No. 01-1277

In the Supreme Court of the United States

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion under 28 U.S.C. 2255 on the ground that the motion raised a claim that had already been raised and rejected on direct appeal.

2. Whether petitioner made a knowing and voluntary waiver of his Fifth Amendment right to prevent the admission at trial of his incriminating plea proffer statements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 01-1277

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (COA) (Pet. App. 1a-2a) is unreported. The opinion of the district court denying a COA (Pet. App. 20a-28a) also is unreported. The opinion of the district court denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 (Pet. App. 3a-19a) is reported at 163 F. Supp. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2001. On December 20, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 25, 2002, 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 jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 14 counts of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d). He was sentenced to 64 months' imprisonment and ordered to pay a $1 million fine. Petitioner appealed his convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions and remanded for resentencing. *United States* v. *Krilich*, 159 F.3d 1020 (7th Cir. 1998), cert. denied, 528 U.S. 810 (1999). On remand, the district court sentenced petitioner to 87 months' imprisonment. Petitioner appealed the sentence and the government cross-appealed, and the court of appeals again remanded for resentencing. *United States* v. *Krilich*, 257 F.3d 689 (7th Cir. 2001), cert. denied, 122 S. Ct. 1175 (2002). On remand, the district court sentenced petitioner to 135 months' imprisonment.

In 2000, following the first remand for resentencing, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion, Pet. App. 3a-19a, and denied petitioner's application for a COA, *id.* at 20a-28a. The court of appeals also denied petitioner's request for a COA. *Id.* at 1a-2a.

1. Petitioner's conviction for making false statements to a federally insured bank was based on his submission of false invoices to obtain the use of municipal bond proceeds for impermissible personal purposes.

His separate conviction for RICO conspiracy was based on several acts of bribery and mail fraud. On one occasion, petitioner paid a bribe to a local mayor to obtain a favorable zoning change. Petitioner also paid the mayor $40,000 to arrange for the issuance of municipal bonds to finance one of petitioner's development projects. That bribe was effectuated by staging a hole-in-one golf contest at which petitioner and others falsely created the impression that the mayor's son had made a hole-in-one, resulting in the payment of a $40,000 prize to the mayor's son from the insurer of the contest. Pet. App. 4a-5a; *Krilich*, 159 F.3d at 1024.

2. a. During the pre-indictment investigation, petitioner met with the government in an attempt to negotiate a plea. Petitioner read and signed a proffer agreement describing the circumstances in which his statements could be introduced by the government at trial. The agreement stated that if petitioner should:

> testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.

159 F.3d at 1024. During the proffer interviews, petitioner admitted that he had bribed the mayor to alter the zoning of his property, rigged the hole-in-one contest, and arranged for the submission of false invoices to a bank in order to obtain municipal bond proceeds for his personal use. *Ibid.*; Pet. App. 4a-5a.

b. At trial, the district court found that petitioner had opened the door to the admission of those proffer statements through his cross-examination of government witnesses and through his direct examination of

his own witnesses. The court explained that petitioner had elicited testimony to show that "the Hole-In-One actually occurred," 9/11/95 Tr. 2375, that "no bribes were paid" to obtain the zoning change, *ibid.*, and that petitioner had no knowledge of the false invoices submitted to the bank, *id.* at 2388. See 159 F.3d at 1026. In doing so, the court held, petitioner had triggered the provision in the proffer agreement allowing use of the proffer at trial if petitioner "otherwise present[ed] a position inconsistent with the proffer." This was not "a case of [petitioner's] being blind sided," the court concluded, but "is a case of [his] entering into an agreement with the government that contained language that seems to me quite clearly to apply to this situation and being visited with the results of that agreement." 9/11/95 Tr. 2377.

c. Petitioner filed a motion for reconsideration, arguing that his waiver of his right to prevent introduction of the proffer at trial was invalid because neither his counsel nor the prosecutor had advised him that his cross-examination of government witnesses or his direct examination of defense witnesses could result in introduction of the statements. 9/13/95 Mot. for Reconsideration 2-3. In a hearing on the motion, petitioner's attorney during the plea negotiations testified that both he and the prosecutor had advised petitioner that the government could introduce the proffer if petitioner testified at trial in a manner inconsistent with his proffer statements. 9/12/95 Tr. 2406, 2410-2411. The attorney stated that, while he had given petitioner the proffer agreement to read, neither he nor the prosecutor had discussed with petitioner the potential use of the proffer if petitioner did not testify, or the meaning of the language in the agreement permitting use of the proffer if petitioner "otherwise present[ed] a

position inconsistent with the proffer." *Id.* at 2407, 2412, 2415-2416, 2419-2420. The prosecutor stated in the hearing that he could specifically recall only that he had told petitioner that the proffer could not be used in the government's case-in-chief. *Id.* at 2396.

