No. 19-611

In the Supreme Court of the United States

RENE A. BOUCHER, 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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QUESTIONS PRESENTED

1. Whether the government's right to appeal the substantive reasonableness of petitioner's 30-day sentence for significantly injuring a U.S. Senator, which was significantly below the advisory Guidelines range of 21 to 27 months of imprisonment, was waived by provisions in petitioner's plea agreement "reserv[ing] [his] right to present evidence and arguments concerning any sentence he believe[d] to be appropriate" in the district court, while waiving his own right to appeal his conviction or sentence.

2. Whether the court of appeals' remand for resentencing, based on its determination that petitioner's low sentence reflected an abuse of the district court's discretion, violates the Double Jeopardy Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 937 F.3d 702. A prior order of the court of appeals (Pet. App. 25a-29a) is reported at 905 F.3d 479.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2019. The petition for a writ of certiorari was filed on November 8, 2019. 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 Kentucky, petitioner was convicted of assaulting a member of Congress, in violation of 18 U.S.C. 351(e). Judgment 1-2; see Pet. App. 2a. The district court sentenced petitioner to 30 days of imprisonment, to be followed by one year of supervised release. Judgment 3-4; see Pet. App. 2a. The court of

appeals vacated the sentence and remanded for resentencing. Pet. App. 1a-24a.

1. On November 3, 2017, Senator Rand Paul was mowing his lawn when he got off his mower to pick up some tree limbs in his own yard. Pet. App. 3a, 49a. Petitioner, Senator Paul's neighbor, was watching Senator Paul from the top of a hill overlooking the property. *Id.* at 2a-3a. During the previous month, petitioner had twice removed bundles of tree limbs from the edge of Senator Paul's yard, out of a desire to clear them from the sightline of petitioner's home. *Ibid.* When Senator Paul began collecting limbs from his yard again, petitioner, without warning, ran down the hill and tackled Senator Paul from behind. *Id.* at 3a. The assault seriously injured Senator Paul, breaking six of his ribs, "including three that split completely in half." *Ibid.* After a brief struggle, Senator Paul left the scene and called the police. *Ibid.*

The Kentucky State Police responded to the call. Pet. App. 3a. Petitioner admitted that he assaulted Senator Paul but asserted that the assault was not politically motivated. *Ibid.* Petitioner stated that the assault was instead "the culmination of 'a property dispute that finally boiled over.'" *Id.* at 3a-4a. Warren County officials initially charged petitioner with a misdemeanor-assault offense under Kentucky law. *Id.* at 4a. After a federal investigation, however, the state charges were dropped and petitioner was charged by information with one felony count of assaulting a member of Congress, in violation of 18 U.S.C. 351(e). Pet. App. 4a.

2. Petitioner pleaded guilty pursuant to a written plea agreement. Plea Agreement 1-9; Plea Tr. 2-17. In the agreement, petitioner admitted the assault and agreed to plead guilty to the charge. Plea Agreement

1-2. The parties agreed that the appropriate total offense level for petitioner's offense was 16, which included a five-level enhancement based on the serious bodily injuries that Senator Paul sustained and a three-level reduction for petitioner's acceptance of responsibility. *Id.* at 6-7. The government agreed to recommend the three-level reduction, and to recommend a sentence of 21 months of imprisonment—the bottom of the resulting advisory Guidelines range. *Id.* at 6. Both parties reserved their right to present evidence and arguments in favor of their respective sentence recommendation. *Ibid.* Petitioner expressly waived his rights to appeal his conviction and sentence and to collaterally attack his conviction and sentence, "[u]nless based on claims of ineffective assistance of counsel or prosecutorial misconduct." *Id.* at 7. The agreement contained no corresponding waiver by the government.

During the plea colloquy, petitioner acknowledged the terms of his plea agreement, including his agreement to waive his right to appeal. Plea Tr. 12-15. Petitioner further acknowledged that no one had "made any promises to [him], outside of what is in th[e] plea agreement, that would induce [him] to plead guilty." *Id.* at 15. The district court accepted petitioner's guilty plea as knowingly and voluntarily made. *Id.* at 15-16.

