No. 14-1306

In the Supreme Court of the United States

CHRISTOPHER ERWIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals imposed an appropriate remedy for petitioner's breach of the appeal-waiver provision of his plea agreement by releasing the government from its obligation to file a motion for a downward departure pursuant to Sentencing Guidelines § 5K1.1 and remanding the case for resentencing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 765 F.3d 219.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2014. A petition for rehearing was denied on December 31, 2014 (Pet. App. 34a-35a). On March 23, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 30, 2015, 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 District of New Jersey, petitioner was convicted of conspiracy to distribute and possess

with intent to distribute a controlled substance, in violation of 21 U.S.C. 846. He was sentenced to 188 months of imprisonment, to be followed by three years of supervised release. After petitioner appealed despite his waiver of appeal, the court of appeals enforced petitioner's appeal waiver by declining to consider his challenge to his sentence, vacating the judgment, and remanding for a de novo resentencing in which the government would be relieved of its obligation to file a downward departure motion. Pet. App. 1a-33a.

1. In 2009 and 2010, petitioner ran a large-scale drug ring that fraudulently obtained prescriptions for hundreds of thousands of oxycodone tablets and illegally sold the drugs on the black market. Pet. App. 3a-4a. In 2011, the government filed a criminal complaint against petitioner and other members of the conspiracy. *Id.* at 4a.

In 2012, petitioner entered into a written plea agreement with the government in which he agreed to plead guilty to a one-count information charging him with conspiracy to distribute and to possess with intent to distribute oxycodone. In return, the government agreed not to bring additional charges arising from his illegal activities. Pet. App. 4a. The parties stipulated that petitioner's adjusted offense level under the Sentencing Guidelines was 39. *Id.* at 4a-5a. Petitioner agreed to waive the right to appeal a sentence that fell within or below the Guidelines range that corresponded to an offense level of 39. *Id.* at 5a-6a.

Petitioner also entered into a cooperation agreement with the government, which provided that the government would move for a downward departure

under Sentencing Guidelines § 5K1.1 if it determined "in its sole discretion" that petitioner substantially assisted the government in its investigation or prosecution of others. Pet. App. 6a. The agreement contained a remedial clause that provided that should petitioner "violate any provision of his cooperation agreement *or the plea agreement*, * * * this Office will be released from its obligations under this agreement and the plea agreement, including any obligation to file [the] motion." *Ibid.*

The district court accepted the parties' Guidelines stipulations, which resulted in a sentencing range of 262 to 327 months of imprisonment. Because the statutory maximum was 20 years, petitioner's Guidelines range was capped at 240 months. Pet. App. 7a-8a. The government then moved for a five-level downward departure under Section 5K1.1, noting that it requested the departure from offense level 39. Petitioner did not object. The court granted the motion and sentenced petitioner to 188 months of imprisonment, which was the top of the Guidelines range for an offense level of 34. *Id.* at 8a.

2. a. Petitioner appealed, claiming that the district court erred by using offense level 39 as the starting point for the downward departure. In petitioner's view, the court should have used offense level 38 as the starting point because that level equated to the statutory maximum sentence of 240 months. Pet. App. 10a-11a. Had the court done so, the upper level of the resulting Guidelines range would have been 168 months rather than 188 months. *Id.* at 11a.

Before petitioner filed his opening brief, the government engaged in extensive negotiations with petitioner "regarding [petitioner's] decision to proceed

with this appeal in the face of his appeals waiver." Gov't C.A. Br. 19 n.3. In the course of those discussions, the government informed petitioner that if he proceeded, the government would seek to withdraw its downward departure motion. Gov't Resp. to Pet. for Reh'g 9-10. Petitioner nonetheless filed a brief in which he argued the district court had erred in using an offense level of 39 as the starting point for the downward departure. Pet. C.A. Br. 12-23. Petitioner did not dispute that his claim was barred by the appeal waiver, but instead argued that the waiver should not be enforced because doing so would work a miscarriage of justice. *Id.* at 23-25; see *United States* v. *Grimes*, 739 F.3d 125, 128-129 (3d Cir. 2014).

In response, the government contested the merits of petitioner's arguments and further argued that, in light of petitioner's breach of the appeal waiver, the court should vacate and remand for a de novo sentencing proceeding in which the government would be released from its obligation to move for a downward departure. Pet. App. 8a; Gov't C.A. Br. 31-36. The government represented that, if the court remanded for resentencing, the government would seek a modest increase in petitioner's sentence. Pet. App. 8a; Gov't C.A. Br. 34.

b. The court of appeals held that petitioner had breached the appeal waiver and that the government was entitled to enforcement of the cooperation agreement's remedial provision. Pet. App. 1a-33a. The court accordingly vacated petitioner's sentence, remanded for resentencing, and held that the government would be released from its obligation to move for a downward departure. *Id.* at 32a-33a.

