No. 11-1522

# In the Supreme Court of the United States

DWANDELL WILLIAMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND 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 appeal waivers in his guilty plea agreements to foreclose petitioner's contention on appeal that he was denied ineffective assistance of counsel at sentencing.

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## OPINION BELOW

The order of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 448 Fed. Appx. 156.

## JURISDICTION

The judgment of the court of appeals was entered on January 18, 2012. On April 12, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 15, 2012, and the petition was filed on that date. 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 Western District of New York, petitioner was convicted in No. 09-CR-227 of possessing with intent to distribute 50 grams or more of cocaine base, in

violation of 21 U.S.C. 841(a)(1) and (b)(1). The district court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. In No. 03-CR-233, petitioner admitted and the district court found that petitioner had violated the terms of his supervised release in that case. The district court revoked petitioner's supervised release and sentenced petitioner to 12 months of imprisonment to be served consecutively with the sentence imposed in No. 09-CR-227. The court of appeals affirmed. Pet. App. 1a-4a.

1. In 2002, petitioner agreed to supply two kilograms of cocaine in a drug transaction involving a government confidential source. Before the transaction occurred, officers executed a traffic stop of petitioner's car. Petitioner fled and, during the high-speed chase, threw a package containing 1.979 kilograms of cocaine out of his car's window. In late 2003, petitioner pleaded guilty in No. 03-CR-233 to possessing with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. 841(a)(1). In 2004, the district court at sentencing granted the government's motion for a two-level downward departure pursuant to U.S.S.G. § 5K1.1. The court then sentenced petitioner to 84 months of imprisonment, to be followed by five years of supervised release. In late 2008, petitioner was released from imprisonment and began serving his five-year term of supervision. Presentence Investigation Report (PSR) ¶¶ 9, 33, 92; C.A. App. 12.

In April 2009, approximately six months after petitioner's release from prison, federal law-enforcement officers learned from a confidential source that petitioner was again involved in arranging drug transactions and accordingly conducted a search of petitioner's car and home. The officers found approximately 474 grams

of cocaine base and 247 grams of cocaine, which had an estimated street value between $23,000 and $96,000, and two digital scales. Petitioner admitted that the drugs and scales were his and that he had planned to sell the cocaine base. The officers arrested petitioner. PSR ¶¶ 8-9, 12; C.A. App. 2, 22-23.

2. Petitioner's April 2009 arrest generated district court proceedings in two separate criminal cases against petitioner. In No. 09-CR-227, a federal grand jury indicted petitioner on three drug counts. C.A. App. 17-19. Petitioner entered a written agreement to plead guilty to one count of possession with intent to distribute 50 grams or more of cocaine base. *Id.* at 20-36 (agreement). In No. 03-CR-233, petitioner was charged with violating the terms of his supervised release. *Id.* at 12-13. Petitioner entered a separate, written agreement admitting that his drug offense violated the terms of his release. *Id.* at 37-43 (agreement).

In his plea agreements, petitioner acknowledged that his drug-trafficking offense carried a statutory minimum sentence of ten years of imprisonment and a maximum of life imprisonment, that petitioner was a career offender, and that petitioner had a Category VI criminal history (the highest category). C.A. App. 20, 24-25; see 21 U.S.C. 841(b)(1). Petitioner agreed that the advisory Sentencing Guidelines ranges for his drug offense and his supervised-release violation were, respectively, 262 to 327 months and 37 to 46 months of imprisonment. C.A. App. 25, 39-40. Petitioner further agreed to waive his right to appeal any sentence of imprisonment imposed by the district court "which falls within or is less than the sentencing range[s]" specified above, "notwithstanding the manner in which the [c]ourt determines the sentence." *Id.* at 28, 41. The plea agreements expressly

state that each of petitioner's appeal waivers includes a promise "to not appeal the imposition of the sentence of imprisonment * * * consecutively or partially consecutively with any sentence of imprisonment imposed on [petitioner]" in the other case. *Id.* at 29, 41. The agreement in No. 09-CR-225 additionally provides that petitioner understands his right to appeal; that he "knowingly waives the right to appeal and collaterally attack any component of a sentence" for his drug offense that falls within the Guidelines range above; and that the waiver relinquished petitioner's "right to challenge [his] sentence" even if he were "in the future * * * [to] become[] aware of previously unknown facts" that might "justify a decrease in [his] sentence." *Id.* at 28-29.

