No. 16-1301

In the Supreme Court of the United States

KIRTISH PATEL, 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 correctly dismissed petitioner's appeal on the ground that petitioner had entered into a plea agreement that provided, with specific exceptions that are not applicable here, that petitioner waived his right to appeal his conviction or sentence.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a) is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2016. On March 20, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 26, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Jersey to health-care fraud, in violation of 18 U.S.C. 1347 and 2. D. Ct. Doc. 36, at 1 (Aug. 16, 2016) (Judgment). He was sentenced to 100 months of imprisonment, to be followed by three

years of supervised release. Judgment 2-3. The court of appeals dismissed his appeal. Pet. App. 1a.

1. From September 2006 through June 2014, petitioner and his wife executed a scheme to defraud the Medicare program and private insurance companies through their health-care companies, Biosound Medical Services, Inc. and Heart Solution, PC (collectively, Biosound). Presentence Investigation Report (PSR) ¶¶ 9, 13-22. Biosound provided mobile diagnostic testing services (such as echocardiograms and ultrasounds) in the offices of primary-care physicians. PSR ¶¶ 9, 13. When a primary-care physician requested a diagnostic test for a patient, a Biosound employee (often petitioner) traveled to the physician's office to administer the test. PSR ¶ 13. Biosound then purported to pay an appropriate specialist physician (*e.g.*, a cardiologist) to interpret the diagnostic test results, and Biosound later transmitted the supposed specialist's report back to the primary-care physician, who relied on the report's findings to determine appropriate treatments for life-threatening health conditions including heart defects, blood clots, abdominal aneurysms, and strokes. PSR ¶¶ 13, 15. Medicare and private insurance companies reimbursed Biosound for the performance and interpretation of the diagnostic tests. PSR ¶ 11.

Beginning in or before October 2008, petitioner and his wife stopped transmitting all of the diagnostic-test results to specialists. PSR ¶ 14. Instead, petitioner—who did not have a medical license—wrote the diagnostic interpretations himself. *Ibid.* Petitioner's wife then affixed a doctor's signature to the report prepared by petitioner, thus giving the false impression that it had been prepared by a licensed specialist, and sent that report to the primary-care physician. PSR ¶¶ 14, 16.

From October 2008 to June 2014, petitioner and his wife forged doctors' signatures on more than half of the thousands of diagnostic reports that Biosound processed. PSR ¶¶ 14, 17, 23. When confronted by concerned Biosound employees, petitioner replied, "Why should I pay these doctors when I can read them?" PSR ¶ 20. Medicare and private insurance companies paid petitioner and his wife more than $4.8 million for fraudulent diagnostic testing and reports. PSR ¶ 22.

2. On November 17, 2015, petitioner was charged by information with one count of health-care fraud, in violation of 18 U.S.C. 1347 and 2. D. Ct. Doc. 25, at 7. On the same day, petitioner and the government entered into a written plea agreement. D. Ct. Doc. 29 (Plea Agreement).

a. In exchange for petitioner's guilty plea to the single charge contained in the information, the government agreed "not to initiate any further criminal charges against [petitioner] for, from September 2006 through June 2014, obtaining payments for health care benefits from the Medicare and Medicaid programs, by means of false pretenses, that is, forging physician signatures in order to create false diagnostic reports that purported to be written by actual physicians who had read and interpreted diagnostic results." Plea Agreement 1. The plea agreement stated that petitioner's guilty plea "carrie[d] a statutory maximum prison sentence of 10 years," and that the ultimate sentence to be imposed would be "within the sole discretion of the sentencing judge * * * up to and including the statutory maximum term of imprisonment and the maximum statutory fine." *Id.* at 2. In addition, petitioner "agree[d] to make full restitution for all losses resulting from the offense of conviction," and he acknowledged that he and

his wife "were paid more than $4,386,133.75" in connection with their offense conduct. *Ibid.* The plea agreement included a stipulation of facts, which indicated that additional losses remained to be calculated. See *id.* at 3, 9.

