No. 22-1200

In the Supreme Court of the United States

LEE JONES, 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, after agreeing with petitioner and the government that petitioner's guilty plea was invalid, the court of appeals erred in giving the district court on remand the option to choose between the two alternative remedies proposed by petitioner, after determining that the government had forfeited the (correct) argument that his preferred alternative would, if granted in isolation, be contrary to law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 53 F.4th 414.

JURISDICTION

The judgment of the district court was entered on November 16, 2022. A petition for rehearing was denied on January 11, 2023 (Pet. App. 9a). On April 3, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including June 9, 2023. The petition for a writ of certiorari was filed on June 8, 2023. 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 Ohio, petitioner was convicted of possessing a firearm following a felony con-

viction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018). Judgment 1. He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals vacated petitioner's sentence and remanded. Pet. App. 1a-8a.

1. During an August 2020 traffic stop in Struthers, Ohio, police officers noticed a firearm behind the driver's seat and ordered petitioner, who was driving, out of the car. Presentence Investigation Report (PSR) ¶¶ 9, 11; Pet. App. 22a. Petitioner refused and instead led police on a high-speed chase, crashed the car, and then fled on foot. PSR ¶¶ 11-12; Pet. App. 23a. Officers apprehended him nearby and recovered a semiautomatic rifle and a handgun, both loaded, from the wrecked car. PSR ¶¶ 12-13; Pet. App. 2a, 23a. A federal grand jury in the Northern District of Ohio indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018). Indictment 1.

Petitioner indicated that he intended to plead guilty. Pet. App. 12a. At the May 2021 change-of-plea hearing, the parties informed the district court that they disagreed about whether the base offense level under the advisory sentencing guidelines would be 18, as the government maintained, or 14, as petitioner maintained. *Id.* at 17a. The court told petitioner that at sentencing, it would therefore "have to decide whether you start at an 18 or a 14." *Id.* at 18a. The court also told him that because the parties "agree[d] that you're a Criminal History Category II," the resulting advisory guidelines range would either be 21 to 27 months of imprisonment or 12 to 18 months of imprisonment. *Ibid.* The court did not explain to petitioner that it was not bound by the

parties' calculations in the absence of a plea agreement. See *id.* at 3a.

Petitioner pleaded guilty. Pet. App. 23a-24a. Before sentencing, the Probation Office prepared a presentence report recommending a base offense level of 20 and a criminal history category of IV, which (after the application of relevant reductions and enhancements) resulted in an advisory guidelines range of 46 to 57 months of imprisonment. PSR ¶¶ 23, 53, 101; Pet. App. 33a-34a. Petitioner objected, stating that "I changed my plea [to] guilty" while under the impression that the district court's choice would be "whether I was at a 14 or a[n] 18," and thus would be "looking at from 12 to 27" months of imprisonment. Pet. App. 40a. The court explained that petitioner could move to withdraw his plea, but that if the motion were denied (or if the motion were granted and the ensuing trial resulted in a conviction) he would no longer be eligible for the three-level reduction in offense level for accepting responsibility and timely pleading guilty. *Id.* at 41a-42a; see PSR ¶¶ 30-31. Petitioner then agreed that he "want[ed] to go forward with the sentencing today." Pet. App. 44a. The court sentenced petitioner to 57 months of imprisonment, to be followed by three years of supervised release. *Id.* at 47a; Judgment 2-3.

2. The court of appeals vacated petitioner's sentence and remanded. Pet. App. 1a-8a.

On appeal, petitioner argued (C.A. Br. 16-26) that his plea was not knowing and voluntary because, among other things, he did not "understand[]" the "maximum possible penalty" he could face when he pleaded guilty. Fed. R. Crim. P. 11(b)(1)(H). As a remedy, petitioner asked the court of appeals to "vacate his sentence and remand for resentencing to a term of imprisonment not

to exceed 27 months," or, "[i]n the alternative," to vacate his conviction and plea "to allow him to decide with complete information how he wishes to proceed." Pet. C.A. Br. 27-28.

