No. 01-1058

In the Supreme Court of the United States

WILLIAM KENNETH PEEBLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" or that "is advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) and (D) (Supp. V 1999), violates the First Amendment.

2. Whether petitioner waived his right to challenge a special condition of supervised release requiring him to register as a sex offender in accordance with state law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 275 F.3d 46 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 4) was entered on October 16, 2001. The petition for a writ of certiorari was filed on January 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of a conditional plea of guilty in the United States District Court for the Southern

District of Texas, petitioner was convicted of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. V 1999). Pet. App. 19-20. He was sentenced to a term of imprisonment of 18 months, to be followed by three years of supervised release. *Id.* at 21-22. As a condition of supervised release, he was ordered to participate in a mental health program designed for the treatment of sex offenders and, pursuant to 18 U.S.C. 3583(d) (1994 & Supp. V 1999), to register with the sex offender registration agency in any State in which he resided or was employed. Pet. App. 2, 25-26. The court of appeals affirmed. *Id.* at 1-3.

1. In 1990, petitioner began working as an engineer for Coral Energy, a subsidiary of Shell Oil Company in Houston, Texas. Pet. App. 15. In early September 1999, a random security check of Coral Energy's computer network revealed that petitioner had visited child pornography sites on his computer and downloaded photographs of nude children and children involved in explicit sexual acts. *Ibid.* The company provided diskettes containing over 80 photographs to the FBI, which determined that the children were likely under twelve years of age. *Ibid.*

On September 16, 1999, the FBI executed a search warrant at petitioner's work station and seized petitioner's computer, a video camera, and monitor. Pet. App. 15. Petitioner confessed to downloading child pornography. *Ibid.* A subsequent search of petitioner's computer hard drive revealed over 350 photographs and eight videos of nude children and children involved in sexual acts. *Id.* at 16. These photos were in addition to those found on the network server. *Ibid.* The FBI determined that the majority of children in these photos were also under the age of twelve. *Ibid.*

2. Petitioner was indicted on one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. V 1999). The Child Pornography Prevention Act of 1996 (CPPA) defines child pornography to include "any visual depiction, including any * * * computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8) and (8)(B) (Supp. V 1999), and any "visual depiction * * * advertised, promoted, presented, described, or distributed in * * * a manner that conveys the impression that the material * * * contains a visual depiction of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(D) (Supp. V 1999).[1]

Petitioner moved to dismiss the indictment on the ground that the statute was vague and overbroad and therefore violative of the First Amendment. Gov't C.A. Br. 3. The district court denied the motion. *Ibid.*

Petitioner thereafter entered into a plea agreement pursuant to which he preserved his right to challenge the constitutionality of 18 U.S.C. 2252A and 2256(8) (Supp. V 1999). Pet. App. 11; 5/10/00 Tr. 20-21. Under the terms of the agreement, he expressly waived the right to appeal his sentence or the manner in which it was determined, either on direct appeal or in a post-conviction proceeding, other than for an upward departure from the sentencing guidelines. Pet. App. 11-12.[2] In return, the government agreed not to oppose a

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[1] The CPPA also defines child pornography to include any visual depiction the production of which "involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999), and any "visual depiction * * * created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999).

[2] The plea agreement provided as follows:

reduction in petitioner's offense level for acceptance of responsibility, nor to oppose a sentence at the lower end of the Guidelines' range. *Id.* at 8.

At the plea hearing, the district court reviewed the agreement with petitioner, including his waiver of appellate rights. 5/10/00 Tr. 15-16. The court accepted petitioner's guilty plea only after ensuring that petitioner understood that he was waiving, among other things, his right to challenge his sentence, other than a sentence above the statutory maximum or an upward departure from the Guidelines. *Id.* at 10, 15-17, 19-20. The court further explained that if petitioner was sentenced to prison, petitioner would be placed on supervised release and subject to the restrictions and conditions of that supervision. Petitioner stated that he understood. *Id.* at 13- 14.

The Presentence Investigation Report (PSR) that was subsequently prepared explained that, pursuant to 18 U.S.C. 3583(d) (1994 & Supp. V 1999), the court was required to impose as a condition of supervised release that petitioner register as a sex offender with law enforcement authorities. PSR 14 para. 63.

> [Petitioner] waives the right to appeal the sentence or the manner in which it was determined on the grounds set forth in Title 18 United States Code, Section 3742 except only that he may appeal any upward departure from the sentencing guidelines not requested by the United States and the denial of the pretrial Motion to Dismiss. * * *
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> * * * * *
>
> [Petitioner] waives his right to contest or collaterally attack his conviction or sentence by means of any post-conviction proceeding except regarding the denial of the pretrial Motion to Dismiss.
>
> Pet. App. 11.

