

No. _____

In the Supreme Court of the United States

CHRISTOPHER ZAMARRIPA, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTION PRESENTED FOR REVIEW

Does a district court's mischaracterization, during the plea colloquy, of an appeal waiver create an ambiguity that must be construed against the government and render a broader appeal waiver unknowing and involuntary?

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Petitioner Christopher Zamarripa asks that a writ of certiorari issue to review the orders entered by the United States Court of Appeals for the Fifth Circuit on July 23, 2020, granting the Government’s motion to dismiss the appeal, and on August 26, 2020, denying Zamarripa’s motion for reconsideration.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Zamarripa*, No. 5:19-CR-00349-FB (W.D. Tex. Aug. 15, 2019) (rearraignment/plea hearing)
- *United States v. Zamarripa*, No. 19-51183 (5th Cir. July 23 & Aug. 18, 2020) (orders dismissing appeal and denying motion to reconsider)

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A copy of the unpublished orders of the court of appeals, *United States v. Zamarripa*, No. 19-51183 (5th Cir. July 23 & Aug. 18, 2020) (per curiam), are attached to this petition as Appendices A and B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The order of the United States Court of Appeals for the Fifth Circuit dismissing the appeal was entered on July 23, 2020. This petition is filed within 150 days after entry of judgment. *See* Sup. Ct. R. 13.1; Miscellaneous Order, 589 U.S. __ (Mar. 19, 2020). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall be ... deprived of life, liberty, or property, without due process of law”

FEDERAL STATUTE INVOLVED

The text of 18 U.S.C. § 3742 is produced in Appendix D.

FEDERAL RULE INVOLVED

The text of Federal Rule of Criminal Procedure 11 is reproduced in Appendix E.

STATEMENT

Christopher Zamarripa appealed his sentence of 460 months' imprisonment. The Government moved to dismiss, seeking to enforce the broad appeal waiver in the written plea agreement. Zamarripa argued the district court's statements at arraignment—that he could appeal if the court made a mistake—rendered the broad appeal waiver unknowing and permitted the appeal because it was not barred by the narrow appeal waiver described by the court. The court of appeals summarily granted the Government's motion to dismiss. Zamarripa moved the court to reconsider, and it summarily denied his motion.

1. District court.

Zamarripa signed a plea agreement admitting his guilt to 10 counts of cyberstalking and one count of possessing child pornography. The written plea agreement waived his “right to appeal the sentence on any ground, including but not limited to any challenges to the determination of any period of confinement ... including any appeal right conferred by 18 U.S.C. §3742.” It also waived his right to challenge the sentence in any post-conviction proceeding, except for claims of prosecutorial misconduct or ineffective assistance of counsel of a constitutional dimension.

At arraignment, the district court did not ask Zamarripa if he reviewed and understood the written plea agreement. The court

explained that, by pleading guilty with the plea agreement, Zamarripa “would be giving up, generally, virtually all of your appellate—direct and habeas corpus appellate rights, although you would retain some limited appellate rights if it were found—of any professional misconduct by the lawyers or if the Court did something it wasn’t supposed to do.” Pet. App. C 7. The court continued, “But assuming we do our jobs right, then you are giving up virtually all of your rights.” *Id.* The court then asked Zamarripa if he understood the rights he had, and Zamarripa said he did. *Id.* The prosecutor did not challenge this characterization of Zamarripa’s appeal waiver. The court accepted Zamarripa’s guilty plea.

At sentencing, the district court adopted the presentence report, which calculated an advisory Guidelines range of 63 to 78 months’ imprisonment. The court relied on undisclosed victim impact statements and imposed a total sentence of 460 months’ imprisonment. The sentence was an upward variance of nearly 32 years, but court explained in the statement of reasons that it imposed a *downward* variance due to the Zamarripa’s mental health issues. Zamarripa appealed.

2. Appeal.

In his opening brief, Zamarripa challenged his sentence as procedurally and substantively unreasonable. He also argued the appeal was not barred by the appeal waiver because the district court did something it was not supposed to do: it miscalculated the Guidelines, relied on undisclosed victim impact statements, and imposed an unreasonable sentence.

