No. 15-101

In the Supreme Court of the United States

WALTER EDWARD HARDIN, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney

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

QUESTION PRESENTED

Whether petitioner's knowing and voluntary waiver of his right to collaterally attack his sentence validly waived his right to collaterally challenge his sentence on grounds of ineffective assistance of counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and guidelines: Page

Miscellaneous:

In the Supreme Court of the United States

No. 15-101

WALTER EDWARD HARDIN, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the Federal Reporter but is reprinted at 595 Fed. Appx. 460. A prior opinion of the court of appeals is also unpublished but is reprinted at 437 Fed. Appx. 469. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 10-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2014. A petition for rehearing was denied on February 19, 2015 (Pet. App. 24). On May 8, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 19, 2015. The petition for a writ of certiorari was filed on July 17, 2015. 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 Eastern District of Kentucky, petitioner was convicted of using a facility and means of interstate commerce to attempt to coerce and entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b), and of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1). He was sentenced to 240 months of imprisonment, to be followed by a lifetime of supervised release. The court of appeals affirmed. Pet. App. 1-9.

1. In 2007 and 2008, petitioner attempted through online conversations with undercover agents to arrange sexual encounters with girls between 6 and 14 years of age. Presentence Investigation Report (PSR) ¶¶ 6-8, 56. Petitioner phoned one such person posing as a 14-year-old girl and attempted to meet her at a shopping center, where he was arrested. PSR ¶ 9. A subsequent search of his home and office computers revealed hundreds of pornographic images and videos involving children, as well as online chats in which petitioner had solicited sexual contact with children as young as four years old. PSR ¶¶ 10-11.

On January 22, 2009, a grand jury returned an indictment charging petitioner with using a facility and means of interstate commerce to attempt to entice and coerce a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b) (Count One); two counts of receiving child pornography in interstate commerce, in violation of 18 U.S.C. 2252(a)(2) (Counts Two and Three); and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) (Count Four). PSR p. 1, ¶ 3. The indictment also sought forfeiture of related equipment (Counts Five and Six). PSR ¶ 3.

Petitioner pleaded guilty to Counts One, Two, and Five. Pet. App. 2. The plea agreement specified that petitioner faced a ten-year mandatory minimum term of imprisonment on Count One. 5:09-cr-0011-JMH Docket entry No. (Dkt. No.) 21, at 5. The plea agreement further provided that "[t]he Defendant waives the right to appeal and the right to attack collaterally the guilty plea, conviction, and sentence, including any order of restitution. The Defendant does reserve the right to appeal any sentence greater than 120 months imprisonment." *Id.* at 7. At petitioner's rearraignment, the government's attorney summarized this provision, noting that petitioner had "waived his right to appeal and collaterally attack his guilty plea, conviction and sentence," although he had "reserve[d] his right to appeal any sentence" greater than 120 months. Dkt. No. 65, at 10. When asked by the court whether that correctly described "your plea agreement as you understand it," petitioner responded "Yes, sir." *Id.* at 12.

A PSR prepared by the Probation Office calculated petitioner's total offense level at 37. PSR ¶ 39. Because he was in criminal history category I, his advisory Sentencing Guidelines range was 210 to 262 months of imprisonment. PSR ¶ 61. Petitioner filed a motion for leave to file objections to the PSR and a motion for a downward departure (Dkt. Nos. 39 and 41), but defense counsel withdrew these motions at the sentencing hearing after further discussions with prosecutors and the district court. Dkt. No. 44; Dkt. No. 59, at 2-3; see Dkt. No. 79-1, at 2 (affidavit from defense counsel explaining withdrawals). The court sentenced petitioner to concurrent terms of 240

months of imprisonment, to be followed by a lifetime of supervised release. Pet. 4.

2. The court of appeals affirmed. 437 Fed. Appx. 469. The court concluded that petitioner's sentence was both substantively and procedurally reasonable. *Id.* at 473-475. The court declined to adjudicate petitioner's argument that counsel had been ineffective during sentencing. *Id.* at 472-473. Noting that ineffective assistance of counsel (IAC) claims "are generally raised in post-conviction proceedings under 28 U.S.C. § 2255," the court found that petitioner's IAC claim was "not ready for review on direct appeal" because resolving it would "require[] information not presently contained in the record." *Ibid.*

3. Petitioner moved in the district court to vacate his sentence under 28 U.S.C. 2255. His motion argued that his counsel had provided IAC at sentencing:

> Defense counsel provided ineffective assistance during the sentencing phase by: 1) failing to present a sentencing defense, 2) withdrawing a motion for leave to object to the presentence report, a motion for downward departure or variance, and a sentencing memorandum at [petitioner's] sentencing hearing, 3) failing to object to the testimony of [petitioner's] ex-girlfriend at sentencing, and 4) failing to present mitigation or argument to support a sentence at the low end of the advisory guideline range.