In February 2010, the district court held a joint plea hearing for both cases (C.A. App. 44-75) in which the court questioned petitioner at length about petitioner's conduct and his understanding of the charges, his rights, and the plea agreements, including the appeal waivers. *Id.* at 59-60, 66; see *id.* at 46-70, 72-75. The court found petitioner "intelligent, alert, focused, attentive," and "fully competent and capable of entering an informed plea." *Id.* at 65, 70. The court also verified that petitioner was satisfied with his counsel's performance. *Id.* at 47. The court thereafter found that petitioner had entered his guilty pleas knowingly and voluntarily, accepted the pleas, and found petitioner guilty of the drug offense and in violation of the terms of his release. *Id.* at 70, 75.

Petitioner's counsel filed a sentencing memorandum seeking a below-Guidelines sentence of three years of imprisonment on humanitarian grounds. Pet.'s Sentencing Mem. 4. The memorandum explained that if the district court were to grant an anticipated motion by the

government for a downward departure, petitioner's advisory Guidelines range would be reduced to 210 to 262 months of imprisonment, but that a below-Guidelines sentence of only three years of imprisonment was warranted. *Id.* at 1-2. Counsel argued petitioner's acceptance of responsibility for his crimes, his substantial assistance to the government, and special humanitarian grounds warranted a three-year sentence: petitioner suffers from end-stage renal disease requiring thrice weekly dialysis that significantly reduces his life expectancy and, after petitioner's arrest, petitioner's longtime girlfriend and ten-year-old daughter were tragically killed in a fire that left petitioner's surviving 13-year-old daughter without a mother and in the care of her aunt. *Id.* at 3-4. The PSR confirmed those facts. PSR ¶¶ 53, 57-65.

The PSR also explained that petitioner had stated during his interview with a probation officer that petitioner's nephew had expressed willingness to donate a kidney to petitioner but could not afford to miss work for the amount of time needed for the procedure. PSR ¶ 15. Petitioner stated that he had decided to do the drug deal to obtain money to pay his nephew's living expenses while he was out of work. *Ibid.* The PSR, however, further revealed that petitioner's mother, who maintained a good relationship with petitioner, stated that she had "no idea what [petitioner's] motivation may have been" to commit the drug offense and that "no family member, other than [petitioner's incarcerated brother,] ha[d] ever been tested as a potential kidney donor for [petitioner] and [that] no family members were willing to do so." PSR ¶¶ 50, 54-55.

At sentencing, the district court adopted the facts in the PSR as the court's factual findings. C.A. App. 79.

The court also granted the government's motion for a two-level reduction under Guidelines § 5K1.1 based on petitioner's substantial assistance, which reduced petitioner's advisory Guidelines sentencing range to 210 to 262 months of imprisonment for his drug-trafficking charge and authorized the court to impose a sentence below the ten-year statutory minimum for that offense. *Id.* at 80; see 18 U.S.C. 3553(e). The district court further determined that the advisory Guidelines range for petitioner's supervised release violation was 37 to 46 months of imprisonment to be served consecutively to the drug-trafficking sentence, and it noted that the Guidelines indicated that an upward departure from that range may be warranted because petitioner originally received a downward departure in his 2004 sentencing. C.A. App. 81; see U.S.S.G. § 7B1.3(f); *id.* § 7B1.4, comment. (n.4).

The district court determined that petitioner's plea agreement should have noted that the Guidelines suggested an upward departure for petitioner's supervised-release violation but did not do so. C.A. App. 81-82. The court asked whether petitioner was aware of that suggestion and, after learning that petitioner was not specifically aware of the relevant Guidelines provision, called a recess to allow defense counsel to advise petitioner. *Id.* at 82-83. After the recess, the court confirmed that counsel had adequate time to advise petitioner. *Id.* at 83.