The plea agreement further provided that, "[i]n exchange for the undertakings made by the government in entering this plea agreement," petitioner "voluntarily and expressly waive[d] all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution." Plea Agreement 9. The agreement stated that, "[n]otwithstanding this waiver provision, the parties reserve any right they may have under 18 U.S.C. § 3742 to challenge any aspect of the sentence that falls outside of any applicable statutory minimum or maximum term of imprisonment, term of supervised release, or fine," and that "[t]he parties also reserve any right they may have under 18 U.S.C. § 3742 to appeal the sentencing court's determination of the criminal history category." *Ibid.*

b. At a plea hearing, the district court discussed the appeal waiver with petitioner:

> THE COURT: * * * Normally, when a person is sentenced by a judge, that person has the right to challenge that sentence by what we call an appeal, either to that same judge or to a higher court, in this instance, it would be the Circuit Court of Appeals, and that person has the right to say that sentence was wrong, incorrect, should be modified, corrected, even thrown out, and that's what we call a right to appeal, simply put.
>
> In this provision, apparently it appears that you are giving up your right to appeal any sentence that I

> may impose upon you so long as it's within the statutory limits.
>
> Am I right in—
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is that your stipulation.
>
> THE DEFENDANT: Um-h'm.
>
> THE COURT: Sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: So in other words, I mean, so you and I understand this and we speak the same language, provided I don't sentence you to more than 10 years in jail, you will not challenge any such sentence.
>
> THE DEFENDANT: Correct.
>
> THE COURT: Are you sure you know what you're doing?
>
> THE DEFENDANT: Yes.

11/17/15 Plea Tr. 20-22; see Fed. R. Crim. P. 11(b)(1)(N) (before accepting guilty plea, court must inform defendant of "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence" and "determine that the defendant understands").

c. In preparation for petitioner's sentencing hearing on August 16, 2016, the PSR calculated petitioner's total offense level as 27, which included a three-level reduction for acceptance of responsibility. PSR ¶¶ 58-62. Combined with petitioner's criminal-history category of I, that offense level established an advisory Sentencing Guidelines range of 70 to 87 months of imprisonment. PSR ¶¶ 72, 101.

The government objected to the three-level reduction in petitioner's offense level for acceptance of responsibility on the ground that petitioner had "backed away from any acceptance of responsibility" in his post-plea court filings and statements. 8/16/16 Sent Tr. (Sent. Tr.) 14; see *id.* at 12-18. In particular, the government relied on petitioner's statements "that not all of the neurological tests that he admitted were, in fact, unsupervised," and that "the government had failed to prove any deaths and therefore he should not get" a sentencing enhancement for an offense involving the conscious or reckless risk of death or serious bodily injury. *Id.* at 13; see PSR ¶ 54. The government also relied on petitioner's statements that "the treatment decisions at issue were never life threatening and * * * that if there is a risk factor, the referring physician would have sent the patients to the hospital instead of scheduling these tests so, a single patient was not at risk." Sent. Tr. 14-15.

The district court agreed that petitioner had not accepted responsibility, and the court calculated a revised total offense level of 30, which resulted in an advisory Guidelines range of 97 to 121 months of imprisonment. Sent. Tr. 25-26. The court imposed a sentence of 100 months of imprisonment, to be followed by three years of supervised release. *Id.* at 27. The court also ordered petitioner to pay $4,803,875.40 in restitution to victim insurance companies, ordered forfeiture in the same amount, and ordered a $100 special assessment. *Id.* at 28-29; see PSR ¶¶ 40-42 (calculating victim loss amounts); Judgment 7-14 (order of restitution and forfeiture).

3. Petitioner filed a notice of appeal. D. Ct. Doc. 38 (Aug. 26, 2016). The government moved to dismiss the

appeal based on the appeal waiver contained in petitioner's plea agreement. Gov't Mot. for Summ. Dismissal 2-5. Petitioner opposed the government's motion, arguing that his appeal waiver should not be enforced because "doing so would result in a miscarriage of justice." Pet. Resp. to Gov't Mot. for Summ. Dismissal 2. Petitioner contended that "the government in fact undertook nothing as a concession to the defendant," *id.* at 6, and he relied on what he characterized as "a combination of troubling procedural irregularities at [petitioner's] sentencing," *id.* at 10. Those purported irregularities included the district court's "interference" with petitioner's allocution, its "undue emphasis" on one 18 U.S.C. 3553(a) factor, and its "injudicious hostility" to petitioner and "repeated references to his national origin and status as a naturalized citizen." Pet. Resp. to Gov't Mot. for Summ. Dismissal 10. Following a reply by the government, the court of appeals summarily granted the government's motion to enforce the appeal waiver and dismissed the appeal. Pet. App. 1a.