The Government moved to dismiss the appeal based on the written appeal waiver. It argued the district court's description of the appeal waiver was synonymous with the written plea agreement that permitted the sentence to be challenged only in a post-conviction proceeding based on ineffective assistance of counsel or prosecutorial misconduct—parties' errors, not the court's. The Fifth Circuit granted the government's motion to dismiss without explaining the basis for its ruling. Pet. App. A.

Zamarripa moved the Fifth Circuit to reconsider, arguing that the district court's description at rearraignment of an appeal waiver that conflicts with the written waiver creates an ambiguity that must be construed narrowly and against the Government. Because Zamarripa's appeal raises sentencing errors that were exceptions to the appeal waiver described by the court, he argued his appeal should be reinstated. Alternatively, Zamarripa asked the

Fifth Circuit to clarify its basis for enforcing the appeal waiver. The Fifth Circuit denied Zamarripa's motion to reconsider without explanation. Pet. App. B.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit’s enforcement of Zamarripa’s written appeal waiver creates a circuit split.

By enforcing Zamarripa’s appeal waiver and dismissing his appeal, the Fifth Circuit created a circuit split regarding the consequences of a district court’s mischaracterization of an appeal waiver during the plea colloquy.

Before enforcing an appeal waiver, a court must determine whether the waiver covers the issue raised on appeal, construing the waiver narrowly and against the government. *See Garza v. Idaho*, 139 S. Ct. 738, 744 (2019); *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). The court must also determine whether the waiver was knowing and voluntary. *Garza*, 139 S. Ct. at 745 & n.5. “A valid and enforceable appeal waiver only precludes challenges that fall within its scope.” *Id.* at 744 (cleaned up).

A district court’s mischaracterization of an appeal waiver before accepting a guilty plea affects both steps of that waiver enforcement review. The Fifth Circuit’s decision to enforce the waiver—even though the district court told Zamarripa he could appeal if the court “did something it wasn’t supposed to do”—conflicts with other circuits that have held an oral mischaracterization narrowed the scope of the appeal waiver or rendered the broad written waiver unknowing.

A. The dismissal conflicts with the Third Circuit’s holding that a court’s mischaracterization of an appeal waiver creates an ambiguity that must be construed against the government, limiting the scope of the appeal waiver.

The Fifth Circuit dismissed Zamarripa’s appeal even though the issues he raised were not waived by the narrow waiver described by the district court at sentencing. That conflicts with the Third Circuit’s holding that “a statement made by the sentencing court during the colloquy can create ambiguity where none exists in the plain text of the plea agreement.” *United States v. Safferstein*, 673 F.3d 237, 243 (3d Cir. 2012). The appellate court must construe the ambiguity against the government and interpret the waiver narrowly. *Id.*

The Third Circuit reached this conclusion based on precedent applying contract law to plea agreements, construing agreements against the government (as the drafting party with greater negotiating power), and finding waivers unknowing and involuntary when a district court fails to inform the defendant of the terms of an appeal waiver and ascertain that the defendant understands those terms prior to accepting a guilty plea. *Id.* at 242–43 (citing Fed. R. Crim. P. 11(b)(1)(N)).

The Third Circuit allows an appeal to proceed on issues the district court said, during the plea colloquy, the defendant could

appeal. *Id.* at 243 & n.3. Other courts have also adopted this reasoning and allowed such appeals to proceed. *See, e.g., United States v. Wilken*, 498 F.3d 1160, 1168 (10th Cir. 2007) (construing waiver narrowly when the written agreement enumerates a broad waiver of appellate rights, but the district court’s statements during the plea colloquy describe a much narrower waiver); *United States v. Melvin*, 557 F. App’x 390, 396 (6th Cir. 2013) (“the district court’s inadvertent expansion of the exceptions to an appeal-waiver provision in a plea agreement controls the actual scope of the defendant’s waiver, provided that the district court misstates the scope of that waiver *before* accepting the defendant’s guilty plea”). Put simply, the district court’s oral pronouncement of the appeal waiver controls. *United States v. Godoy*, 706 F.3d 493, 496 (D.C. Cir. 2013).

B. The dismissal conflicts with circuits that hold a court’s mischaracterization of an appeal waiver creates an ambiguity that renders the broader, written waiver unknowing.