The court of appeals first held that petitioner's sentencing challenge fell within the appellate waiver and that he had not demonstrated that enforcing the waiver would work a miscarriage of justice. Pet. App. 10a-14a. In light of the "unambiguous" terms of the appeal waiver, the court reasoned, petitioner had materially breached the plea agreement by appealing. *Id.* at 17a; see *id.* at 16a-18a & n.6.

The court of appeals then turned to the appropriate remedy for petitioner's breach. The court emphasized that the "ordinary" remedy for an appeal-waiver breach is to decline to consider the defendant's arguments and dismiss the appeal. Pet. App. 14a. The court concluded, however, that dismissing the appeal, without more, would not "make the government whole," *ibid.*, because "the Government devoted valuable resources to litigating an appeal that should never have been filed in the first place," *id.* at 21a. The court therefore held that enforcing the cooperation agreement's remedial provision was "warranted here." *Id.* at 22a. That provision stated that if petitioner breached "any" provision of the plea agreement, the government would be released from its obligations, "including any obligation to file a motion" for a downward departure. *Ibid.* The court therefore vacated the sentence and remanded for resentencing, "where, in light of [petitioner's] breach, the Government will be relieved of its obligation to seek a downward departure." *Id.* at 23a.

The court of appeals rejected petitioner's argument that the government was required to file a cross-appeal in order to obtain a remand for resentencing. Pet. App. 23a-30a. The court explained that under *Greenlaw* v. *United States*, 554 U.S. 237 (2008), when

an appellate court considering a defendant's challenge to his sentence identifies a sentencing error in the defendant's favor, it may not direct that the defendant receive a higher sentence unless the government has cross-appealed the sentence. Pet. App. 27a-28a. *Greenlaw* did not bar a remand for resentencing in this case, the court concluded, because the remand was designed to address petitioner's post-sentencing breach of the agreement, not any error in the district court's sentence. *Id.* at 24a-26a. Finally, the court explained that it had authority to vacate and remand for resentencing under 28 U.S.C. 2106, which provides that a court of appeals may modify, vacate, or set aside any judgment "lawfully brought before" the court for review. Pet. App. 31a.

3. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 34a-35a. Judges Ambro, Rendell, Greenaway, and Vanaskie would have granted the petition. *Id.* at 36a-41a. Those judges explained that, in their view, "nullify[ing] [petitioner's] appeal" would have adequately remedied petitioner's breach. *Id.* at 38a.

ARGUMENT

Petitioner contends (Pet. 19-30) that the court of appeals erred in remedying petitioner's breach of the appeal-waiver provision in his plea agreement by remanding for a de novo resentencing in which the government would be relieved of its obligation to file a motion for a downward departure. Further review is unwarranted. The court of appeals' decision is correct. It is also interlocutory, and it does not conflict with the decision of any other court of appeals. The impact of the decision is likely limited, moreover, as defendants have begun negotiating plea-agreement

provisions that limit the situations in which they might be exposed to a resentencing remedy like the one imposed here.

1. Because the court of appeals remanded the case for further proceedings, its decision is interlocutory. 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 *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). On remand, the district court will conduct a de novo resentencing. Pet. App. 33a. Petitioner will be free to argue (as he did on appeal) that any departure or variance should be calculated using the statutory maximum of 240 months as the starting point. While the government will not be obligated to seek a downward departure, it is possible that petitioner could receive the same sentence that he received initially. See Gov't Resp. to Pet. for Reh'g 9 n.3 (explaining that sentencing court may take petitioner's cooperation into account even in the absence of a government motion for a downward departure). If petitioner ultimately is dissatisfied with the sentence he receives, he will then have the opportunity to raise his current claim, together with any other claims that may arise, 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).

2. Contrary to petitioner's argument (Pet. 12-16), the decision below does not conflict with any decision of another court of appeals.

Petitioner cites (Pet. 13) a number of decisions in which courts of appeals enforced an appeal waiver by dismissing the defendant's appeal. None of those

decisions addressed the question presented here—namely, whether a court may grant any remedy beyond dismissing the appeal for the defendant's breach of the appeal-waiver provision. No court has held, contrary to the decision below, that dismissing the appeal is the sole remedy available to the government.