At sentencing, the district court granted petitioner a three-level reduction in offense level for acceptance of responsibility. Gov't C.A. Br. 3; Pet. App. 29. The resulting Guidelines' range of imprisonment was 27 to 33 months. *Id.* at 30. The court granted petitioner's motion for a downward departure and sentenced him to a term of imprisonment of 18 months, to be followed by a three-year term of supervised release. *Id.* at 21-22, 31. The court further ordered that petitioner participate in a mental health program designed for the treatment of sex offenders, and, pursuant to 18 U.S.C. 3583(d) (1994 & Supp. V 1999), ordered that petitioner register with the sex offender registration agency in any State in which petitioner resided or was employed. Pet. App. 25-26; Gov't C.A. Br. 3-4. Petitioner does not contend that he objected to the terms of his supervised release.

3. Petitioner appealed both his conviction and sentence. Pet. App. 1. He renewed his First Amendment challenge to 18 U.S.C. 2256(8)(B) (Supp. V 1999). Pet. App. 2. He also argued that there was no factual basis for his plea because the record failed to establish that the pornographic images were "transported in interstate or foreign commerce." *Ibid.* Finally, he argued that the special condition of supervised release requiring him to register as a sex offender violated the Eighth Amendment's proscription against cruel and unusual punishment, was void for vagueness, and violated the substantive due process and equal protection requirements of the Fourteenth Amendment. Pet. C.A. Br. 25-57.

4. The court of appeals affirmed. Pet. App. 1-3. The court rejected petitioner's constitutional challenge to Section 2252A. The court noted that petitioner conceded that his claim was foreclosed by the court of

appeals' earlier decision in *United States* v. *Fox*, 248 F.3d 394, 406-407 (5th Cir. 2001), petition for cert. pending, No. 01-805 (filed Aug. 20, 2001), which held that Section 2252A is neither unconstitutionally overbroad nor vague. Pet. App. 2.

The court also rejected petitioner's claim that there was no factual basis for his plea. The court found that the factual basis written into the plea agreement and established at the plea hearing showed that petitioner "downloaded the [pornographic] images onto a computer and through a network server that transmitted the images across state lines." Pet. App. 2.

Finally, the court rejected petitioner's challenge to the special condition of supervised release requiring him to register as a sex offender in accordance with state law, finding that petitioner had "validly waived any appeal of his sentence except for an upward departure from the guidelines." Pet. App. 2. The court found that because the district court was required by 18 U.S.C. 3583(d) (1994 & Supp. V 1999) to impose sex-offender registration as a condition of petitioner's supervised release, the registration was not an "upward departure" that petitioner could appeal. Pet. App. 2-3.

DISCUSSION

1. Relying on *Free Speech Coalition* v. *Reno*, 198 F.3d 1083 (9th Cir. 1999), petitioner contends that the definition of child pornography governing Section 2252A is unconstitutionally vague and overbroad because it includes depictions of sexually explicit conduct by persons who appear to be minors and depictions presented in a manner that conveys the impression that the depictions are of minors engaged in sexually explicit conduct. Pet. 5-6, 8-16. Petitioner argues that his conviction under that statute should be set aside and the

indictment dismissed. As petitioner observes (Pet. 4), while this case was on appeal, the Court granted the government's petition for a writ of certiorari in *Free Speech Coalition*, *supra*, now styled *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution as is presented in this petition. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

2. Petitioner also argues that the waiver-of-appellate-rights provision in his plea agreement did not preclude him from challenging the constitutionality of Texas's sex offender registration program. Pet. 6-8, 16-20. Petitioner's argument is that his preservation under the plea agreement of his right to challenge the constitutionality of the CPPA necessarily encompasses the right to challenge the terms of his supervised release that he register as a sex offender. Petitioner reasons that if the CPPA is held unconstitutional, he cannot be sentenced under the Act, and there can be no terms of supervised release.

Under the specific terms of his plea agreement, however, petitioner preserved only the right to challenge the constitutionality of the CPPA. Should this Court hold in *Free Speech Coalition* that the CPPA is unconstitutional, petitioner's sentence, including the terms of his supervised release, will have to be vacated—not because of any constitutional infirmity in Texas's sex offender registration program, but because of the invalidity of petitioner's underlying conviction. The preservation of petitioner's right to challenge the constitutionality of the CPPA, however, did not preserve the right to mount an independent challenge to petitioner's sentence—in particular to the constitutionality of Texas's sex offender registration program. Under

petitioner's analysis, a defendant's preservation of his right to appeal his conviction on one ground would necessarily, and in all instances, also preserve his right to appeal his sentence on *any* ground despite an express waiver of such right. Such clearly is not the case.