ARGUMENT

Petitioner seeks this Court's review (Pet. 7-24) of the court of appeals' dismissal of his appeal, contending that enforcement of the appeal-waiver provision in his plea agreement resulted in a miscarriage of justice because the district court committed procedural errors at sentencing. The court of appeals correctly enforced the appeal waiver, and its dismissal of petitioner's appeal does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly dismissed petitioner's appeal because the appeal fell within the scope of an enforceable appeal-waiver provision, and because

petitioner lacks a colorable claim that enforcement of that provision would result in a miscarriage of justice.

a. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of the plea-bargaining process. See, *e.g.*, *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995) (collecting cases and explaining that "many of the most fundamental protections afforded by the Constitution" may be waived, and that statutory rights are presumptively waivable); see also *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480 (2000) (requiring courts to consider whether the plea agreement "waived some or all appeal rights" in determining whether counsel was ineffective for failing to appeal); *Ricketts* v. *Adamson*, 483 U.S. 1, 8-10 (1987) (upholding plea agreement's waiver of right to raise double-jeopardy defense). Applying that principle, every court of appeals to consider the issue has held that an appeal waiver like the one in petitioner's plea agreement is generally enforceable according to its terms as long as it was knowing and voluntary. See, *e.g.*, *United States* v. *Hahn*, 359 F.3d 1315, 1324 n.10 (10th Cir. 2004) (en banc) (per curiam) (collecting cases); *United States* v. *Andis*, 333 F.3d 886, 889-890 (8th Cir.) (en banc) (same), cert. denied, 540 U.S. 997 (2003).[1]

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[1] See also *United States* v. *Alvarado-Casas*, 715 F.3d 945, 955-956 (5th Cir. 2013), cert. denied, 134 S. Ct. 950 (2014); *United States* v. *Beals*, 698 F.3d 248, 255-256 (6th Cir. 2012); *United States* v. *Riggi*, 649 F.3d 143, 146-148 (2d Cir. 2011); *United States* v. *Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009); *United States* v. *Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006); *United States* v. *Wilson*, 429 F.3d 455, 460-461 (3d Cir. 2005); *United States* v. *Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005); *United States* v. *Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005); *United States* v. *Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

b. Petitioner concedes (Pet. 7-8) that he knowingly, intelligently, and voluntarily waived his right to appeal; that the appeal he filed was within the scope of his appeal waiver; that he has no claim of ineffective assistance of counsel in connection with his plea agreement; and that the government has not breached its obligations under the plea agreement. He argues instead (Pet. 8-9) that, due to "certain sentencing-related errors" committed by the district court, enforcing his appellate waiver would "work a miscarriage of justice." In particular, petitioner contends (Pet. 17-18) that his appeal waiver should not be enforced because of "the district court's interference with petitioner's attempt to exercise his right of allocution, its repeated references to the defendant's ethnicity (or national origin) and immigrant status, an undue emphasis on the punishment factor" in 18 U.S.C. 3553(a)(2), and the court's "improper expression of overt hostility to the petitioner himself." None of the actions petitioner complains of constituted an error by the district court, let alone an error that could justify a refusal to enforce petitioner's appeal waiver.

i. Contrary to petitioner's contention (Pet. 19), the district court did not "derail[]" his allocution. Petitioner began his allocution by claiming that he "didn't mean to harm anyone." Sent. Tr. 10. The district court probed that assertion, asking how petitioner could avoid harming anyone when he was "falsifying reports" by interpreting medical tests without "any medical training." *Ibid.* Petitioner appeared to trivialize his offense by stating that he had falsified reports only with respect to "screening tests," and that he was "trying to save the company" by expediting the reporting process. *Id.* at 11. The district court responded that the tests were "serious medical tests," and that petitioner was "a greedy

fool because [he] made a lot of money" from the scheme. *Id.* at 11-12. Petitioner agreed. *Id.* at 12. The court then asked petitioner, "Anything else you want to tell me?" *Ibid.* Petitioner responded, "That's it." *Ibid.* The court also asked defense counsel whether there was "[a]ything else," to which counsel responded, "No, your honor." *Ibid.* The court then invited the government to give its sentencing recommendation. *Ibid.*

Nothing in that exchange reflected error or improper behavior by the district court. "Before imposing sentence, [a district] court must * * * permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii). But "a defendant's right to allocution is not unlimited in terms of either time or content." *United States* v. *Li*, 115 F.3d 125, 133 (2d Cir. 1997); see *United States* v. *Covington*, 681 F.3d 908, 910 (7th Cir.) ("[A]n interruption by the court does not in itself amount to a denial of a defendant's right to allocution."), cert. denied, 133 S. Ct. 804 (2012). Nothing prohibits a court from interrupting a defendant's allocution and asking him probing questions related to his offense conduct. The colloquy between the court and petitioner was particularly appropriate here because petitioner's excuses for his conduct appeared to conflict with his acknowledgement in his plea agreement that his offense "involved the conscious or reckless risk of death or serious bodily injury." Plea Agreement 9. The court's questions were also relevant to resolving whether petitioner was entitled to a sentencing benefit for acceptance of responsibility. When the district court inquired of petitioner and of his lawyer whether either wished to add "[a]nything else," both declined. Sent. Tr. 12.