No court of appeals other than the Third Circuit has squarely addressed whether an appellate court may remedy a defendant's breach of an appeal-waiver provision by remanding for de novo resentencing. To the extent that courts have considered whether they may grant any remedy beyond dismissing the appeal, they have employed reasoning that is consistent with the decision below. The Seventh Circuit has held that the defendant's breach may entitle the government to "withdraw some concessions" and to take "steps that can increase the sentence" by reinstating charges that it agreed to drop. *United States* v. *Whitlow*, 287 F.3d 638, 640-641 (2002); see *United States* v. *Hare*, 269 F.3d 859, 862 (2001). In addition, the Fourth Circuit has suggested in dicta that if a defendant breaches an appeal-waiver provision, the government may "assert that it is no longer bound by the plea agreement," and it may seek a "higher sentence" or reinstate charges. *United States* v. *Poindexter*, 492 F.3d 263, 271, 273 (2007). The First Circuit also has suggested that the government may "disclaim a plea agreement" in response to an appeal-waiver breach. *United States* v. *Teeter*, 257 F.3d 14, 26 (2001).

3. In the absence of any circuit conflict, the question presented lacks sufficient importance to warrant this Court's review. Contra Pet. 17. The Third Circuit itself emphasized that dismissal of the appeal is the "ordinary" remedy for a breach, suggesting that it

does not anticipate ordering resentencing with any frequency. Pet. App. 14a. And since the decision below was issued, the Third Circuit has not ordered vacatur and remand in any case involving arguments barred by an appeal waiver. See *United States* v. *Proctor*, No. 14-3684, 2015 WL 2403427, at *2 (May 20, 2015) (declining to consider defendant's arguments; government did not seek vacatur and remand for resentencing); *United States* v. *McElroy*, 592 Fed. Appx. 139, 140-141 (2015) (same); *United States* v. *Diaz-Hinirio*, 588 Fed. Appx. 181 n.1 (2014) (same).

Nor does the decision below necessarily involve a recurring issue. Defendants can reduce the likelihood that they will face a remand for resentencing, if they choose to appeal despite an appeal waiver, by negotiating provisions in plea or cooperation agreements limiting the circumstances in which the government may seek such a remedy. For instance, since the decision below, defendants in the Eastern District of Pennsylvania have pleaded guilty pursuant to a plea agreement providing that "the filing and pursuit of an appeal constitutes a breach only if a court determines that the appeal does not present an issue that a reasonable judge may conclude is permitted by an exception to the waiver stated in the preceding paragraph or constitutes a 'miscarriage of justice' as that term is defined in applicable law." See App., *infra*, at 4a-5a (Plea Agreement, *United States* v. *Engebretson*, 13-cr-647 Docket entry No. 116 (E.D. Pa. July 24, 2015)).

Such provisions protect a defendant's ability to assert reasonable arguments that his claims on appeal are not barred by the waiver or that the waiver should not be enforced. Petitioner is therefore incorrect in arguing (Pet. 28) that the court of appeals' decision

will deter defendants from attempting to raise potentially meritorious claims on appeal. Defendants who are concerned about their ability to raise appellate arguments can negotiate for provisions like those already in use in some district courts in the Third Circuit. Petitioner's approach, in contrast, would reduce the value of appeal waivers to the government by permitting defendants a cost-free right to appeal in any case despite entering a waiver. "A sounder way" to proceed "is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips." *United States* v. *Mezzanatto*, 513 U.S. 196, 208 (1995).

4. The court of appeals correctly held that the circumstances of petitioner's appeal-waiver breach warranted enforcing the remedial provision in petitioner's cooperation agreement and remanding for a sentencing proceeding in which the government would not be obligated to move for a downward departure.

a. It is well-settled "that the interpretation of plea agreements is rooted in contract law." *United States* v. *Dawson*, 587 F.3d 640, 645 (4th Cir. 2009) (citation and internal quotation marks omitted); see *Puckett* v. *United States*, 556 U.S. 129, 137 (2009) (applying contract principles to breach of a plea agreement); *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Like other contracts, plea agreements may contain remedial provisions establishing the parties' agreement as to the appropriate remedies in the event one or both of them breaches their obligations. In the event of a breach, the court may enforce the remedial provisions against the breaching party. See, *e.g.*, *United States* v. *Holbrook*, 368 F.3d 415, 421 (4th Cir. 2004) (enforcing provision that "provides the Government with a

broad range of remedies in the event of a breach by" the defendant), cert. granted, judgment vacated on other grounds, 545 U.S. 1125 (2005).