Petitioner's counsel renewed his sentencing contentions at the sentencing hearing, arguing that petitioner regretted his drug-trafficking offense, petitioner should be permitted to raise his surviving daughter after the tragic death of her mother and sister, petitioner's renal failure and dialysis significantly reduced his life expec-

tancy, and part of petitioner's motivation for the offense was to earn money to allow his nephew to donate a kidney to petitioner. C.A. App. 83-87. The court asked petitioner's counsel whether he "believe[d] [petitioner's] story" about dealing drugs to pay a nephew who was willing to donate his kidney given that nothing indicated that "anybody had been tested." *Id.* at 87. Counsel stated that he believed petitioner and had "no reason to doubt" him. *Ibid.* The government acknowledged petitioner's kidney failure and took no position on petitioner's suggested three-year below-Guidelines sentence. *Id.* at 91.

The district court acknowledged the "tragic situation with [petitioner's] daughter and his girlfriend" and petitioner's serious kidney condition, adding that it was "very unfortunate that a man with [petitioner's] medical condition would find himself involved in this drug activity again." C.A. App. 84, 87. But the court noted that petitioner had been through the criminal justice system multiple times, had "a criminal history [c]ategory of VI," and had returned to selling drugs within about six months from his release from prison. *Id.* at 83-85. The court explained that, while it understood that petitioner had experienced "real tragic events in his life," the court also had to "look at society," observed that petitioner had "lived a life of crime," and asked, "how do you save society from someone like [petitioner]?" *Id.* at 84, 87, 94. The court added that it was "obviously concerned about the amount of drugs" at issue and was "very concerned" that petitioner committed his drug-trafficking offense just "a short period" after leaving prison "while he was on supervised release." *Id.* at 93-94. The court stated that it could have sentenced petitioner to life imprisonment "based on this record," but that the court

had decided to sentence petitioner at the "low end" of the Guidelines range for petitioner's drug offense (210 months) and "below" the range for petitioner's supervised-release violation (12 months). *Id.* at 90-91, 93. The court added that the sentences would "run consecutive[ly]" such that "when you put the two sentences together" they are "adequate to deal with the crime that was committed here." *Id.* at 93, 95.

Petitioner filed a *pro se* notice of appeal. C.A. App. 105. With new appellate counsel, petitioner argued on appeal that he was denied his Sixth Amendment right to effective counsel at sentencing. Petitioner asserted in his brief (without evidentiary support) that petitioner's "current life expectancy is less than 10 years"; that his trial counsel "failed to make any meaningful effort to substantiate the seriousness of [petitioner's medical] condition"; and that trial counsel failed to conduct "any investigation in an attempt to support [petitioner's] alleged motivation" for his drug-trafficking offense, *i.e.*, to "help fund a kidney donation by his nephew." Pet. C.A. Br. 3. Petitioner further argued that his appeal waiver was invalid because it was the product of ineffective assistance that was "obvious on the record" of his direct appeal. *Id.* at 10, 12-13.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1a-4a. The court held that petitioner's appeal waiver foreclosed his appeal based on asserted ineffective counsel at sentencing. *Id.* at 3a-4a. The court of appeals explained that so long as an appeal waiver is knowing and voluntary, it forecloses claims within its terms. *Id.* at 3a. Here, petitioner "waived his right to appeal any sentence within or below the Guidelines range." *Ibid.* That provision, the court concluded, barred petitioner's sentencing challenge because his

"sentence fell within or below the Guidelines ranges specified in the plea agreements." *Ibid.* Petitioner "may not now do an end-run around his plea agreements on the ground of ineffective assistance." *Ibid.*

The court of appeals also rejected petitioner's contention that he was denied the effective assistance of counsel when he "enter[ed] into the plea agreement." Pet. App. 4a. Although petitioner argued that defense counsel failed at the time to explain a Guidelines provision that could have resulted in an upward departure from the Guidelines range for petitioner's supervised-release violation, the court noted that petitioner knew that he could receive a sentence of up to five years of imprisonment for the violation. *Ibid.* The court additionally concluded that petitioner could not show that he was prejudiced by any deficient performance because "he ultimately received a below-Guidelines sentence." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 9-11) that the court of appeals erred in enforcing his appeal waivers against his appellate claims of ineffective assistance of counsel at sentencing. The court of appeals correctly enforced petitioner's knowing and voluntary appeal waivers. Its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. This Court has repeatedly held that a defendant may validly waive constitutional and statutory rights as part of the plea bargaining process so long as his waiver is knowing and voluntary. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-202 (1995) (explaining that a defendant may waive "many of the most fundamental protections afforded by the Constitution"); *Ricketts* v. *Ad-*

