No. 20-6668

In the Supreme Court of the United States

CHRISTOPHER ZAMARRIPA, *PETITIONER*,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

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I. The district court mischaracterized the written appeal waiver during rearraignment.

The Government attempts to insert a factual dispute where none exists. The district court told Zamarripa he could appeal "if the Court did something it wasn't supposed to do" or if it did not do its "job[ ] right[.]" Pet. App. C 7. That is not what the written appeal waiver said. It waives his right to appeal the sentence on any ground, reserving only the "right to challenge the sentence on grounds of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension." Plea agreement 9–10.

Attempting to argue the district court did not mean what it said, the Government admits it has no idea what else the court could have meant. The Government posits the district court "may have been referring" to Zamarripa's right to appeal if the court imposed a sentence above the statutory maximum or "may also have been referring, perhaps inartfully, to the limited exceptions to the appeal waiver as specified in the written plea agreement." BIO 10. If the Government does not know, how could Zamarripa have known? "Taken for its plain meaning—which is how criminal defendants should be entitled to take the statements of district court judges—the court's explanation allows" him to appeal a court's mistake. *United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013).

The Government further argues the plain reading is untenable because it conflicts with the court's statement that Zamarripa "would be giving up, generally, virtually all of your appellate … rights[.]" Pet. App. C 7; *see* BIO 7. That argument ignores the court's full explanation of Zamarripa's appellate rights:

> And you also 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. But *assuming we do our jobs right*, then you are giving up virtually all of your rights. You will still have Mr. May to be your lawyer.

Pet. App. C 7 (emphasis added). The court conditioned Zamarripa's loss of appellate rights on the lawyers and the court doing their jobs right. Pet. App. C 7.

Even if the district court's explanation was internally inconsistent, as the Government argues, BIO 10, that does not mean the broad, written appeal waiver should be enforced. The Tenth Circuit addressed a similar plea colloquy where the district court's description of the exceptions of the appeal waiver, as the government would argue, swallowed the waiver. *See United States v. Wilken*, 498 F.3d 1160, 1164 (10th Cir. 2007). There, the written waiver reserved the right to appeal a sentence above the statutory maximum. *Id.* But the court explained Wilken also could appeal a sentence entered "*in violation of the factors listed in the statute*[.]" *Id.*

The Tenth Circuit reasoned that the defendant "could not be faulted for relying upon the court's explanation, rather than his own understanding" of the plea agreement. *Id.* at 1168. The Tenth Circuit "construed the waiver narrowly, according to what the defendant reasonably understood when he entered his plea," and then considered the merits of Wilken's challenges to the Guidelines calculation and reasonableness of the sentence. *Id.* at 1168–75 (cleaned up).

The D.C. Circuit also refused to enforce a waiver in a similar situation. The district court told Godoy he had given up his right to appeal unless "'the Court has done *something illegal, such as* imposing a period of imprisonment longer than the statutory maximum.'" *Godoy*, 706 F.3d at 495 (quoting transcript). Even though the written agreement allowed only the appeal of a sentence above the statutory maximum, the D.C. Circuit rejected the Government's request to interpret "such as" as "limited to" and held the court's comments allowed Godoy to appeal *any* illegal sentence. *Id.*

Both district courts, like the one here, told the defendants they had waived their rights to appeal and then described broad exceptions to those waivers—ones that allowed the defendants to appeal any illegal sentence. As here, the Government did not object to the

courts' mischaracterizations of the appeal waivers during the colloquies. *See Godoy*, 706 F.3d at 495; *Wilken*, 498 F.3d at 1168. The D.C. and Tenth Circuits refused to enforce the written waivers, holding the district courts' statements created ambiguity that must be construed against the government. But here the Fifth Circuit enforced the written appeal waiver, ignoring the ambiguity created by the district court's oral statements.

II. Enforcing the written appeal waiver conflicts with decisions from other circuits.

The Government argues the two-sentence unpublished order dismissing Zamarripa's appeal reflects a "case-specific finding" that his appeal waiver was knowing and voluntary, given the circumstances of his case, and does not conflict with other circuits or unpublished cases from the Fifth Circuit. BIO 12. The Government is incorrect.

The district court mischaracterized the appeal waiver. *See supra* Arg. I. For many circuits, that mischaracterization, with no correction before pleading guilty with a plea agreement, created an ambiguity that must be construed against the Government. *See United States v. Saferstein*, 673 F.3d 237, 243 (3d Cir. 2012); *Wilken*, 498 F.3d at 1168; *United States v. Melvin*, 557 F. App'x 390, 396 (6th Cir. 2013); *Godoy*, 706 F.3d at 496. Zamarripa presented that theory and line of cases to the Fifth Circuit in his

response to the motion to dismiss and in his motion to reconsider. Pet. C.A. Resp. 9 (citing *Wilken*, 498 F.3d at 1168; *Saferstein*, 673 F.3d at 243); Pet. C.A. Mot. Reconsider 8–9 (same). By dismissing the case and denying the motion to reconsider, the Fifth Circuit rejected that theory.