In its response brief, the government agreed that petitioner's plea did not meet the standard in Federal Rule of Criminal Procedure 11 and asked the court of appeals to "remand to allow [petitioner] the opportunity to withdraw his guilty plea before the district court and then proceed anew, either via a knowing and voluntary guilty plea or to trial." Gov't C.A. Br. 21. The government stated that "[petitioner] is not, however, entitled to specific performance of a 27-month sentence, as he alternatively suggests." *Ibid.* The government did not elaborate on those statements or make any additional argument about the appropriate remedy. In a letter submitted before the oral argument, however, the government explained that under binding circuit precedent, "the appropriate remedy [in a case like this] is to vacate the plea and remand so that the defendant can plead anew if he chooses, or proceed to trial." C.A. Doc. 30, at 1 (Oct. 30, 2022) (quoting *United States* v. *Ataya*, 884 F.3d 318, 323 (6th Cir. 2018)); see Fed. R. App. P. 28(j).

The court of appeals agreed that petitioner's plea did not comport with Rule 11. Pet. App. 4a. On the issue of the appropriate remedy, the court took the view that the government's "fail[ure] to develop any argument against [petitioner's] proposed remedy" of a "resentencing to no greater than 27 months' imprisonment" constituted "an obvious forfeiture." *Ibid.* Citing this Court's decision in *Young* v. *United States*, 315 U.S. 257 (1942), however, the court of appeals explained that "the government's forfeiture does not allow the court to or-

der a remedy that is contrary to law" because "courts have an independent obligation to get the law right in criminal cases." Pet. App. 4a-5a.

The court of appeals then explained that petitioner's proposal "to cap the sentencing court's discretion at 27 months" would be "contrary to law" because "there's only one way a defendant can cap the district court's sentence: a binding plea agreement." Pet. App. 5a (citing Fed. R. Crim. P. 11(c)(1)(C)). The court of appeals observed that district courts must follow "an elaborate process" before accepting a plea agreement, and that petitioner's proposed remedy "would short-circuit that whole process." *Id.* at 5a-6a. The court of appeals further observed that petitioner "[i]n effect * * * asks us to impose a binding plea agreement—even though he didn't obtain one." *Id.* at 6a. The court reasoned that such a remedy would be inconsistent "with the proper administration of the criminal law." *Ibid.*

The court of appeals rejected petitioner's reliance on habeas cases in which the court had "ordered a state prisoner to be resentenced without vacating his guilty plea," explaining that the "remedies possible to redress constitutional violations in state courts" are shaped by "federalism and comity" concerns that are inapposite "in federal court." Pet. App. 6a-7a. The court also rejected petitioner's reliance on *United States* v. *Smagola*, 390 Fed. Appx. 438 (6th Cir. 2010), finding that "unpublished" decision to be "unpersuasive" because it "ignore[d] the distinction between guilty pleas entered in state and federal court." Pet. App. 7a.

Citing *McCarthy* v. *United States*, 394 U.S. 459 (1969), the court of appeals explained that "the proper remedy" for a "violation of Rule 11" is "to vacate [petitioner's] plea and remand for him to plead anew." Pet.

App. 6a (citing *McCarthy*, 394 U.S. at 472). Nevertheless, the court took the view that "because the government forfeited any objection to [petitioner's] proposed remedy," it would "grant the closest remedy the law permits." *Id.* at 7a. And the court reasoned that it "can give the district court the option of resentencing [petitioner] to no more than 27 months or allowing him to plead anew." *Ibid.*

The court of appeals emphasized that "[i]n making that decision, the district court may consider any of the relevant sentencing factors, including post-sentencing rehabilitation." Pet. App. 7a. And the court of appeals observed that "[t]his choice preserves the district court's discretion and comports with [this] Court's decision in *McCarthy*." *Ibid.* The court of appeals accordingly "vacate[d] the district court's sentence and remand[ed] for further proceedings consistent with [its] opinion." *Id.* at 8a.