*amson*, 483 U.S. 1, 9-10 (1987) (upholding plea agreement's waiver of right to raise double jeopardy defense). The district court specifically questioned petitioner about his appeal waivers before finding petitioner's pleas knowing and voluntary, C.A. App. 59-60, 66, 70, 75, and the court of appeals correctly concluded that petitioner's knowing and voluntary appeal waivers are valid, enforceable, and cover his claims of ineffective assistance of counsel at sentencing. Pet. App. 3a. Petitioner does not directly dispute the court of appeals' conclusion.

Petitioner suggests (Pet. 10-11) that the court of appeals erroneously upheld a waiver of petitioner's Sixth Amendment right to the effective assistance of counsel without requiring that petitioner be advised as such. But petitioner did not waive his right to effective counsel; he waived his right to *appeal* his sentence. The fact that the waivers in petitioner's plea agreements did not expressly address the possible appellate claims of error that petitioner would waive does not undermine the knowing and voluntary nature of his appeal waiver. See *United States* v. *Broce*, 488 U.S. 563, 573 (1989) ("Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty."); *Ricketts*, 483 U.S. at 9 (explaining that the Court did "not find it significant" that a double-jeopardy claim "was not specifically waived by name in the plea agreement"); see also *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002) ("[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not

know the *specific detailed* consequences of invoking it.").

2. Petitioner's assertion (Pet. 11-14) that the courts of appeals are divided over the question presented is without merit. "[E]very Circuit to have addressed the issue has held that a valid sentence-appeal waiver * * * precludes the defendant from [later] attempting to attack * * * the sentence through a claim of ineffective assistance of counsel during sentencing." *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 contrary rule would incorrectly permit an appeal waiver to be rendered "meaningless" by allowing a defendant to "dress up his claim as a violation of the Sixth Amendment, [when] in reality [he] is challenging the correctness of his sentence." *United States* v. *Djelevic*, 161 F.3d 104, 107 (2d Cir. 1998).

Petitioner's reliance (Pet. 11-12) on *Nunez*, *Sotirion* v. *United States*, 617 F.3d 27 (1st Cir. 2010), and *United States* v. *Attar*, 38 F.3d 727 (4th Cir. 1994), cert. denied, 514 U.S. 1107 (1995), is misplaced. In *Nunez* , the Ninth Circuit stated that it did "not decide" whether an appeal waiver could be rendered involuntary by sufficiently "egregious" counsel incompetence. 233 F.3d at 959. That non-holding cannot establish a circuit conflict. Likewise, in *Sotirion*, the First Circuit reasoned in dicta that it could decline to enforce an appeal waiver in an "egregious" case to avoid a "miscarriage of justice" but ultimately held that Sotirion's appeal waiver was properly enforced and barred his appeal from a Sentenc-

ing Guidelines error. 617 F.3d at 36-38. Nothing in that decision suggests a division of authority.

The Fourth Circuit's decision in *Attar* also fails to create a circuit conflict. In *Attar*, defense counsel was allowed to withdraw at the beginning of the sentencing hearing, and the defendants were essentially forced to represent themselves at the hearing, which included presentation of a motion to withdraw their guilty pleas. 38 F.3d at 729-731. The defendants then argued on appeal that the district court proceedings after the entry of their guilty pleas were conducted in violation of their Sixth Amendment right to counsel. *Id.* at 732-733. Although the defendants had agreed to an appeal waiver in their plea agreement, the Fourth Circuit construed the "scope" of that waiver not to extend to their Sixth Amendment claim. *Id.* at 732-734

The appeal waiver in *Attar*, however, unlike the appeal waiver in this case, specifically preserved the "right to appeal * * * upon grounds of ineffective assistance of counsel * * * not known to the Defendants at the time of the[ir] . . . guilty plea." 38 F.3d at 729. And although the court of appeals did not expressly parse the text of that waiver in its analysis, the court held that "the general waiver of appeal rights contained in *this plea agreement* can[not] fairly be construed as a waiver of the right to challenge [the defendants'] sentences on" the ground that the post-plea proceedings "were conducted in violation of their Sixth Amendment right to counsel." *Id.* at 732-733 (emphasis added). Because petitioner's appeal waiver contains no similar reservation of the right to present an ineffectiveness claim on appeal, *Attar* does not conflict with the decision below.