Nothing in the district court's exchange with petitioner was irregular. In any event, petitioner waived his right to appeal except with respect to a specified category of potential errors in the calculation of his sentence, and the district court's purported interference with his allocution is not a type of error as to which petitioner reserved his right to appeal. In addition, petitioner did not object to any part of the exchange described above, and he has not attempted to show that he could establish plain error on appeal if he had not waived his appellate rights. *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993).

ii. Petitioner argues (Pet. 21-23) that the district court failed to consider all of the sentencing factors enumerated in 18 U.S.C. 3553(a) and instead "announced that 'punishment' was [its] sole objective." Pet. 22 (citing Sent. Tr. 22-30). In the same paragraph, however, petitioner concedes (*ibid.*) that the district court did consider the "history and characteristics of the offender," the "nature and circumstances of the offense," 18 U.S.C. 3553(a)(1), the Guidelines range, 18 U.S.C. 3553(a)(4), the "need for restitution," 18 U.S.C. 3553(a)(7), and the need for rehabilitation, 18 U.S.C. 3553(a)(2)(D). Indeed, the district court addressed all of those factors in substance before determining that the need for just punishment, 18 U.S.C. 3553(a)(2)(A), was the most important factor in this case. See Sent. Tr. 22-27. Because petitioner's argument "ultimately boils down to an assertion that the district court should have balanced the [Section] 3553(a) factors differently," it is "simply beyond the scope of * * * appellate review, which looks to whether the sentence is reasonable, as opposed to whether in the first instance [the appellate court] would

have imposed the same sentence." *United States* v. *Sexton*, 512 F.3d 326, 332 (6th Cir.) (citation omitted), cert. denied, 555 U.S. 928 (2008). Petitioner cites no authority suggesting either that the district court erred in its consideration of the Section 3553(a) factors or that his within-Guidelines sentence was unreasonable. And in any event, petitioner's appeal waiver unambiguously precludes appeal of this type of alleged error.[2]

iii. Petitioner contends (Pet. 23-24) that he suffered a miscarriage of justice because the district court referenced his place of birth (India) several times, as well as his status as a naturalized citizen. A sentencing court may not impose a harsher sentence based on a defendant's race, ethnicity, or national origin. See *Buck* v. *Davis*, 137 S. Ct. 759, 775 (2017); *Pepper* v. *United States*, 562 U.S. 476, 489 n.8 (2011). "[D]iscrimination on the basis of race" or ethnicity, "'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017)

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[2] Petitioner argues (Pet. 23) that his appeal waiver should be disregarded because the district court "injudicious[ly] suggest[ed] penal confinement under torture as a form of punishment." That argument lacks merit. In expressing outrage that petitioner had falsified medical reports over a long period of time and had been paid for doing so, the district court noted that it wanted to put petitioner on the historical penal colony called "Devil's Island," but explained that it "will not go that far" because it is "expect[ed] to be punitive" but not "Draconian." Sent. Tr. 24. As petitioner concedes, "it was not inappropriate * * * for the sentencing court to express outrage at the nature of the offense." Pet. 18-19; cf. *Liteky* v. *United States*, 510 U.S. 540, 550-551 (1994) (observing that a judge may "be exceedingly ill disposed towards [a] defendant, who has been shown to be a thoroughly reprehensible person," but that "the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings").

(quoting *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979)). Permitting racial or ethnic prejudice in sentencing would "damage[] 'both the fact and the perception'" of the court's role in meting out justice on an even-handed basis. *Ibid.* (quoting *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991)).