The plea and cooperation agreements in this case established the parties' reciprocal obligations and also set forth remedies in the event of a breach. The plea agreement provided that in return for petitioner's pleading guilty and waiving any appeal of a sentence reflecting a Guidelines range lower than that resulting from an offense level of 39, the government would not initiate any further criminal charges based on petitioner's participation in the oxycodone-distribution conspiracy. Pet. App. 4a. The cooperation agreement further provided that in return for petitioner's cooperation, the government would decide whether petitioner had rendered substantial assistance and, if so, move for a downward departure at sentencing. Gov't C.A. Supp. App. 47. The cooperation agreement contained a remedial clause that provided that if petitioner violated "*any* provision" of the plea or cooperation agreements, the government "will be released from its obligations under this agreement and the plea agreement, including any obligation to file a motion under U.S.S.G. § 5K1.1." *Id.* at 48 (emphasis added). The government would also be permitted to bring any additional charges against petitioner. *Ibid.* Petitioner, however, would not be permitted to withdraw his guilty plea if he breached any of his obligations. *Ibid.*

b. In ordering vacatur and resentencing, the court of appeals enforced the parties' own agreement concerning the appropriate remedy in the event of a breach by petitioner. Pet. App. 22a. Pursuant to the remedial clause, the court released the government from one of its obligations—namely, the obligation to

seek a downward departure. That remedy was relatively cabined, as the remedial provision would have permitted the government to withdraw from *all* of its obligations, including its promise not to bring additional charges against petitioner. See Supp. C.A. App. 48. Under the court's decision, however, the government remains bound by that promise. Also in accordance with the remedial provision, which did not provide that petitioner could be released from his obligations if he breached the agreements, the court held petitioner to his appeal waiver. Pet. App. 14a; see Supp. C.A. App. 48.

That remedy was an appropriate exercise of the court's discretion. See *United States* v. *Cimino*, 381 F.3d 124, 127-130 (2d Cir. 2004); *United States* v. *Palladino*, 347 F.3d 29, 34 (2d Cir. 2003). As the court of appeals explained, petitioner's breach of the appeal waiver was particularly stark. Pet. App. 21a. Petitioner acknowledged that his challenge clearly fell within the waiver's terms, Pet. C.A. Br. 23-25, and his argument that enforcing the appeal waiver would work a miscarriage of justice lacked any colorable merit. Petitioner acknowledged in the plea agreement that any sentence at or below the range resulting from an offense level of 39 would be reasonable. Pet. App. 5a. And his constitutional and procedural error claims provided no tenable basis for circumventing the appeal waiver. *Id.* at 9a-14a. Petitioner does not even contend that his miscarriage-of-justice arguments had any colorable basis.

The court of appeals correctly recognized that in those circumstances, merely dismissing the appeal would be an "empty remedy." Pet. App. 22a. If the sole remedy consisted of dismissing the appeal, the

government would be deprived of the benefit of its bargain, while petitioner would retain the full benefit of the government's performance of its obligations—a lower sentence reflecting the government's downward departure motion. *Cimino*, 381 F.3d at 128; see *Whitlow*, 287 F.3d at 640 ("[O]nce an appeal is taken and a brief filed, the prosecutor must respond, and the resources sought to be conserved by the waiver have been squandered.").

c. Petitioner argues (Pet. 25-27) that the court of appeals' enforcement of the remedial clause is inconsistent with the principles governing enforcement of plea agreements and contracts. Those arguments are unpersuasive.

Petitioner first argues (Pet. 25) that a plea-agreement breach should generally be remedied through either "specific performance of the agreement on the plea" or by setting aside the entire agreement. *Santobello*, 404 U.S. at 263. But specific performance of the remedial provision in the cooperation agreement is precisely what the court ordered here. Pet. App. 22a ("specific performance is warranted"). Petitioner contends, however, that the court's remedy cannot be characterized as specific performance because it "enforce[es] some [of the agreement's terms] (*e.g.*, the guilty plea) while ignoring others (*e.g.*, the Government's promises to dismiss charges or make sentence reduction recommendations) in order to remedy a breach of yet a different contractual provision (the promise not to appeal)." Pet. 26. Each of those characteristics of the remedy, however, flows directly from the remedial clause itself. That provision stated that in the event petitioner breached "any" of his obligations (including the appeal

waiver), the government would be permitted to withdraw from some or all of its obligations but petitioner would not be permitted to withdraw his guilty plea. C.A. Supp. App. 48. Rather than picking and choosing among the agreements' terms, the court of appeals enforced the remedial provision containing the parties' agreement about their respective rights in the event of a breach.