The district court denied the motion for reconsideration. It rejected petitioner's argument that his waiver of his right to prevent introduction of the proffer at trial was not knowing and voluntary. The court held that the "otherwise" clause of the proffer agreement "obviously * * * refers to something different than testimony by the defendant which is contrary to the substance of the proffer," 9/12/95 Tr. 2433, and that petitioner could not "ignore [that] plain language by refusing to consider its significance and then claim ignorance of the plain meaning of that language," *id.* at 2432.

3. The court of appeals affirmed petitioner's convictions. *United States* v. *Krilich*, 159 F.3d 1020 (7th Cir. 1998), cert. denied, 528 U.S. 810 (1999).[1] Giving the proffer agreement "neither a stingy reading nor a generous one, but a natural reading," *id.* at 1025, the court held that petitioner had opened the door to introduction of his statements by "advanc[ing] a position inconsistent with the proffer" at trial, *id.* at 1026.

The court also rejected petitioner's argument that his waiver of his right under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) to prevent the use of those statements at trial was invalid because neither his attorney nor the prosecutor had advised him that the testimony he elicited at trial could

---

[1] The court also vacated the sentence and remanded for resentencing. 159 F.3d at 1030-1031. That aspect of the court's decision is not in issue here.

result in admission of the proffer. The court explained that, while a waiver is unenforceable if given involuntarily or unknowingly, that "is a far cry from saying that waivers mean whatever the defendants say they understood them to mean." 159 F.3d at 1026. "A waiver is voluntary in the absence of coercion and is knowing if made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Ibid.* (internal citations and quotation marks omitted). Petitioner's waiver satisfied that standard, the court held, because "[a] defendant's understanding of the *consequences* of his waiver need not be perfect; it was [petitioner's] understanding of the rights being relinquished, not of all possible repercussions of relinquishing them, that made his waiver knowing." *Ibid.*

4. Petitioner filed a motion for collateral relief under 28 U.S.C. 2255, alleging that his waiver of his Fifth Amendment right against compelled self-incrimination in the proffer agreement was invalid because the prosecutor had "provided incorrect and misleading information" about the circumstances in which the proffer could be introduced at trial. Mot. 8-9. Petitioner also alleged that both his attorney in plea negotiations and his trial counsel had provided ineffective assistance by failing to advise him correctly about the terms of the proffer agreement and by opening the door to the admission of his statements. Mot. 11-15.

The district court denied petitioner's Section 2255 motion. Pet. App. 3a-19a. The court held that petitioner was barred from challenging the validity of his waiver of Fifth Amendment rights because the validity of petitioner's waiver had already been resolved against him on direct appeal. *Id.* at 8a-10a. The court found no material distinction between petitioner's claim of an

invalid waiver of his Fifth Amendment rights in his Section 2255 motion and his claim of an invalid waiver of his rights under Rules 410 and 11(e)(6) on direct appeal. "In fact," the court emphasized, the court of appeals had addressed the latter claim on direct appeal by applying "the test for determining whether a criminal suspect has waived his constitutional right to remain silent." Pet. App. 9a. As a result, the "waiver analysis that the Seventh Circuit previously undertook" was "identical" to the one petitioner "is now asking us to conduct in addressing his § 2255 petition." *Id.* at 10a. The court concluded that petitioner could not "take a second bite at the apple merely by restyling his previously-adjudicated complaint as a constitutional claim." *Ibid.*