ARGUMENT

Petitioner contends (Pet. 21-25) that the court of appeals erred in giving the district court the option to choose between two potential remedies that petitioner himself had proposed on the ground that the government forfeited its argument against his preferred alternative. Review of that contention would at best be premature, as the case is in an interlocutory posture and the district court remains able to grant him precisely the remedy that he seeks. In any event, the court of appeals was not required to force the district court to adjust petitioner's sentence, and the court of appeals' decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. As a threshold matter, review of the question presented is unwarranted because this case is in an interlocutory posture. This Court has explained that a lower-court decision's interlocutory posture may "alone furnish[] sufficient ground for the denial of" a petition for writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari).

Here, the court of appeals vacated petitioner's sentence and remanded the case for the district court to select, in its discretion, one of the two alternative remedies that petitioner himself had proposed. Pet. App. 7a-8a. One of those alternatives is the remedy that petitioner would have preferred that the court of appeals mandate as the sole option—namely, "resentencing [him] to no more than 27 months." *Id.* at 7a; see, *e.g.*, Pet. 11-12.

As a result, it is far from clear, in the current posture, what term of imprisonment petitioner will ultimately receive—or, indeed, if he will be imprisoned at all, given that the district court could also allow him to withdraw the plea and he could be acquitted at a trial. If petitioner is ultimately dissatisfied with the eventual disposition of his case in the district court, he will be able to raise his current claim, together with any other claims that may arise with respect to his resentencing, in a single petition for a writ of certiorari. See *Major League Baseball Players Association* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. In any event, the court of appeals did not err in determining that "allowing [petitioner] to plead anew" would be an appropriate remedy in this circumstance.

Pet. App. 7a. Courts have independent authority to apply the correct law, and petitioner's contrary view conflates forfeiture of an issue with failure to develop an argument in support of an issue properly before a court.

This Court has explained that, under the principle of party presentation, a court should generally consider only the issues and arguments presented by the parties. *Wood* v. *Milyard*, 566 U.S. 463, 472 (2012). At the same time, the Court has drawn a distinction between "*claims*" that might be forfeited by parties and "separate *arguments* in support of a single claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). While a party can forfeit a claim by failing to raise it, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534. For that reason, this Court has emphasized that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991).

The court of appeals' decision accords with those principles. The issue of a remedy for petitioner's defective plea was properly before the court; both parties raised it in their briefs and, having found a Rule 11 violation, the court was required to address the appropriate remedy for that error. And petitioner does not dispute that had the government *agreed* with petitioner's preferred remedy, the court would have had an independent obligation "to examine independently" the appropriateness of that remedy because "the proper administration of the criminal law cannot be left merely to

the stipulation of parties." *Young* v. *United States*, 315 U.S. 257, 258-259 (1942). It would be highly anomalous if, as petitioner contends, the government's *disagreement* (albeit without elaboration) with petitioner's proposal not only relieved the court of that obligation, but deprived it of the authority (absent "extraordinary circumstances") to conduct that independent examination. Pet. 25.

Instead, the court of appeals "retain[ed] the independent power to identify and apply the proper construction of governing law" in determining the appropriate legal remedy for the Rule 11 violation in this case, irrespective of the parties' arguments (or lack thereof). *Kamen*, 500 U.S. at 99; see *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law."). As the court explained, petitioner's proposal to curtail the sentencing court's discretion on remand was inconsistent with this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969), the court of appeals' own precedent, and the rules and practices governing plea agreements. Pet. App. 5a-6a.

The petition for a writ of certiorari does not dispute that "the proper remedy for an unknowing plea entered in violation of Rule 11 is allowing the defendant to plead anew." Pet. App. 7a. To the contrary, it appears to be a premise of the petition that petitioner's preferred remedy would have "result[ed] in an outcome that is contrary to law." Pet. 15. The court of appeals thus had discretion to allow for the proper remedy, and would have violated its "judicial obligations," *Young*, 315 U.S. at 258, by entering an unlawful order, as petitioner claims it should have done.

