No. _____

In the

Supreme Court of the United States

HUMBERTO VERDUZCO-MAGANA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Whether a written appellate waiver giving up the right to appeal any portion of the sentence waive the right to ask the Circuit to conform the written judgment to the oral pronouncement of sentence.

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Petition for Writ of Certiorari

Humberto Verduzco-Magana petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's order dismissing Mr. Verduzco-Magana's appeal was not published. App. 1a.

Jurisdiction

The Ninth Circuit issues its order dismissing Mr. Verduzco-Magana's appeal February 27, 2019. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

On October 2, 2017, Mr. Verduzco-Magana was charged with illegal reentry after deportation in violation of 8 U.S.C. § 1326(a). He pleaded guilty to an information, and the district court imposed a 51-month term of imprisonment. At the time of sentencing, the court also imposed a three-year period of supervised release "under the standard conditions of supervised release to follow."

When the written judgment was issued, it reflected the 51-month term of imprisonment and three-year period of supervised release. App. 3a. But, in addition to the standard conditions of supervision, it also listed five special conditions of supervision--conditions that had not been read into the record at the time of sentencing. Those conditions included drug testing, compliance with the immigration law, a prohibition on possessing identification in any name other than his true name and use of any other name, and collection of a DNA sample. App. 3a-4a.

Mr. Verduzco-Magana appealed, arguing that the district court erred in including in the written judgment conditions of supervision that had not been pronounced as part of the sentence in open court. He thus asked that the Ninth Circuit remand to conform the written judgment to the oral pronouncement of sentence. The government filed a motion to dismiss, in

which it argued that Mr. Verduzco-Magana had agreed waive appeal as to the imposition of those conditions at sentence. Mr. Verduzco-Magana opposed dismissal, arguing that he was not "appealing" the sentence, because, under the Ninth Circuit's law, the only legal cognizable sentence is the one pronounced in the presence of the defendant. Thus, Mr. Verduzco-Magana maintained that his challenge to the written judgment was merely asking for enforcement of the sentence he received, and did not fall under the appellate waiver.

Mr. Verduzco-Magana also argued that, because an appellate waiver does not bar constitutional claims, it should not bar his claim here. Due process is violated where the court imposes one sentence in the presence of the defendant, and then enlarges the sentence outside his presence.

The Ninth Circuit rejected his challenge and dismissed his appeal. It concluded that his appellate waiver encompassed the claim he made in his brief, and that his constitutional argument failed because he had notice of the conditions before they were imposed.

Reason for Granting the Writ

This case presents a question on which the federal circuit courts are divided--whether a written appellate waiver bars a claim that the written judgment does not reflect the oral pronouncement of sentence. The Ninth Circuit, here, said that it did, joining the Fifth Circuit. *United States v. Higgins*, 739 F.3d 733, 738 (5th Cir. 2014). The Eighth Circuit has found that an appellate waiver does not preclude a challenge that a written judgment does not conform to the oral pronouncement of sentence. *United States v. Brave*, 642 F.3d 625, 627 (8th Cir. 2011).

The Ninth Circuit is wrong. It's true that Mr. Verduzco-Magana waived his right to "appeal any portion of [the] sentence." But Mr. Verduzco-Magana does not appeal his sentence. Under Ninth Circuit's law, the "only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant." *United States v. Munoz-Dela Rosa*, 495 F.2d 254, 256 (9th Cir. 1974). Under *Munoz-Dela Rosa*, Mr. Verduzco-Magana's sentence does not include any condition of supervision not orally stated during the sentencing proceeding, in his presence.

It follows that Mr. Verduzco-Magana is not "appealing" his sentence. To appeal is to "apply to a higher court for a reversal of the decision of a lower court." New Oxford American Dictionary, (3d ed. 2010); Black's Law

Dictionary (9th ed. 1990) (defining appeal as "[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp. the submission of a lower court's or agency's decision to a higher court for review and possible reversal"). And that's not what Mr. Verduzco-Magana hopes to accomplish--he does not challenge the sentence the district court imposed, nor does he ask this Court to change anything about his sentence. He only asks this Court to ensure that the sentenced pronounced by the district court is effectuated. The appellate waiver should not be read to bar such claims. *E.g.*, *United States v. Frater*, 735 F. App'x 467 (9th Cir. 2018) (finding that defendant's waiver of his right to appeal his sentence barred all claims, except the claim that the written judgment did not conform to the oral pronouncement of sentence).[1]

If the appellate waiver did apply to this circumstances, it could not be applied to bar Mr. Verduzco-Magana's appeal in any event. As the government concedes, an appellate waiver does not bar consideration of a claim that the sentence violates the Constitution. (Motion at 11-12; *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007).) Where the court imposes one sentence in the presence of the defendant, and then enlarges the

1 To the extent that the language of the waiver is ambiguous--and Mr. Verduzco-Magana does not believe it is--any ambiguity must be construed against the government. *United States v. Cope*, 527 F.3d 944, 951 (9th Cir. 2008).

punishment outside the defendant's presence, it commits error--error "so plain . . . that it should [be] dealt with by the Court of Appeals, even though it had not been alleged as error." *Bartone v. United States*, 375 U.S. 52, 53 (1963). That error is constitutional in nature; it is grounded in a defendant's due process right to be present as his sentencing. *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016). As such, where that rule is violated, the sentence is unconstitutional *and* the appellate waiver may be deemed unenforceable. *Id.* at 1020-21.

In *Ornelas*, the defendant had voluntarily absented himself from the sentencing proceeding and thus had waived his constitutional right to be present at sentencing. Because the defendant's constitutional right to be present at sentencing had not been violated, the Court applied the appellate waiver and dismissed the appeal. *Id.* at 1023. In this case, however, Mr. Verduzco-Magana did not voluntarily absent himself from the process that enlarged the sentence imposed in open court--the preparation of the judgment took place in the judge's chambers. Under these facts, the enlargement in his sentence, without his presence, both violates the Constitutional and renders the appellate waiver unenforceable.

Conclusion

For the foregoing reasons, Mr. Verduzco-Magana respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: May 20, 2019

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