Enforcement of a plea-agreement remedial provision is a well-established remedy for a defendant's breach of a plea agreement. Although the court below appears to have been the first to have done so when the breach occurred post-sentencing, courts have routinely enforced a plea agreement's remedial provision when the defendant's breach occurs before sentencing. The result is often that (as here) the defendant is held to his obligations under the agreement while the government is released from some or all of its obligations. See, *e.g.*, *United States* v. *Brumer*, 528 F.3d 157, 159 (2d Cir. 2008) (district court released the government from its sentencing concessions while refusing to permit the defendants to withdraw their pleas); *Holbrook*, 368 F.3d at 421 (district court enforced remedial provision; the defendant was not permitted to withdraw guilty plea as to Count 1, but the government was released from its promise not to try her on Count 2); see also, *e.g.*, *United States* v. *Hallahan*, 756 F.3d 962, 973 (7th Cir.) (district court relieved government of sentencing obligation and rejected defendants' argument that if government was released from its obligations, defendants should be released from appeal waiver), cert. denied, 135 S. Ct. 498 (2014); *United States* v. *Byrd*, 413 F.3d 249, 251 (2d Cir. 2005) (per curiam) (district court left guilty

plea in place but relieved government of sentencing obligations). The court of appeals' decision is thus consistent with the enforcement of plea agreements more generally.

The fact that the court of appeals enforced the remedial clause to remedy a post-sentencing breach does not change that conclusion. Petitioner argues (Pet. 26-27) that the remedial provision "says nothing about vacating an already entered criminal judgment and remanding" for resentencing. But petitioner's promise not to appeal could be breached only after the government had fulfilled its sentencing-related obligation and petitioner had been sentenced. In providing that the government could be released from its obligations if petitioner breached any of his obligations, then, the agreements contemplated that the government's ability to withdraw its concessions in the event of a breach would not end with petitioner's sentencing.[1]

Finally, petitioner is incorrect in contending (Pet. 26), that the Third Circuit's remedy is not consistent with contract-law principles. In the contract context, courts vindicate the non-breaching party's expectation interest by enforcing remedial clauses, including when the clauses provide the parties with asymmetrical rights in the event of a breach. See, *e.g.*, *J.T. Enters., LLC* v. *Countrywide Home Loans, Inc.*, No. C0A09-843, 2010 WL 2162836, at *2-*3 (N.C. Ct. App. June 1,

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[1] Petitioner unquestionably had notice that the government could seek release from its obligations if petitioner breached the appeal waiver. In addition to the terms of the remedial provision itself, the government warned petitioner that it would seek to withdraw its Section 5K1.1 motion if petitioner breached the appeal waiver. Gov't Resp. to Pet. for Reh'g 9-10.

2010) (remedial clauses providing that seller would be released from its obligations in the event of a breach, but buyer would not be released in event of seller's breach, were valid and enforceable); *FB & I Bldg. Prods., Inc.* v. *Superior Truss & Components*, 727 N.W.2d 474, 479 (S.D. 2007) (enforcing provision that permitted non-breaching party to cancel contract while obligating the breaching party, after cancellation, to permit non-breaching party to retain its customers); cf. *Priebe & Sons* v. *United States*, 332 U.S. 407, 411 (1947) (remedial clauses providing that one party must pay liquidated damages in the event of a breach are generally enforceable).

5. Petitioner asserts (Pet. 19-23) that the court of appeals violated the cross-appeal rule by vacating the district court's judgment in the absence of a government cross-appeal. Petitioner is incorrect.

a. In *Greenlaw* v. *United States*, 554 U.S. 237 (2008), this Court reaffirmed the "cross-appeal rule," which it described as an "unwritten but longstanding rule" that "an appellate court may not alter a judgment to benefit a nonappealing party." *Id.* at 244. The defendant had appealed his sentence on the ground that it was too long. *Id.* at 242. The United States did not cross-appeal, but it pointed out to the court of appeals that, in fact, the defendant's sentence was actually too short in light of the applicable mandatory minimum. *Ibid.* The court of appeals vacated the sentence and directed the district court to impose a substantially higher sentence on remand. *Id.* at 242-243. This Court held that the court of appeals had erred in altering the judgment based on an error that the government could have, but did not, challenge in a cross-appeal. *Id.* at 254. The Court emphasized that