3. The Probation Office prepared a presentence report calculating a total offense level of 16, and recommending an advisory Guidelines range of 21 to 27 months of imprisonment. Presentence Investigation Report ¶¶ 24, 50. Petitioner did not object to the presentence report's calculations, but requested leniency from the district court. Pet. App. 4a, 67a-73a.

At the sentencing hearing, petitioner called three witnesses in support of his request for leniency. Pet.

App. 4a-5a. The Warren County Attorney testified that the standard plea for a defendant with a background similar to petitioner's who committed misdemeanor assault would generally be 30 days in the regional jail. *Id.* at 4a. But she acknowledged that she did not know the extent of Senator Paul's injuries when the original state misdemeanor-assault charges were filed against petitioner, and that the commonwealth attorney had not yet decided whether to file felony charges when federal authorities took over the case. *Id.* at 4a-5a. A developer of the community in which petitioner lived testified that petitioner paid his homeowner's dues and "kept a neat place." *Id.* at 5a. And the priest from petitioner's church testified that petitioner was a "friendly, open, kind, faithful person." *Ibid.*

In support of its recommended sentence of 21 months of imprisonment, the government introduced the victim impact statements of Senator Paul and his wife, which described the extent of Senator Paul's injuries and the recurring medical problems he suffered as a result of the assault. See Pet. App. 6a-7a. Senator Paul explained that he had experienced "intense pain," difficulty breathing, multiple trips to the hospital, risk of future illness, and continued chronic pain. *Ibid.* His wife "likewise testified that [petitioner's] assault began 'a long odyssey of severe pain and limited mobility for'" Senator Paul. *Id.* at 7a.

The district court sentenced petitioner to 30 days of imprisonment. Pet. App. 85a. It relied primarily on the fact that the confrontation was "strictly * * * a dispute between neighbors," *id.* at 80a, and its view of the unlikelihood that petitioner would repeat this "isolated" and "first-time action," *id.* at 84a. The court also considered petitioner's "excellent background," including

his education, lack of criminal history, and his contributions to the community and his church. *Id.* at 83a. After the sentence was announced, the government objected to the 20-month downward variance from the advisory Guidelines range. *Id.* at 88a.

4. The government appealed petitioner's sentence, maintaining that it was unreasonable. Pet. App. 26a.

a. Petitioner moved to dismiss the appeal, claiming that the plea agreement barred it. Pet. App. 26a. The court of appeals denied the motion. *Id.* at 25a-29a.

The court of appeals observed that the plea agreement "sa[id] nothing about waiving the government's right to appeal," but instead "mention[ed] only [petitioner's] waiver of his right to appeal." Pet. App. 26a. "That," the court explained, "is all anyone needs to know to conclude that the agreement does not waive the government's statutory right to appeal." *Ibid.* The court added that petitioner could not "realistically maintain that no consideration supports *his* appeal waiver," in light of the government's agreement to recommend an acceptance-of-responsibility reduction and a sentence of 21 months of imprisonment. *Id.* at 27a. And while the court acknowledged that, in *United States* v. *Guevara*, 941 F.2d 1299 (1991), cert. denied, 503 U.S. 977 (1992), the Fourth Circuit had found that a defendant's appeal waiver in a plea agreement implied a parallel obligation on the government, the court here observed that the Fourth Circuit had "offered no support" for its conclusion, that several judges on that court had disagreed with that conclusion, and that other courts of appeals had rejected it. Pet. App. 27a.

Finally, the court of appeals rejected petitioner's argument that the government orally agreed not to appeal

his sentence when, in a pre-plea communication, the government purportedly agreed that defense counsel "would be free to recommend any authorized sentence." Pet. App. 28a. The court explained that any such agreement did not "constrain[] the government's right to appeal or its arguments on appeal." *Ibid.* The court added that, in any event, the written plea agreement superseded all prior understandings between the parties. *Ibid.*

b. In a subsequent opinion, the court of appeals reversed petitioner's 30-day sentence as substantively unreasonable. Pet. App. 1a-24a. After reviewing the district court's analysis of each of the sentencing factors under 18 U.S.C. 3553(a), the court of appeals found that the district court had not adequately justified its "well-below-Guidelines sentence." Pet. App. 23a-24a. The court expressed no view whether petitioner ultimately was "entitled to a downward variance after the district court reweighs the relevant § 3553(a) factors." *Id.* at 24a. The court of appeals vacated the sentence and remanded for resentencing. *Ibid.*