Dkt. No. 71, at 4.

The government opposed petitioner's motion on the ground that, in his plea agreement and at his rearraignment, petitioner had knowingly and voluntarily waived the right to collaterally attack his sentence. Dkt. No. 79, at 3-6. In addition, the government ar-

gued that petitioner's IAC claims lacked merit. *Id.* at 6-14. The government attached to its opposition an affidavit from petitioner's trial counsel averring that counsel's alleged sentencing errors were part of a considered strategy—to which petitioner had consented—intended to prevent consideration at sentencing of additional sexual misconduct likely to result in a higher sentence. Dkt. No. 79-1; see Sentencing Guidelines § 2G2.2(b)(5) (five-level enhancement for engaging in a "pattern of activity involving the sexual abuse or exploitation of a minor").

The district court referred the motion to a magistrate judge who recommended that it be denied on the ground that petitioner had waived his right to seek collateral relief. Pet. App. 16-23. The court adopted the magistrate judge's recommendation. *Id.* at 10-13. The court of appeals granted a certificate of appealability limited to the question whether petitioner's waiver of his right to collaterally attack his sentence precluded his IAC claim. *Id.* at 3.

4. On appeal, petitioner did not argue that the plea agreement's waiver of his right to assert IAC at sentencing was inconsistent with the Sixth Amendment. Instead, he argued that he had not knowingly and voluntarily waived his IAC claim because he had intended to preserve his right to challenge any sentence in excess of 120 months. See Pet. C.A. Br. 6; Pet. C.A. Reply Br. 4.

The court of appeals affirmed. Pet. App. 1-9. The court noted that it had previously held, in *Davila* v. *United States*, 258 F.3d 448 (6th Cir. 2001), "that a defendant who knowingly and voluntarily agreed not to contest his sentence in a post-conviction proceeding waived the right to argue in a § 2255 motion that his

counsel provided ineffective assistance at sentencing." Pet. App. 3. The court concluded that petitioner had knowingly and voluntarily waived his right to collaterally attack his sentence, including on IAC grounds. The court rejected petitioner's claim that he had not understood that a Section 2255 motion was a "collateral attack." *Id.* at 4-5. It also held that, in reserving the right to "appeal any sentence exceeding 120 months," petitioner did not retain the right to collaterally attack the sentence. *Id.* at 5-6. In the court's view, the "plain language of [petitioner's] plea agreement," which "refers to 'appeal' and 'collateral attack' as separate concepts," foreclosed his argument. *Ibid.*

Judge White dissented. Pet. App. 7-9. While acknowledging that the appellate waiver could be "parse[d] * * * to preclude this collateral attack," Judge White concluded that "a reasonable defendant in [petitioner's] position" would have believed that he had preserved his right to attack any sentence in excess of 120 months by direct appeal *and* collateral attack. *Id.* at 7-8.

5. In a petition for panel rehearing and rehearing en banc, petitioner argued for the first time that a plea agreement may not validly waive an IAC claim because, *inter alia*, such waivers violate "the due process guarantees of the United States Constitution." Pet. for Reh'g 2. The Sixth Circuit denied the petition. Pet. App. 24-25.

ARGUMENT

Petitioner contends that the Sixth Amendment prevents a criminal defendant from validly waiving any IAC claim in a plea agreement. Pet. 5-11. No such argument was raised or decided below, however. The court of appeals' decision to enforce petitioner's

waiver of his right to collaterally attack his sentence was also correct and does not conflict with any decision of this Court or any other court of appeals. Finally, petitioner's constitutional challenge is of diminishing importance in federal criminal cases, because current Department of Justice policy advises against seeking waivers of IAC claims in plea agreements. Further review is unwarranted.

1. Petitioner did not argue below that his plea agreement, to the extent it waived a collateral attack based on ineffective assistance of counsel, violates the Sixth Amendment, and the court of appeals did not address that issue. It is therefore not properly presented here. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (arguments not raised below are waived); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (Court's usual practice is to decline review of issues not pressed or passed upon below). In his Section 2255 motion in the district court, petitioner did not argue that the Sixth Amendment invalidates a criminal defendant's waiver of his right to claim IAC at sentencing. Rather, petitioner argued that his plea agreement waiver was not knowing and voluntary and should therefore not be enforced. His briefing on appeal made the same point. See pp. 4-5, *supra*. This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Nothing justifies a departure from that practice in this case.