Congress provided in 18 U.S.C. 3742(b) that the government could appeal a sentence only with the authorization of "high-ranking officials within the Department of Justice." *Greenlaw*, 554 U.S. at 246. Appellate courts, the Court stated, would circumvent Section 3742(b) if they were to "take up errors adverse to the Government" when it has not cross-appealed with the requisite authorization. *Ibid.*

b. The decision below is not inconsistent with *Greenlaw* for two primary reasons.

i. Unlike in *Greenlaw*, here the government did not seek to correct an error in the district court's sentence that it could have, but did not, cross-appeal. Cf. 554 U.S. at 243-245. From the government's perspective, there was no error in the judgment to correct: the district court had correctly applied the Guidelines and accepted the government's sentencing recommendation. As a result, the government was not "aggrieved by the judgment," and it could not have filed an appeal. *United States* v. *Windsor*, 133 S. Ct. 2675, 2687 (2013) (prudential limitations generally prevent a party that entirely prevailed from appealing) (quoting *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980)).

Rather, the government advocated vacatur and remand in order to obtain a remedy for petitioner's breach of the plea agreement. That breach occurred only when the case was already on appeal and petitioner filed a brief raising arguments that were barred by the appeal waiver. The government was entitled to respond to that breach by advocating the remedy it believed was appropriate, even though the government was the appellee. That the government's preferred remedy involved vacatur does not alter the fact

that the government was not attacking the district court's judgment as erroneous.[2]

ii. The court of appeals did not alter the judgment below in the manner that concerned the Court in *Greenlaw*: it did not itself "add[] years to [petitioner's] sentence" or direct the district court to do so. 554 U.S. at 254. In considering the government's arguments in favor of vacatur and remand, the court of appeals did not review petitioner's sentence in order to determine whether it was erroneous. See p. 5, *infra*. Instead, the court addressed only the threshold question whether petitioner's appellate litigation conduct had violated the government's rights under the plea and cooperation agreements. Accordingly, the court did not direct the district court to impose a particular sentence on remand, or to conduct any particular analysis. Its remedy was much more limited: it ordered a de novo resentencing, before a different district judge, in which the government will not be obligated to move for a downward departure.

Petitioner contends (Pet. 21-23) that, for purposes of the cross-appeal rule, the court's remand here is equivalent to an order directing the district court to increase the sentence like that at issue in *Greenlaw*. That is not correct. Unlike in *Greenlaw*, the court of appeals did not identify an error that made the initial

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[2] *Jennings* v. *Stephens*, 135 S. Ct. 793 (2015), is not to the contrary. There, the Court stated that "an appellee who does not cross-appeal may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Id.* at 798 (quoting *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). In this case, the government did not "attack the decree" of the district court; rather, it sought vacatur as a remedy for petitioner's conduct before the court of appeals.

sentence too lenient, thereby obligating the district court to abide by the court of appeals' ruling on the error. Rather, the court of appeals' opinion leaves the district court with discretion to determine the appropriate sentence that should be imposed on remand. The court of appeals has simply ordered that one of the parties to the sentencing be permitted to refrain from making certain arguments. It is true that the absence of a government downward-departure motion may well lead the district court to impose a higher sentence than that initially imposed. But that increase will be the result of the district court's exercise of its sentencing discretion in light of changed circumstances on remand—not the result of a directive from the court of appeals to calculate the sentence in a particular way. Cf. *Pepper* v. *United States*, 562 U.S. 476, 503-504 (2011) (sentencing court may impose a higher sentence than initially imposed, based on post-sentencing conduct).

c. Petitioner also contends (Pet. 20) that the government's arguments in support of vacatur and remand effectively circumvented statutory limitations on when and how the government may appeal a sentence. See *Greenlaw*, 554 U.S. at 245-246; 18 U.S.C. 3742(b). That is not so.

Section 3742(b) provides that the government may file a notice of appeal for review of a sentence based on certain enumerated errors (for instance, that the sentence was "imposed in violation of law," 18 U.S.C. 3742(b)(1)), and that in order to further prosecute the appeal, it must obtain the approval of certain high-level Department of Justice officials: the Attorney General, the Solicitor General, or a Deputy Solicitor General designated by the Solicitor General. Section

3742(b) was not implicated here because the government's vacatur argument was not premised on an asserted error in the sentence that could have been addressed through an appeal brought under Section 3742(b). Rather, it was based on rights in the plea agreement that were violated only after sentence was imposed. The procedures set forth in Section 3742(b) apply to the enumerated types of sentencing errors described in that Section, not the remedy sought here.

6. Petitioner next contends (Pet. 24-25) that even if the government need not have filed a cross-appeal, the court of appeals lacked authority under 18 U.S.C. 3742(f) to remand for resentencing. Petitioner is incorrect.