The district court also denied relief on petitioner's ineffective assistance of counsel claims. Pet. App. 10a-19a. The court held that his attorneys' performance had not been constitutionally deficient, and that petitioner, in any event, could not make the required showing of prejudice. The court explained that the government had "presented eyewitness testimony from [petitioner's] bagman and others regarding bribes [petitioner] paid * * * and false invoices he submitted for the municipal bond proceeds," as well as documentary evidence establishing petitioner's use of the proceeds to purchase a car and to make a payment on his yacht. *Id.* at 18a. "With respect to the hole-in-one contest in particular," the court observed, there was testimony showing that petitioner "had sent the spotter away from the tee before the mayor's son arrived there" and that petitioner "had falsely listed two witnesses to the winner's staged hole-in-one." *Ibid.* "In light of this significant evidence of [his] guilt," the court determined, petitioner could not establish prejudice. *Ibid.*

5. a. The district court denied petitioner's motion for a COA on all his claims. Pet. App. 20a-28a. In addressing petitioner's contention that his waiver of Fifth Amendment rights was invalid, the court reiterated that "the Seventh Circuit had applied the constitutional test in assessing the voluntariness of [petitioner's] waiver" and that he "was barred from re-arguing the waiver issue on habeas." *Id.* at 21a. The court rejected petitioner's argument that the resolution of the claim on direct appeal should not bar its assertion under Section 2255 because it was now "supported by evidence outside the record on appeal," *i.e.*, evidence that "his attorney and the [prosecutor] with whom he negotiated the proffer agreement misled him regarding the circumstances under which the [g]overnment would seek admission of his proffer statements if the case ultimately proceeded to trial." *Id.* at 22a. The court concluded that "[t]hese facts, even if true, do not bear significantly on the question of whether [petitioner] knowingly and voluntarily waived certain rights by signing the proffer agreement." *Ibid.* As a result, petitioner had "failed to demonstrate a good reason for * * * reexamin[ing] the Seventh Circuit's ruling that his waiver was knowing and voluntary." *Ibid.*

b. Petitioner also filed an application for a COA in the court of appeals, which was summarily denied. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 12-21) that the federal courts disagree on the circumstances in which there is a procedural bar against obtaining review of a claim under Section 2255 based on extra-record evidence when the claim was already raised and rejected on direct appeal. That issue is not squarely implicated by the

district court's decision, however, and there is no conflict in the courts of appeals on the question.

a. According to petitioner, the district court "erected an absolute bar to raising issues decided on direct appeal regardless of whether the § 2255 claim depend[s] on extra-record evidence," Pet. 20, and the decision thus exacerbates a conflict among federal courts on the extent to which there is a procedural bar against seeking reexamination of a claim under Section 2255 on the basis of extra-record evidence when the claim was already raised on direct appeal. Contrary to petitioner's submission, the district court did not hold that the assertion of a claim on direct appeal effects an absolute procedural bar against its reassertion under Section 2255, regardless of any new evidence introduced in support of the claim. Instead, the court found that the particular extra-record evidence relied on by petitioner in this case, "even if true," could not alter the conclusion reached on direct appeal that his waiver was knowing and voluntary. Pet. App. 22a. He therefore had "failed to demonstrate a good reason" for "re-examin[ing] the Seventh Circuit's ruling" on the issue. *Ibid.*

Because the basis of the district court's decision was that the specific extra-record evidence identified by petitioner was not material to his claim—not that he was procedurally barred from seeking reexamination of the claim on the basis of extra-record evidence—the decision does not implicate the first question presented by the petition. In fact, the decision is fully consistent with the approach advocated by petitioner, according to which a "court may decline to revisit an issue decided on direct appeal if the prisoner has raised no new facts * * * that could possibly change the outcome." Pet. 18.

b. In any event, there is no conflict in the federal courts on the circumstances in which raising a claim on direct appeal effects a procedural bar against later seeking review of the same claim under Section 2255 on the basis of new evidence. This Court held in *Kaufman* v. *United States*, 394 U.S. 217 (1969), that courts may decline to review a claim under Section 2255 where the claim was raised and resolved on direct appeal. See *id.* at 227 n.8. It is now "well settled" in the courts of appeals "that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances." *Jones* v. *United States*, 178 F.3d 790, 796 (6th Cir.), cert. denied, 528 U.S. 933 (1999); see *United States* v. *Sanin*, 252 F.3d 79, 83 (2d Cir.), cert. denied, 122 S. Ct. 492 (2001); *United States* v. *Wiley*, 245 F.3d 750, 752 (8th Cir. 2001), cert. denied, 122 S. Ct. 818 (2002); *United States* v. *Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000), cert. denied, 531 U.S. 1131 (2001); *United States* v. *DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); *United States* v. *Taglia*, 922 F.2d 413, 418 (7th Cir.), cert. denied, 500 U.S. 927 (1991); *United States* v. *Prichard*, 875 F.2d 789, 791 (10th Cir. 1989); *Garris* v. *Lindsay*, 794 F.2d 722, 726 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986).