Petitioner relies (Pet. 11-12) on *Attar*'s statement that a provision generally waiving post-conviction re-

view does not preclude a post-plea Sixth Amendment claim because, the court stated, "a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations." *Attar*, 38 F.3d at 732. That statement, however, is properly understood only in light of the claim presented in *Attar*. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)). Even if *Attar*'s analysis could be separated from the text of the appeal waiver in the case, *Attar* addressed a claim not present here: the *Attar* defendants argued they were denied counsel altogether. This Court has recognized that the deprivation of counsel is a "jurisdictional defect" that is cognizable in situations in which a mere claim of ineffective assistance of counsel is not. See *Custis* v. *United States*, 511 U.S. 485, 496 (1994). Furthermore, although a defendant can recharacterize almost any alleged error as a claim of ineffective assistance, see *Djelevic*, 161 F.3d at 107, a claim of deprivation of counsel is not subject to that potential abuse. In short, *Attar* addressed materially distinguishable claims and thus does not conflict with the decision below.

3. In any event, this case would be a poor vehicle to address petitioner's contention that the court of appeals erred in rejecting his ineffective claims on appeal-waiver grounds, because petitioner failed to establish a valid claim of ineffective assistance at sentencing. The judgment below thus may be affirmed on alternative grounds without reaching the question presented. See *Schiro* v.

*Farley*, 510 U.S. 222, 228-229 (1994) (a respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

To establish ineffective assistance of counsel, petitioner had to 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 evidence overcoming the "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" with 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 failed to establish either prong.

First, petitioner relies on the assertion (Pet. 2-3) that defense counsel was constitutionally deficient in failing to investigate petitioner's story that he was dealing drugs to pay his nephew for a kidney. By deciding to press this claim on direct appeal, petitioner has not had the benefit of making evidentiary submissions that normally would support an ineffective-assistance claim asserted on collateral review. Petitioner thus has not provided any evidence about what his trial counsel did or did not do outside of court to investigate petitioner's sentencing claims and has submitted no evidence suggesting that a reasonable investigation would have discovered a nephew to verify petitioner's story. Cf. p. 5, *supra* (evidence that no family member other than peti-

tioner's brother was willing to be a donor). The only possible evidence in the record about counsel's performance at sentencing consists of the sentencing-hearing transcript (C.A. App. 77-95), which does not support petitioner's position.

Moreover, petitioner has not shown a "reasonable probability" that, but for the asserted error, he would have obtained a lower sentence. The district court accepted the seriousness of petitioner's medical condition and personal tragedies but it focused on petitioner's long criminal history and the seriousness of his drug-trafficking offense. See pp. 7-8, *supra*. Nothing suggests that any further investigation would have changed the result at sentencing.

Second, petitioner failed to prove his assertion (Pet. 9) of ineffective assistance based on trial counsel's failure to seek concurrent sentences expressly or to object to the imposition of consecutive sentences. Although the district court ultimately followed the advisory Guidelines' recommendation of consecutive sentences, C.A. App. 93, 95, the court had previously confirmed that petitioner understood that the government did not object to the imposition of concurrent sentences and stated that the court was "going to consider it." *Id.* at 72. Trial counsel thus reasonably could have decided to focus his sentencing argument for a total below-Guidelines sentence of three years of imprisonment on other factors that would ultimately influence the court's sentencing discretion and aggregate sentence. Furthermore, even if counsel's performance could be deemed deficient, nothing in the record suggests that the sentencing court, having already varied from a Guidelines' range of 37 to 46 months to a sentence of only 12 months for petitioner's supervised-release violation, would have been

swayed by a request for concurrent sentences. To the contrary, the court's explanation that it had imposed consecutive sentences that were "adequate to deal with the crime that was committed" "when you put the two sentences together," *id.* at 93, undermines any claim of prejudice.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2012