2. Petitioner's argument also lacks merit. This Court has repeatedly held that a defendant may validly waive constitutional and statutory rights as part of the plea bargaining process so long as his waiver is knowing and voluntary. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-202 (1995) (defendant may

waive "many of the most fundamental protections afforded by the Constitution"); *Ricketts* v. *Adamson*, 483 U.S. 1, 9-10 (1987) (upholding plea agreement's waiver of right to raise double jeopardy defense). The district court specifically questioned petitioner about his appeal and collateral review waivers before finding petitioner's plea to be knowing and voluntary, see p. 3, *supra*, and the court of appeals correctly concluded that petitioner's waiver was valid and enforceable, see Pet. App. 3-6. See also Pet. 3 ("Through the Plea Agreement, [petitioner] knowingly and voluntarily waived his 'right to appeal and the right to attack collaterally the guilty plea, conviction, and sentence.'").

Petitioner does not claim that the courts of appeals are divided over whether the Sixth Amendment precludes waiver of IAC claims. While arguing that such waivers "create an untenable conflict of interest between a defendant and his attorney," Pet. 5, petitioner cites no case invalidating an IAC waiver on that ground. In fact, numerous courts of appeals have upheld plea agreements containing waivers of IAC claims. See, *e.g.*, *United States* v. *Djelevic*, 161 F.3d 104, 106-107 (2d Cir. 1998); *United States* v. *Mabry*, 536 F.3d 231, 236-244 (3d Cir. 2008), cert. denied, 557 U.S. 903 (2009); *United States* v. *White*, 307 F.3d 336, 341-344 (5th Cir. 2002); *Davila* v. *United States*, 258 F.3d 448, 451-452 (6th Cir. 2001); *Mason* v. *United States*, 211 F.3d 1065, 1068-1070 (7th Cir. 2000), cert. denied, 531 U.S. 1175 (2001); *United States* v. *Nunez*, 223 F.3d 956, 959 (9th Cir. 2000), cert. denied, 534 U.S. 921 (2001); *United States* v. *Cockerham*, 237 F.3d 1179, 1183-1187 (10th Cir. 2001), cert. denied, 534 U.S. 1085 (2002); *Williams* v. *United States*, 396 F.3d 1340,

1342 (11th Cir.), cert. denied, 546 U.S. 902 (2005); see also *United States* v. *Kentucky Bar Ass'n*, 439 S.W.3d 136, 144 (Ky. 2014) ("[E]very federal circuit to consider the validity of an IAC waiver * * * has explicitly permitted defendants to plead guilty and waive collateral review, including IAC.").

Kentucky Bar Association, *supra*, on which petitioner principally relies, is not to the contrary. In that case, the Kentucky Supreme Court upheld an ethics advisory opinion of the Kentucky Bar Association that precluded prosecutors from proposing, and defense counsel from advising a client about, a plea agreement term waiving an IAC claim. 439 S.W.3d at 151-158. But *Kentucky Bar Association* addressed only "[t]he obligations of *attorneys*" under that state's rules of professional conduct, and it expressly disclaimed any intent to "decid[e], on its merits, whether a defendant could waive an IAC claim." *Id.* at 144; see *ibid.* ("[W]e are not deciding that issue.").

3. Finally, petitioner contends (Pet. 11-12) that certiorari review is warranted in light of a recent memorandum from the Deputy Attorney General establishing, as a matter of "uniform Department of Justice polic[y]," that "[f]ederal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel." Deputy Attorney General James M. Cole, *Department Policy on Waivers of Claims of Ineffective Assistance of Counsel* (Oct. 14, 2014).[1] The memorandum does not suggest that such waivers are unconstitutional, however. To the contrary, it notes that "federal courts have uniformly held a defendant may waive

[1] http://www.justice.gov/file/70111/download.

ineffective assistance claims * * * related to sentencing," and it expresses "confiden[ce] that a waiver of a claim of ineffective assistance of counsel is both legal and ethical."[2] *Ibid.*

Further, the adoption of the Department's uniform policy counsels against certiorari review. In federal prosecutions, the constitutionality of IAC claim waivers is now of little if any prospective importance. And petitioner's argument that "a majority of state ethics boards * * * have instituted outright prohibitions on the inclusion of [IAC] waivers" (Pet. 12) suggests that the validity of such waivers will be of an issue of diminishing importance in state prosecutions as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney

OCTOBER 2015

---

[2] Although the memorandum directs federal prosecutors not to enforce existing waivers of IAC claims if those claims are meritorious or raise "a serious debatable issue that a court should resolve," *ibid.*, petitioner's IAC claim does not meet those criteria. Defense counsel explained that his actions, taken with his client's consent, represented a strategic decision to avoid a longer sentence. See p. 5, *supra*. Such strategic actions are reasonable under *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984).