By the time the appeal was decided, petitioner had served his 30-day term of imprisonment and his one-year term of supervised release. See Fed. Bureau of Prisons, *Find an Inmate*, http://www.bop.gov/inmateloc (showing release date of August 20, 2018, for Federal Bureau of Prisons Register No. 19212-033).

ARGUMENT

Petitioner renews his contention (Pet. 10-17) that the government waived its right to appeal his sentence by agreeing that petitioner could recommend any sentence within the statutory sentencing range or by entering a plea agreement in which petitioner himself waived his right to appeal his conviction and sentence. He newly

contends (Pet. 17-24) that the Double Jeopardy Clause of the Fifth Amendment precludes resentencing because he has fully served his sentence. Each of those contentions lack merit. The court of appeals' decision is correct, does not conflict with any decision of this Court, and does not implicate any division of authority that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. As an initial matter, this Court's review is unwarranted at this time because the case is in an interlocutory posture. The court of appeals vacated petitioner's sentence as substantively unreasonable and remanded to the district court for resentencing. Pet. App. 24a. That posture "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); Stephen M. Shapiro et al., *Supreme Court Practice* 4-55 n.72 (11th ed. 2019). After petitioner is resentenced, he will have an opportunity to raise the claims pressed here, in addition to any claims arising from his resentencing, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from this Court's usual practice of awaiting final judgment.

2. In any event, further review is unwarranted because petitioner's claims lack merit.

a. Petitioner first contends (Pet. 12-13) that the plea agreement here expressly waived the government's right to appeal petitioner's below-Guidelines sentence as substantively unreasonable, apparently relying on the provision in the plea agreement "reserv[ing] [petitioner's] right to present evidence and arguments concerning any sentence he believes to be appropriate in the case." Plea Agreement 6.[1] But the relevant language only preserved petitioner's ability to present arguments and evidence to the district court, which he did. It cannot reasonably be read as foreclosing the government from appealing the resulting sentence imposed by the court on the ground that it was substantively unreasonable. Petitioner's factbound challenge to the court of appeals' construction of the express language of the plea agreement does not warrant this Court's further review.

b. Petitioner next contends (Pet. 14-17) that, even if the government did not expressly waive its right to appeal, petitioner's agreement to waive *his* right to appeal his conviction and sentence should also give rise to an implicit agreement barring the government from appealing petitioner's sentence. That contention is unsound and does not implicate any division of authority warranting this Court's review. The Court has previously

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[1] Petitioner states (Pet. 12) that the government agreed that petitioner "would be . . . '*free to recommend any sentence authorized by the statute (0-10)*.'" Petitioner does not cite anything in the record for that assertion and the written plea agreement, which "supersede[s] all prior understandings, if any, whether written or oral, and [which] cannot be modified other than in writing," does not include that language. Plea Agreement 9; see Plea Tr. 15 (petitioner acknowledging that no one had "made any promises to [him], outside of what is in th[e] plea agreement, that would induce [him] to plead guilty").

denied review of a similar alleged conflict. See *Hammond* v. *United States*, 575 U.S. 912 (2015) (No. 13-1512). The same result is warranted here.

Consistent with general contract principles, courts cannot "imply as a matter of law a term" into a plea agreement "which the parties themselves did not agree upon." *United States* v. *Benchimol*, 471 U.S. 453, 456 (1985) (per curiam); see generally 11 Richard A. Lord, *Williston on Contracts* § 31:5 (4th ed. 2012 & Supp. 2019) (discussing general rule that courts should not add to a contract a term to which the parties did not agree). Here, the plea agreement reflected the bargain into which the parties knowingly and voluntarily entered. Petitioner agreed to plead guilty and to waive his appellate rights. In exchange, the government promised to recommend a reduction of three levels in petitioner's total offense level for his acceptance of responsibility and a sentence of 21 months of imprisonment. Petitioner does not dispute that the government complied with those obligations.