The decisions cited by petitioner (Pet. 12-13) do not suggest a conflict on the issue. Instead, they merely apply the general rule barring re-litigation under Section 2255 of claims raised and rejected on direct appeal, while noting certain exceptions to the rule that might apply in other situations. See *United States* v. *Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979) ("in the absence of newly discovered evidence that could not reasonably have been presented at the original trial, or other circumstances indicating that an accused did not

receive full and fair consideration of his federal constitutional and statutory claims, a § 2255 petitioner may not relitigate issues that were adjudicated at his original trial and on direct appeal"), cert. denied, 446 U.S. 922 (1980); *United States* v. *Little*, 608 F.2d 296, 301 (8th Cir. 1979) (declining to reconsider claim raised on collateral review that was decided in prior appeal where defendant did not "allege[] the discovery of any additional evidence or any change in the law"), cert. denied, 444 U.S. 1089 (1980). See also *Wiley*, 245 F.3d at 752; *Nyhuis*, 211 F.3d at 1343. None of the opinions allows reassertion of a claim that was addressed on direct appeal, and none describes the circumstances in which re-litigation might be permitted in a manner that conflicts with another opinion.[2]

Finally, even if there were any disagreement in the courts of appeals on the circumstances in which extra-record evidence can justify re-litigation of a claim under Section 2255, this case would not present an appropriate vehicle for addressing the issue. None of the decisions relied on by petitioner contemplates reexamination of a claim in a Section 2255 proceeding based on evidence that was readily available on direct appeal. See, *e.g.*, *Palumbo*, 608 F.2d at 533 (suggesting possibility of re-litigation under Section 2255 based on "newly discovered evidence that could not reasonably have been presented" previously). As petitioner acknowledges (Pet. 19), relief under Section 2255 is unavailable where "the absence from the record of the facts proffered by the prisoner is due to a lack of diligence * * * in attempting to discover those facts and bring

---

[2] Two of the decisions that petitioner submits are in conflict, *United States* v. *Little*, *supra*, and *United States* v. *Wiley*, *supra*, are from the same court of appeals.

them to the trial court's attention." Here, however, petitioner was fully aware of the prosecutor's statements to him about the scope of the waiver in the proffer agreement well before the time that questions about the validity of the waiver arose at trial. In fact, petitioner relied on the prosecutor's statements in his motion for reconsideration of the district court's ruling admitting the proffer and in his briefs on direct appeal. See 9/13/95 Decl. of Jeffrey B. Steinback 3; Pet. C.A. Br. 40-42; Pet. C.A. Reply Br. 19.

2. Petitioner also contends on the merits (Pet. 21-27) that his waiver of his Fifth Amendment right to prevent use of the proffer at trial was invalid because the prosecutor misled him about the circumstances in which the proffer could be introduced. That contention is limited to the specific facts of this case and does not warrant this Court's review. In addition, petitioner did not establish the factual predicate for his claim when the issue arose at trial, such as by filing an affidavit describing the prosecutor's alleged misrepresentations. While petitioner suggests (Pet. 19-20) that his counsel prevented him from testifying about the prosecutor's statements, any questions concerning his counsel's performance are properly considered in the context of petitioner's claims of ineffective assistance, which the district court rejected. Pet App. 10a-19a.

Finally, any error in allowing the government to use the proffer at trial was harmless. As the district court explained in determining that petitioner could not establish prejudice on his claims of ineffective assistance (Pet. App. 18a), the government introduced "significant evidence of [petitioner's] guilt" at trial aside from the proffer, including eyewitness testimony and documentary evidence establishing his payment of bribes to local officials, his submission of false invoices for the

municipal bond proceeds, and his fraudulent actions in connection with the hole-in-one contest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
NINA GOODMAN
Attorney

MAY 2002