Other circuits have focused on whether a waiver is knowing when the district court tells a defendant he or she retained more appellate rights than reflected in the written plea agreement. Those circuits have found that a broad written waiver is unknowing and involuntary if the district court described a narrower

waiver during the plea colloquy. *See, e.g., United States v. Padilla-Colon*, 578 F.3d 23, 29 (1st Cir. 2009) (allowing appeal on safety-valve eligibility because the magistrate court suggested, contrary to the written agreement, the defendant could appeal that issue); *United States v. Ready*, 82 F.3d 551, 557–58 (2d Cir. 1996) (allowing restitution appeal because the district court said, contrary to the written appeal waiver, the defendant could appeal an illegal sentence); *United States v. Manigan*, 592 F.3d 621, 628 (4th Cir. 2010) (allowing sentencing appeal because the district court said, contrary to the written agreement, the defendant could appeal the sentence); *Sarlog v. United States*, 422 F. App'x 399, 403 (6th Cir. 2011) (per curiam) (allowing appeal of certain Guidelines issues because the district court said, contrary to the written agreement, the defendant could appeal those issues); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997) (allowing appeal because the district court said, contrary to the written agreement, the defendant could appeal the judgment); *Wilken*, 498 F.3d at 1168 (allowing sentencing appeal because the district court said, contrary to the written agreement, the defendant could appeal an unreasonable sentence); *Godoy*, 706 F.3d at 495 (allowing sentencing appeal because the district court said, contrary to the written agreement, the defendant could appeal if the court did something illegal).

These circuits recognize the importance of a court’s admonishments during the plea colloquy. A defendant cannot be expected “to distinguish and disregard those statements of the court that deviate from the language of a particular provision in a lengthy plea agreement—especially where, as here, neither the government nor defense counsel apparently noticed the error at the time.” *Wilken*, 498 F.3d at 1168. Defendants “need to be able to trust the oral pronouncements of district court judges.” *Godoy*, 706 F.3d at 495 (cleaned up). “When a district court has advised a defendant that, contrary to the plea agreement, he is entitled to appeal ... , the defendant can hardly be said to have knowingly waived his right of appeal.” *Manigan*, 592 F.3d at 628.

When the district court tells the defendant during the plea colloquy that he or she can appeal a particular issue, the overwhelming majority of appellate courts decline to enforce a broader written appeal waiver.

II. Zamarripa’s case is an appropriate vehicle to answer this important question.

Plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (cleaned up). Over 90% of federal defendants plead

guilty.¹ Many defendants plead guilty pursuant to plea agreements, which routinely include appeal waivers. *See* Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 76–88 (2015) (discussing the rise of waiver provisions in plea agreements and observing that “[w]aivers of discovery and appellate rights are sprouting up like wildfires”).

In response to the increased use of appeal waivers, the Rules Committee amended Rule 11 to require that the district court advise the defendant of the waiver provision to ensure a complete record and “that the waiver was voluntarily and knowingly made by the defendant.” Fed. R. Crim. P. 11 (1999 Amendments). “The very premise of the required Rule 11 colloquy is that, even if counsel is present, the defendant may not adequately understand the rights set forth in the Rule unless the judge explains them.” *United States v. Vonn*, 535 U.S. 55, 78 (2002) (Breyer, J., concurring).

Complying with the Rule 11 admonishments provides “prophylactic protection for the constitutional rights involved in the entry

¹ John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, FactTank: News in the Numbers (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

of a guilty plea.” *United States v. Gracia*, 983 F.2d 625, 627 (5th Cir. 1993). These include the right to appeal and to a fair judicial proceeding. *See* 18 U.S.C. § 3742(a); 28 U.S.C. § 1291; U.S. Const. amend. V (constitutional guarantee of due process); *cf. Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (establishing presumption of prejudice if counsel’s inactions deprived defendant of an appeal).

But here, the district court mischaracterized the appeal waiver, telling Zamarripa that he could appeal if the court did something it was not supposed to do. Zamarripa appealed, raising the mistakes made by the court when it sentenced him 32 years above the advisory Guidelines range. Other circuits would have recognized that the court’s description of the waiver during the plea colloquy controls. The court introduced an ambiguity to the appeal waiver that must be construed against the government, and that the broader written waiver was unknowing and involuntary. But the Fifth Circuit enforced the broad written waiver and dismissed Zamarripa’s appeal.

A defendant’s appeal rights should not depend on where a case is charged.

CONCLUSION

FOR THESE REASONS, Zamarripa asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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