Section 3742 governs the court of appeals' review of a sentence for error. 18 U.S.C. 3742. Subsections (a) and (b) set forth the grounds on which the defendant and the government, respectively, may appeal a sentence. The sentencing errors that a defendant or the government may assert include that the sentence was "imposed in violation of law," as well as several other enumerated defects. 18 U.S.C. 3742(a) and (b). Section 3742(f), which governs the court's "decision and disposition" of the appeal, provides that "[i]f the court of appeals determines that" the sentence suffers from certain enumerated errors, the court "shall" vacate and remand the sentence. 18 U.S.C. 3742(f)(1)-(2). The errors listed in Subsections (f)(1) and (2) as warranting vacatur and remand track those that the parties may assert on appeal under Subsections (a) and (b). Section 3742(f)(3) further provides that if the court "determine[s]" that none of the listed errors is present, the court "shall affirm the sentence." 18 U.S.C. 3742(f)(3).

Petitioner contends (Pet. 24-25) that because the court of appeals did not find that petitioner's sentence was erroneous on any of the grounds enumerated in Section 3742(f), that provision did not permit the court to remand for resentencing.[3] Section 3742(f) did not govern the court of appeals' adjudication in this case, however. That provision applies only when the court of appeals "determines" whether the sentence suffers from an error claimed by an appealing party pursuant to Section 3742(a) and (b). 18 U.S.C. 3742(f). Here, the court of appeals did not "determine[]" whether the sentence was in fact erroneous on the grounds petitioner asserted in his appeal under Section 3742(a). Instead, the court considered only *whether* it should review petitioner's sentence for the errors petitioner claimed—*i.e.*, whether petitioner's challenges to his sentence were "within the scope of the waiver," Pet. App. 9a, and whether the waiver should be enforced, *id.* at 10a-14a. The court's ultimate conclusion was that petitioner was not entitled to review of his appeal. *Id.* at 14a. Because the court did not review the sentence for error, Section 3742 did not govern the court's authority to order a remedy.

Rather, the court of appeals' authority to vacate and remand for resentencing arose from 28 U.S.C. 2106, which provides that an appellate court may "affirm, modify, vacate, set aside or reverse any judgment * * * lawfully brought before it for re-

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[3] Petitioner also relies (Pet. 24) on Section 3742(e), which governed the court of appeals' "consideration" of the appeal and provided standards of review applicable to the errors that the parties may assert under Subsections (a) and (b). Section 3742(e), however, was severed and excised by *United States* v. *Booker*, 543 U.S. 220, 261 (2005).

view." Section 2106 authorizes an appellate court to "enter orders necessary and appropriate to the final disposition of a suit that is before [the court] for review." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 22 (1994) (Section 2106 authorizes court to vacate judgment when case has become moot on appeal). As the court of appeals noted, it had jurisdiction over petitioner's appeal, pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742(a), Pet. App. 8a, even though it enforced the appeal waiver. An appeal waiver does not divest the court of appeals of jurisdiction over an appeal. *United States* v. *Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007).

Petitioner argues (Pet. 25), however, that Section 2106 cannot "override the more specific statute Congress enacted to govern the disposition of sentencing appeals"—*i.e.*, Section 3742. He particularly notes the direction to the court of appeals to affirm if it finds no error of the types listed in the statute. 18 U.S.C. 3742(a), (b), and (f). Petitioner is correct that Section 2106's general grant of authority may not be used to circumvent Section 3742. As this Court has held, an appellate court may not invoke Section 2106 to vacate a sentence in a situation in which the court reviews the sentence for errors asserted under Section 3742(a) and (b) and "determines" under Section 3742(f) that no such error is present. See *Greenlaw*, 554 U.S. at 249. But, as explained above, because the court of appeals was not reviewing the sentence for error and Section 3742(f) therefore did not apply, Section 2106 authorized it to enter orders necessary and appropriate to dispose of the case. Cf., *e.g.*, *Crampton* v. *Thomas*, 401 Fed. Appx. 227, 228 (9th Cir. 2010) (in-

voking Section 2106 in dismissing appeal of sentence as moot).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
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LESLIE R. CALDWELL
Assistant Attorney General
KIRBY A. HELLER
Attorney

SEPTEMBER 2015

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 13-647

UNITED STATES OF AMERICA

v.

ZACHARIAH ENGEBRETSON

GUILTY PLEA AGREEMENT

Under Rule 11 of the Federal Rules of Criminal Procedure, the government, the defendant, and the defendant's counsel enter into the following guilty plea agreement. Any reference to the United States or the government in this agreement shall mean the Office of the United States Attorney for the Eastern District of Pennsylvania.

