence-appeal waiver \* \* \* precludes the defendant from attempting to attack \* \* \* the sentence through a claim of ineffective assistance of counsel during sentencing," even in a

collateral proceeding. Williams v. United States, 396 F.3d 1340, 1342 (11th Cir.) (citing decisions from the Second, Fifth, Sixth, Seventh, and Tenth Circuits), cert. denied, 546 U.S. 902 (2005); United States v. Nunez, 223 F.3d 956, 959 (9th Cir. 2000), cert. denied, 534 U.S. 921 (2001). A fortiori, a valid sentence-appeal waiver precludes such a claim on direct appeal.

2. Petitioner errs in contending (Pet. 13-14) that the court of appeals' decision conflicts with the D.C. Circuit's decision in United States v. Soto, 132 F.3d 56 (1997). In that case, the D.C. Circuit determined, on direct appeal, that the defendant received ineffective assistance of counsel during sentencing when his counsel failed to request an offense-level reduction under Sentencing Guidelines § 3B1.2 (1995), even though the defendant "appeared to satisfy the standards" in that provision. 132 F.3d at 57. Nothing in the court's decision, however, indicates that the defendant in Soto had expressly waived the right to appeal his sentence pursuant to a valid plea agreement. Indeed, Soto does not mention appeal waivers at all. Accordingly, Soto does not suggest that the D.C. Circuit would have permitted petitioner to press his current ineffective assistance claim despite his knowing and voluntary agreement to such a waiver.

3. In any event, this case would be a poor vehicle to address the question presented because the record provides no basis to

conclude that petitioner received ineffective assistance at sentencing. To establish ineffective assistance of counsel, petitioner must prove both (1) deficient performance and (2) prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Strickland's deficient-performance prong requires a showing that defense counsel's conduct fell below an "objective standard of reasonableness," with the court applying a "strong presumption" that counsel's strategy and tactics fell "within the wide range of reasonable professional assistance." Id. at 688-689. The prejudice prong, in turn, requires a showing that counsel's deficient performance "prejudiced the defense," through proof of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687, 694. Petitioner has failed to establish either prerequisite.

Petitioner asserts (Pet. 10-11) that defense counsel was constitutionally ineffective for failing to request a downward variance based on the sentencing factors set forth in 18 U.S.C. 3553(a) and Sentencing Guidelines § 5K2.0. Because petitioner presses this claim on direct appeal, he has forgone the benefit of making evidentiary submissions that could potentially support an ineffective-assistance claim asserted on collateral review. Accordingly, the only possible evidence in the record about

counsel's performance at sentencing consists of counsel's written response to the PSR and the sentencing transcript. See Pet. App. C1-C22; Response to PSR 1-4. And those documents do not support petitioner's contention that his counsel's performance during sentencing was deficient.

To the contrary, as petitioner acknowledges (Pet. 9-10), his counsel raised several mitigating factors at sentencing, including petitioner's employment history, lack of criminal history, alleged lack of knowledge of the quantity of drugs aboard the semi-submersible vessel, and allegedly minor role in the offense. See Pet. App. C5-C17; Response to PSR 1-4. Moreover, after making several arguments in support of a lower advisory Guidelines range, petitioner's counsel further asked the district court to "extend to [petitioner] any kindness, or mercy, or consideration that you can give this case." Pet. App. C16-C17. Although counsel did not cite Section 3553(a) or Sentencing Guidelines § 5K2.0 in making that request for leniency, the court would have understood that counsel was asking for a downward variance.

For similar reasons, the record provides no basis to find a "reasonable probability" that, but for the asserted error, petitioner would have obtained a lower sentence. Based on the presentence report and the arguments of petitioner's counsel in his written response and at sentencing, the district court knew

the potential grounds for granting petitioner a downward variance, and the court considered the sentencing factors set forth in Section 3553(a) before deciding on petitioner's sentence. See Pet. App. C19. Nothing in this record suggests that further argument from defense counsel would have changed the court's determination that a 168-month sentence was appropriate punishment for his role as a load guard on a semi-submersible vessel smuggling more than 6000 kilograms of cocaine. Id. at C17-C18.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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