The government, however, never agreed to forgo its own right to appeal the imposition of a substantively unreasonable sentence. "[T]he plea agreement says nothing about waiving the government's right to appeal." Pet. App. 26a. And nothing in plea-agreement law or logic requires that a defendant's appeal waiver must be read to imply a corresponding appeal waiver by the prosecutor. See, *e.g.*, *United States* v. *Hare*, 269 F.3d 859, 861 (7th Cir. 2001) (rejecting contention that a defendant's appeal waiver must be "matched against a mutual and 'similar' promise" by the government); cf. *United States* v. *Anderson*, 921 F.2d 335, 337-338 (1st Cir. 1990) (argument that government waived its right to appeal

sub silentio by failing to expressly preserve that right in a plea agreement "stands logic on its ear").

Petitioner contends (Pet. 14-15) that the decision below conflicts with the Fourth Circuit's two-paragraph decision in *United States* v. *Guevara*, 941 F.2d 1299 (1991), cert. denied, 503 U.S. 977 (1992). But that decision creates no conflict warranting this Court's review. In *Guevara*, the court of appeals declined to construe a plea agreement as permitting the government to appeal the district court's sentence when the defendant had expressly promised to plead guilty and to waive her own right to appeal, stating that such a deal would be "far too one-sided." *Id.* at 1299. The Fourth Circuit instead determined that the agreement should be construed as including an "implicit[]" waiver by the government of its right to appeal, in parallel to the defendant's "explicit[]" waiver. *Id.* at 1299-1300; cf. *United States* v. *Blick*, 408 F.3d 162, 168 n.5 (4th Cir. 2005) (stating in dicta that *Guevara* "evened the playing field somewhat" by extending an appeal waiver to the government).

Guevara, however, cited no authority to support its rule of construction, nor did *Guevara* address the inconsistency between its reasoning (on the one hand) and this Court's precedent and general principles of contract law (on the other). See *United States* v. *Guevara*, 949 F.2d 706, 707-708 (4th Cir. 1991) (Wilkins, J., dissenting) (arguing that the panel's decision was inconsistent with this Court's decision in *Benchimol*). Other courts of appeals have accordingly declined to follow *Guevara*, rejecting the contention that the government has silently waived its right to appeal simply because the defendant expressly waived his own right to appeal. See, *e.g.*, *United States* v. *Miles*, 902 F.3d 1159, 1160-1161 (10th Cir. 2018) (per curiam); *United States* v. *Powers*,

885 F.3d 728, 732-733 (D.C. Cir. 2018); *United States* v. *Hammond*, 742 F.3d 880, 883-884 (9th Cir. 2014), cert. denied, 575 U.S. 912 (2015); *Hare*, 269 F.3d at 861-862.

Moreover, *Guevara*'s practical impact has been limited even within the Fourth Circuit by changes to the standard language of government plea agreements used in that circuit, which now expressly preserve the government's right to appeal notwithstanding a defendant's waiver. See, *e.g.*, *United States* v. *Russell*, 402 Fed. Appx. 772, 773 n.* (4th Cir. 2010) (per curiam) (rejecting challenge to government appeal under *Guevara* because plea agreement expressly preserved government's appeal rights); *United States* v. *Burton*, 201 Fed. Appx. 186, 188 (4th Cir. 2006) (per curiam) (similar); *United States* v. *Peebles*, 146 Fed. Appx. 630, 632 (4th Cir. 2005) (per curiam) (similar).

Subsequent Fourth Circuit precedent has made clear that *Guevara* poses no barrier to the enforcement of such agreements. In *United States* v. *Zuk*, 874 F.3d 398 (2017), the Fourth Circuit declined "to extend *Guevara* and * * * hold for the first time that the waiver of appeal rights must always be reciprocal in plea bargaining, regardless of the parties' desire to negotiate otherwise." *Id.* at 407. Instead, "[b]ecause there is nothing unconscionable or contrary to public policy in permitting a criminal defendant and the government to agree to terms where the defendant waives his appellate rights and the government does not," the court "refuse[d] to rewrite the parties' plea agreement * * * by striking the provision that allow[ed] the government to appeal [the defendant's] sentence." *Id.* at 408. *Guevara*'s application of an implicit government appeal waiver thus lacks prospective importance in the only jurisdiction in which it applies, and provides no basis for this Court's review.