1. The defendant agrees to plead guilty to Counts One, Two and Three of the Superseding Indictment charging him with the following: in Count One, knowingly and intentionally distributing 5 grams or more, that is approximately 27.9 grams of methamphetamine (actual), a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B); in Count Two, knowingly and intentionally distributing 5 grams or more of methamphetamine (actual), within 1,000 feet of a day care center, in violation of 21 U.S.C. § 860(a); and in Count Three, knowingly and intentionally possessing with the intent to distribute 50 grams or more, that is approxi-

mately 885 grams, of methamphetamine (actual), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and not to contest forfeiture as set forth in the notice of forfeiture charging criminal forfeiture under 21 U.S.C. § 853(p), all arising from his sale of methamphetamine within 1,000 feet of the Little Shepherd Christian Learning Center and his possession of approximately 885 grams of methamphetamine in his residence. The defendant further acknowledges his waiver of rights, as set forth in the attachment to this agreement.

* * * * *

10. If the defendant commits any federal, state, or local crime between the date of this agreement and her sentencing, or otherwise violates any other provision of this agreement, the government may declare a breach of the agreement, and may at its option: (a) prosecute the defendant for any federal crime including, but not limited to, perjury, obstruction of justice, and the substantive offenses arising from this investigation, based on and using any information provided by the defendant during the investigation and prosecution of the criminal case; (b) upon government motion, reinstate and try the defendant on any counts which were to be, or which had been, dismissed on the basis of this agreement; (c) be relieved of any obligations under this agreement regarding recommendations as to sentence; and (d) be relieved of any stipulations under the Sentencing Guidelines. Moreover, the defendant's previously entered guilty plea will stand and cannot be withdrawn by her. The decision shall be in the sole discretion of the government both whether to declare a breach, and regarding the remedy or remedies to seek. The defendant understands and agrees that the

fact that the government has not asserted a breach of this agreement or enforced a remedy under this agreement will not bar the government from raising that breach or enforcing a remedy at a later time.

11. If the Court accepts the recommendation of the parties and imposes the sentence stated in paragraph 4 of this agreement, the parties agree that neither will file any appeal of the conviction and sentence in this case. Further, the defendant agrees that if the Court imposes the recommended sentence he voluntarily and expressly waives all rights to collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution. However, the defendant retains the right to file a petition for collateral relief under 28 U.S.C. § 2255 asserting only a claim that the attorney who represented the defendant at the time of the execution of this agreement and the entry of the defendant's guilty plea provided constitutionally ineffective assistance during any part of the representation.

12. If the Court does not accept the recommendation of the parties to impose the sentence stated in paragraph 4 of this agreement, and the defendant nevertheless decides to enter a guilty plea, without objection by the government, then the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.

b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal or petition for collateral relief but may raise only a claim, if otherwise permitted by law in such a proceeding:

(1) that the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 3 above;

(2) challenging a decision by the sentencing judge to impose an "upward departure" pursuant to the Sentencing Guidelines;

(3) challenging a decision by the sentencing judge to impose an "upward variance" above the final Sentencing Guideline range determined by the Court; and

(4) that an attorney who represented the defendant during the course of this criminal case provided constitutionally ineffective assistance of counsel.

If the defendant does appeal or seek collateral relief pursuant to this subparagraph, no issue may be presented by the defendant in such a proceeding other than those described in this subparagraph.

13. The defendant acknowledges that filing an appeal or any other collateral attack waived in the preceding paragraph may constitute a breach of this plea agreement. The government promises that it will not declare a breach of the plea agreement on this basis based on the

mere filing of a notice of appeal, but may do so only after the defendant or his counsel thereafter states, either orally or in writing, a determination to proceed with an appeal or collateral attack raising an issue the government deems barred by the waiver. The parties acknowledge that the filing and pursuit of an appeal constitutes a breach only if a court determines that the appeal does not present an issue that a reasonable judge may conclude is permitted by an exception to the waiver stated in the preceding paragraph or constitutes a "miscarriage of justice" as that term is defined in applicable law.

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ZANE DAVID MEMEGER
United States Attorney

PETER F. SCHENCK
Chief, Criminal Division
Assistant United States Attorney

A. NICOLE PHILLIPS
Assistant United States Attorney

ZACHARIAH ENGEBRETSON
Defendant

MARIA PEDRAZA, ESQ.
Standby Counsel for Defendant

Date: _____

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