Contrary to petitioner's contention, however, he has no colorable claim that the district court's comments gave rise to "[a]n appearance * * * that the defendant's ethnicity or citizenship played a role in determining his sentence." Pet. 24 (brackets, citation, and internal quotation marks omitted). The district court observed that petitioner had grown up in India and had immigrated to the United States, Sent. Tr. 10, 14, a reference petitioner concedes (Pet. 23) was "entirely appropriate." Later in the proceeding, the court explained that petitioner's crime was "horrific" because "[s]ociety as we live today, depends upon reliance upon people who can provide medical care and treatment." Sent. Tr. 23-24. The court noted that such reliance is "a universal dependence" that is "just as important in India, [petitioner's] homeland, as here in this country or in South America or in Africa or in Greenland." *Ibid.*

The district court's passing reference to humans' universal dependence on the reliability of medical tests does not suggest that the court viewed petitioner's place of birth as relevant to the choice of an appropriate criminal sentence. Petitioner did not object to the district court's comments, moreover, and he has made no attempt to establish that the comments constituted plain error. Thus, even assuming that improper consideration of race or ethnicity at sentencing would be redressable on appeal despite petitioner's appeal waiver, petitioner has no colorable claim of entitlement to relief.

c. Petitioner argues (Pet. 19) that the "judicial reaction to the circumstances of the case" resulted in a sentence that "was reached in a manner that the plea agreement did not contemplate." Courts of appeals have consistently rejected such contentions. See, *e.g.*, *United States* v. *Rutan*, 956 F.2d 827, 830 (8th Cir. 1992), overruled in part on other grounds by *Andis*, *supra*; *United States* v. *Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); *United States* v. *Wiggins*, 905 F.2d 51, 53-54 (4th Cir. 1990). Although a defendant may not know the exact contours of his prospective sentence when he executes a waiver, the defendant knows that he has a right to appeal the sentence and the manner in which it will be imposed, and that he is relinquishing that right. Such knowledge is sufficient to render the waiver knowing and intelligent. "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it." *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002) (upholding validity of plea agreement in which defendant waived right to receive from prosecutor exculpatory impeachment material and information relating to affirmative defenses).

Petitioner's plea agreement stated that, with specific exceptions that are not applicable here, petitioner waived his right to appeal his sentence and the manner in which the sentence was determined. Because petitioner had not yet been sentenced when the plea agreement was executed, the appeal waiver necessarily encompassed potential errors that had not yet occurred. Although petitioner suggests (Pet. 21) that he should

not be held to his waiver for errors he could not foresee, the text of his agreement does not contemplate any such exception, and petitioner offers no means of distinguishing foreseeable from unforeseeable grounds for appeal. Except for his claim of impermissible race- or national-origin-based sentencing (which has no colorable basis in the record), the errors petitioner ascribes to the district court in this case are "precisely the kind of 'garden-variety' claim of error contemplated by [an] appellate waiver." *Sotirion* v. *United States*, 617 F.3d 27, 38 (1st Cir. 2010).

d. Petitioner contends (Pet. 13-14) that this aspect of the plea agreement should not be enforced because the agreement "confer[ed] little or no benefit on" him. In exchange for the conditions petitioner accepted in the plea agreement, however, the government pledged not to "initiate any further criminal charges against [petitioner] for, from September 2006 through June 2014, obtaining payments for health care benefits from the Medicare and Medicaid programs, by means of false pretenses." Plea Agreement 1. That term of the agreement was of great value to petitioner, who had forged doctors' signatures on more than half of the thousands of diagnostic reports that Biosound had processed during that period. PSR ¶ 17. The government could have charged each forgery separately as a health-care fraud offense, each with its own ten-year statutory maximum term of imprisonment, fine, term of supervised release, and $100 special assessment. In addition, the government could have charged petitioner with the separate offense of paying kickbacks to a doctor. See PSR ¶¶ 63-65. Instead, the government permitted petitioner to plead guilty to a single count of health-care fraud.

2. Petitioner contends (Pet. 7-12) that this Court's review is warranted to resolve a conflict among the courts of appeals about when to apply the "miscarriage of justice" exception to the enforcement of appeal waivers. To the extent that courts of appeals have varied in their articulation of that standard, this Court's intervention is unwarranted in this case because petitioner could not prevail in any circuit.