a. This Court has held repeatedly that a defendant may validly waive constitutional and statutory rights as part of the plea bargaining process. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-202 (1995) (explaining that "many of the most fundamental protections afforded by the Constitution" may be waived and that statutory rights are presumptively waivable); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). Applying that principle, the courts of appeals have consistently enforced voluntary and knowing waivers of the right to appeal a sentence. See, *e.g.*, *Jones* v. *United States*, 167 F.3d 1142, 1144 (7th Cir. 1999); *United States* v. *Atterberry*, 144 F.3d 1299, 1300-1301 (10th Cir. 1998); *United States* v. *Michelsen*, 141 F.3d 867, 871-873 (8th Cir.), cert. denied, 525 U.S. 942 (1998); *United States* v. *Ashe*, 47 F.3d 770, 775-776 (6th Cir.), cert. denied, 516 U.S. 859 (1995); *United States* v. *DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992), cert. denied, 513 U.S. 1128 (1995); *United States* v. *Salcido-Contreras*, 990 F.2d 51 (2d Cir.) (per curiam), cert. denied, 509 U.S. 931 (1993); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States* v. *Marin*, 961 F.2d 493, 495-496 (4th Cir. 1992).

The courts of appeals have recognized certain circumstances in which defendants who have signed waivers of rights to appeal retain the right to appellate review on limited grounds. *United States* v. *Ready*, 82 F.3d 551, 555-556 (2d Cir. 1996); *United States* v. *Johnson*, 67 F.3d 200, 202 & n.4 (9th Cir. 1995). For example, appellate review is available if the plea agreement is

involuntary, see, *e.g.*, *United States* v. *Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); if the sentence is imposed in excess of the statutory maximum penalty, see, *e.g.*, *United States* v. *Broughton-Jones*, 71 F.3d 1143, 1146-1147 (4th Cir. 1995); *United States* v. *Attar*, 38 F.3d 727, 732 (4th Cir. 1994), cert. denied, 514 U.S. 1107 (1995); if the sentencing court relies on a constitutionally impermissible factor, such as race, see, *e.g.*, *United States* v. *Hicks*, 129 F.3d 376, 377 (7th Cir. 1997); or if the sentence imposed is not in accordance with the negotiated agreement, see, *e.g.*, *United States* v. *Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992).

Petitioner attempts to fit within this limited class by arguing that Texas's sex offender registration program is unconstitutional. Petitioner, however, cites no case, and we are aware of none, finding Texas's program to be unconstitutional. Indeed, the courts have routinely upheld against constitutional attack Texas's sex offender registration program. See, *e.g.*, *Creekmore* v. *Attorney Gen.*, 138 F. Supp. 2d 795 (E.D. Tex. 2001) (rejecting claim that Texas Sex offender Registration Program violated procedural due process); *Dean* v. *State*, 60 S.W.3d 217 (Tex. Ct. App. 2001) (rejecting ex post facto challenge to Texas Sex Offender Registration Program); *Gone* v. *State*, 54 S.W.3d 27, 36-37 (Tex. Ct. App. 2001) (rejecting claim that Texas sex offender provisions constituted "outlawry" in violation of the Texas Constitution); *In re M.A.H.*, 20 S.W.3d 860 (Tex. Ct. App. 2000) (rejecting due process and equal protection challenges to Texas Sex Offender Registration Program).[3]

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[3] Relying on *Doe* v. *Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001), petition for cert. pending, No. 01-1231 (filed Feb. 19,

The court of appeals correctly enforced petitioner's waiver of his right to appeal his sentence in this case. Petitioner entered into a counseled plea agreement in which he knowingly and voluntarily waived his right to appeal his sentence other than an upward departure from the sentencing guidelines not requested by the United States. Petitioner does not contend that he was coerced or misled into signing the plea agreement or that he was misinformed in any way about its provisions. Nor does he claim that his counsel was ineffective or that there was misconduct on the part of the prosecutor. "In no circumstance * * * may a

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2002), petitioner nonetheless argues (Pet. 7 & n.20) that Texas's sex offender registration program violates the due process and equal protection guarantees of the Fourteenth Amendment because it fails to distinguish between non-dangerous and dangerous offenders. Petitioner's reliance on *Department of Public Safety* is misplaced. There, the court held that there is a constitutionally protected liberty interest in non-disclosure of information obtained through a sex offender registration program, and that making information of this type concerning an offender publicly available constitutes a denial of due process unless the State first provides an opportunity for a particularized assessment of the offender's likely dangerousness. Unlike Connecticut's sex offender registration program, which was at issue in *Department of Public Safety*, Texas's sex offender registration program provides for an individualized assessment of an offender's dangerousness to the community, the registry identifies the sex offender's risk level, and the treatment of the registered offender depends on the individualized assessment of the level of risk he poses to the community. See Tex. Code Crim. P. Ann. arts. 62.03, 62.035, 62.045 (West 2002). For similar reasons, petitioner is not helped by *Otte* v. *Doe*, cert. granted, 122 S. Ct. 1062 (2002) (No. 01-729). That case involves an Ex Post Facto Law challenge to Alaska's sex offender registration program. Petitioner alleges no ex post facto violation here, and the Texas program's individualized assessment of dangerousness distinguishes it from Alaska's program.

defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." *Salcido-Contreras*, 990 F.2d at 53.

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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