3. Petitioner separately contends (Pet. 17-24) that the court of appeals' remand for resentencing violates the Double Jeopardy Clause. Petitioner did not raise a double jeopardy claim in the court of appeals, and the court did not pass on that question. Petitioner provides no justification for this Court to depart from its usual practice by addressing the question in the first instance. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule * * * preclud[ing] a grant of certiorari * * * when the question presented was not pressed or passed upon below") (citation and internal quotation marks omitted).

In any event, petitioner's double jeopardy argument lacks merit. As the Court held in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), where "Congress has specifically provided that [a defendant's] sentence is subject to appeal[,] * * * there can be no expectation of finality in the original sentence" and no double jeopardy violation. *Id.* at 139; see *id.* at 139-140. Because the appeal in this case was statutorily authorized, petitioner could have "no expectation of finality in his sentence until the appeal is concluded." *Id.* at 136; see also *Monge* v. *California*, 524 U.S. 721, 730 (1998) ("[I]t is a 'well-established part of our constitutional jurisprudence' that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal.") (quoting *DiFrancesco*, 449 U.S. at 135).[2]

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[2] Petitioner also invokes (Pet. 17, 20, 22) the Due Process Clause in passing, but does not explain why it would offer protection that the most pertinent constitutional provision does not. This Court has expressly rejected the notion that "the Due Process Clause provides

None of the cases on which petitioner relies (Pet. 18-21) are to the contrary. In *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), a habeas petitioner was granted relief because his original sentence—a $200 fine *and* one year in prison—exceeded the punishment allowed by statute, which was a fine *or* a prison term, and the trial court then resentenced him to one year in prison. *Id.* at 174-175. This Court held that, because the prisoner had already paid the fine and the money could not be returned to him, he was entitled to immediate release so that he would not be "put to actual punishment twice for the same thing." *Id.* at 175; see *Jones* v. *Thomas*, 491 U.S. 376, 383 (1989) ("*Lange* * * * stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature."); *In re Bradley*, 318 U.S. 50, 52 & n.3 (1943) (holding that a district court violated double jeopardy principles under *Lange* by attempting to return a fine and require the defendant to serve a term of imprisonment instead).

The court of appeals and other lower court decisions cited by petitioner (Pet. 18-21) are likewise inapposite. None precludes resentencing after the government successfully challenges the original sentence on direct appeal. See, *e.g.*, *United States* v. *Rosario*, 386 F.3d 166, 170-171 (2d Cir. 2004) ("[A] sentence may be increased after a successful appeal by the Government."); *United States* v. *Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (per curiam) (concluding that the district court lacked authority to itself increase the defendant's sentence after he had completed serving his term of imprisonment, had paid all fines and restitution, and the time for either the

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greater double-jeopardy protection than does the Double Jeopardy Clause." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 116 (2003).

government or the defendant to appeal had elapsed); *United States* v. *Fogel*, 829 F.2d 77, 88-90 (D.C. Cir. 1987) (en banc) (holding that the district court could not *sua sponte* increase the defendant's sentence while curing an unrelated defect); *United States* v. *Earley*, 816 F.2d 1428, 1433 (10th Cir. 1987) ("[T]here can be no reasonable expectation of finality when a statute gives the government a right to appeal—at least not until expiration of the time for appeal to be taken."); *United States* v. *Arrellano-Rios*, 799 F.2d 520, 523-525 (9th Cir. 1986) (declining to permit resentencing after vacating conviction under 18 U.S.C. 924(c) (1982) because defendant had completed sentence on other lawful counts); *United States* v. *Silvers*, 90 F.3d 95, 101 (4th Cir. 1996) (similar). Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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