Every court of appeals to consider the question has held that a defendant can validly waive his right to appeal his sentence, before the sentencing hearing takes place, as long as he does so knowingly and voluntarily. See p. 9, *supra*. As petitioner notes (Pet. 7-12), courts of appeals have also held that a defendant may appeal his sentence despite an appeal waiver in limited circumstances, as when the sentence imposed exceeds the statutory maximum or is inconsistent with the negotiated agreement; when the sentencing court relies on a constitutionally impermissible factor (such as the defendant's race or religion); or when the waiver was the product of ineffective assistance of counsel or otherwise results in a "miscarriage of justice." See, *e.g.*, *United States* v. *Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *Hahn*, 359 F.3d at 1327-1328 (10th Cir.); *United States* v. *Johnson*, 347 F.3d 412, 414-415 (2d Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *Andis*, 333 F.3d at 891 (8th Cir.); *United States* v. *Khattak*, 273 F.3d 557, 562-563 (3d Cir. 2001); *United States* v. *Hicks*, 129 F.3d 376, 377 (7th Cir. 1997); *United States* v. *Broughton-Jones*, 71 F.3d 1143, 1146-1147 (4th Cir. 1995); *Navarro-Botello*, 912 F.2d at 321 (9th Cir.).

Petitioner contends (Pet. 7-12) that courts of appeals are divided about how to apply the "miscarriage of justice" exception to the enforcement of appellate waivers.

He argues in particular that the Second and D.C. Circuits have adopted a view of that exception that is more "generous" than "the standard applied by the court below." Pet. 11. This case would be an unsuitable vehicle for resolving any divergence among the circuits. That is so both because the court below enforced the appeal waiver summarily (Pet. App. 1a) and thus articulated no particular standard, and because petitioner's appeal waiver would have been enforced even under the standards articulated by the Second and D.C. Circuits.

Contrary to petitioner's contention (Pet. 11, 17), his appeal waiver would have been enforced under the standard applied by the D.C. Circuit in *Guillen*, 561 F.3d at 527. The D.C. Circuit held in that case that the miscarriage-of-justice exception to the enforceability of appeal waivers would apply where, *e.g.*, a district court either imposed a sentence exceeding the statutory maximum or "utterly fail[ed] to advert to the factors in 18 U.S.C. § 3553(a)," or where a defendant has a "colorabl[e]" claim that the district court relied on impermissible factors such as the defendant's race or religion. *Id.* at 531. In this case, the district court imposed a sentence at the low end of the advisory Guidelines range and well below the statutory maximum. And petitioner concedes (Pet. 22) that the court adverted to the factors enumerated in Section 3553. Although petitioner argues (Pet. 23-24) that the district court acted improperly by referring to his birth in India, he identifies no evidence that colorably suggests that the court relied on petitioner's national origin as a basis for the sentence imposed. Petitioner therefore could not prevail under the legal principles articulated in *Guillen*.

Contrary to petitioner's contentions (Pet. 11-13, 17), his appeal waiver would likewise be enforceable in the

Second Circuit. Petitioner principally relies (Pet. 12-13) on that court's decision in *United States* v. *Goodman*, 165 F.3d 169 (2d Cir.), cert. denied, 528 U.S. 874 (1999). But the factors that induced the Second Circuit not to enforce the appeal waiver in *Goodman* are not present here.

In *Goodman*, the Second Circuit declined to enforce a defendant's waiver of her right to appeal any sentence that was at or below the statutory maximum. The court relied on the facts that (1) the sentence imposed was nearly twice as long as the high end of the advisory Guidelines range predicted in the plea agreement; (2) the sentencing judge had erroneously informed the defendant that she could appeal an upward departure, leaving in serious doubt whether her waiver was knowing; (3) the defendant had bargained for downward departures totaling six levels that were not applied to her sentence; and (4) the defendant had ultimately received no benefit from the plea agreement because the government did not refrain from pursuing any charges against her. 165 F.3d at 174-175. Here, by contrast, (1) petitioner's plea agreement did not predict any advisory Guidelines range; (2) petitioner was not misinformed about the nature of his waiver, but knowingly and voluntarily accepted its terms; (3) petitioner's plea agreement did not stipulate to any offense level or downward variance; and (4) petitioner benefitted from the government's agreement not to file or pursue numerous other potential charges connected to petitioner's fraudulent scheme.[3]

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[3] Petitioner's reliance (Pet. 12) on *United States* v. *Padilla*, 186 F.3d 136, 141 (2d Cir. 1999), is similarly unavailing. In that case, the Second Circuit declined to enforce the plea agreement because the government had breached its obligations under the agreement.

Petitioner thus cannot identify any decision suggesting that another court of appeals would have declined to enforce his appeal waiver under the circumstances presented here. Any variation among the circuits in their articulations of the miscarriage-of-justice standard therefore does not warrant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2017

Id. at 138-141. Petitioner concedes (Pet. 8) that the government did not breach the plea agreement in this case.