Petitioner's reliance (Pet. 21-23) on *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020), is misplaced. There, the Ninth Circuit itself raised—and then adopted as the sole ground of decision—a First Amendment facial overbreadth claim that the defendant had "never raised," that was "contrary" to the defendant's "theory of the case," and that required the appointment of "three *amici* * * * to brief and argue" it. *Id.* at 1578, 1581. This Court held that the Ninth Circuit's departure "from the principle of party presentation" was "an abuse of discretion." *Id.* at 1578. Here, in contrast, the parties themselves raised the issue of remedy; and though the government did not elaborate on its arguments until a pre-argument letter, it expressly noted its disagreement with petitioner's preferred remedy in its appellate brief, see Gov't C.A. Br. 21.

In reaching the issue and basing its decision on its independent evaluation of the law, the court of appeals did not depart from the principle of party presentation. See *Young*, 315 U.S. at 258-259 ("[O]ur judicial obligations compel us to examine independently the errors confessed."). That is all the more clear given that the court of appeals did not actually foreclose petitioner's requested remedy; instead, it simply remanded with instructions for the district court to choose between the two alternative remedies that petitioner himself had proposed in his appellate briefing. Pet. App. 7a; see Pet. C.A. Br. 27-28.

3. The court of appeals' decision does not implicate any circuit conflict warranting this Court's review. Petitioner cites (Pet. 15-17) two cases in which the Seventh and Eleventh Circuits considered—and adopted—alternative grounds for affirming denials of motions to suppress after the government had either failed to raise

those grounds at all or raised the grounds too late. See *United States* v. *Edwards*, 34 F.4th 570, 584 (7th Cir.), cert. denied, 143 S. Ct. 307 (2022); *United States* v. *Campbell*, 26 F.4th 860, 872 (11th Cir.) (en banc), cert. denied, 143 S. Ct. 95 (2022). Those decisions, which declined to grant relief to a defendant, do not indicate that those courts would deem themselves obligated to order an unlawful remedy in the circumstances of this case.

Petitioner errs in attempting to draw a contrast between the principle in those decisions that courts will consider a forfeited claim only in "'extraordinary circumstances,'" and the principle in the decision below that "courts have an 'independent obligation to get the law right in criminal cases'" and thus should not hold the government to a forfeiture if that would "lead to an outcome that is 'contrary to law.'" Pet. 16-17 (citations omitted). Those principles do not conflict because entering an order that is "contrary to law" by definition would qualify as an "extraordinary circumstance." As petitioner himself observes, such circumstances include situations when "'the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice,'" or when "'the proper resolution is beyond any doubt.'" See Pet. 16 n.3 (citation omitted). Here, the court of appeals here found it "clear" that petitioner's proposed remedy would be "contrary to law," Pet. App. 5a & n.1, and petitioner does not contest that purely legal determination. Accordingly, no sound basis exists to conclude that the Seventh or Eleventh Circuits would have reached a different result.

Indeed, the court of appeals elsewhere has made clear that it "typically" excuses a government forfeiture "only in 'exceptional cases.'" *Greer* v. *United States*, 938 F.3d 766, 770 (6th Cir. 2019) (citation omitted). That

underscores that the decision below should not be construed to conflict with the similar statements in the Seventh and Eleventh Circuit decisions on which petitioner relies. And to the extent any such conflict might exist, that would be in intra-circuit issue more appropriately addressed in the first instance by the court of appeals itself. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Either way, this Court's review is unwarranted.

Finally, petitioner's reliance (Pet. 17) on the Fifth Circuit's decision in *United States* v. *Garcia-Pillado*, 898 F.2d 36 (1990), is misplaced. That case involved a failure to raise and develop a claim in the district court itself, which the Fifth Circuit resolved through a straightforward application of plain-error principles. See *id.* at 39-40. The case did not involve, as this case does, a failure to develop an argument on appeal with respect to a proposed remedy that would be contrary to law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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