Other circuits would reason the mischaracterization rendered the broad appeal waiver unknowing and involuntary. *See United States v. Padilla-Colon*, 578 F.3d 23, 29 (1st Cir. 2009); *United States v. Manigan*, 592 F.3d 621, 628 (4th Cir. 2010). In those cases, as here, the defendants had executed written plea agreements with clear appeal waivers. At the change-of-plea hearing, the courts inaccurately described the defendants' appellate rights under the plea agreements. *See Padilla-Colon*, 578 F.3d at 28–29 (explaining, "depending on the facts the court finds and the sentence it eventually imposes," the defendant could appeal the sentence subject to the waiver); *Manigan*, 592 F.3d at 628 (never addressing the written waiver and instead advising the defendant he could appeal his sentence). After voicing they understood the oral explanation of the waivers, the defendants entered guilty pleas. Facts the Government relies upon—that Zamarripa signed and initialed the clear plea agreement, BIO 10–11—do not distinguish

Zamarripa's case from others where appeal waivers are not enforced based on the court's mischaracterization of the waiver.

Zamarripa asked the court of appeals to explain its reasoning to assist in further review, but it refused to do so. Pet. C.A. Mot. Reconsider 10–11; Pet. App. B. Ultimately, given the district court's description of the appeal waiver that conflicts with the written version, the rejection of other circuits' approaches is inescapable.

III. Zamarripa's case is an appropriate vehicle to address this important issue.

Do a district court's words matter? A criminal defendant should be able to rely upon a court's explanation of his plea agreement. *Godoy*, 706 F.3d at 495. Otherwise, the plea colloquy is a farce—a play in which the actors say words but need not understand them and cannot rely upon them.

The Government would have this Court avoid the issue by finding that Zamarripa's appeal would lose on the merits. But the Government's cursory analysis is unpersuasive and does not warrant short-circuiting appellate review.

1. **The district court incorrectly believed the sentence was a downward variance.** During the sentencing hearing, the district court never stated whether the Guidelines recommended concurrent or consecutive sentences. *See* Sent. Tr. 3. The PSR was

silent on that issue, stating simply that the Guidelines ranges were 60 months' imprisonment for the cyberstalking counts and 63 to 78 months' imprisonment for the child pornography count. PSR ¶ 120. Neither the PSR nor the court specified that the Guidelines recommended total punishment of 63 to 78 months. *See* PSR ¶ 120; Sent. Tr. 3; U.S.S.G. §5G1.2(b) & comment. (n.1). Instead, immediately after announcing the Guidelines calculations for each count, the court said that "there will be an issue of concurrent or consecutive on these matters[.]" Sent. Tr. 3. The court imposed consecutive sentences totaling 460 months' imprisonment: 40 months' imprisonment on each cyberstalking count, and 60 months' imprisonment on the child pornography possession count. Sent. Tr. 40–41.

The statement of reasons (SOR) is internally consistent in its representation that the district court believed it was imposing a downward variance. The court checked the boxes indicating that the sentence was "outside the sentencing guideline system" and "below the guideline range" based on a "defense motion for a variance[.]" SOR 2–3. Zamarripa had made such a motion, highlighting his mental health struggles. Sent. Tr. 21–24. In its own words, the court explained it "considered the defendant's mental and physical health and determined the sentence to be sufficient to

address the sentencing objectives of punishment, general deterrence and incapacitation." SOR 3.

The SOR's individualized explanation distinguishes its description of the downward variance from the harmless "inadvertent misstep" ignored in *United States v. Maturino*, 887 F.3d 716, 725 n.44 (5th Cir. 2018) (finding an internally inconsistent SOR a clerical mistake that conflicted with the district court's oral statements). It was not a "clerical error." BIO 13. The district court personally signed nearly identical SORs twice—for the original judgment and then the amended one.

The logical implication is that the court incorrectly believed the Guidelines recommended consecutive sentences and that it was imposing a downward variance by sentencing Zamarripa to less than the Guidelines range on each count.

The district court's statements during the sentencing hearing do not contradict this interpretation. The Government leans heavily, BIO 14, on the court simply noting defense counsel's objection to the sentence "being outside the guidelines," Sent. Tr. 41–42. But this pro forma acknowledgment following a lengthy sentencing hearing is normal. After having imposed the sentence, the court may not have felt the need to "correct" what it believed was a mistaken impression that the sentence was above the Guidelines.

The Government also relies on the district court's experience to claim it could not have believed that the Guidelines recommended consecutive sentences. BIO 14. But the district court has made this mistake before—and repeatedly. *See United States v. Candelario-Cajero*, 134 F.3d 1246, 1247 (5th Cir. 1998) (remanding for resentencing where the court imposed "consecutive sentences in apparent disregard" of the concurrent sentencing required under the Guidelines); *United States v. Andrews*, 390 F.3d 840, 851 (5th Cir. 2004) (citing *Candelario-Cajero*, noting "we recently have reversed the same judge for precisely this error," and justifying assignment to a different judge on remand because "[t]his is far from the first time we have had to reverse this judge for blatantly electing to ignore the plain language of the guidelines"); *cf.* Revocation Order, *United States v. Lyles*, Nos. SA-10-CR-322-FB, SA-10-CR-570-FB (W.D. Tex. Feb. 23, 2016) (imposing consecutive terms of supervised release even though the court had been reversed for the same issue in *United States v. Hernandez-Guevara*, 162 F.3d 863, 877–78 (5th Cir. 1998)).

This procedural error warrants appellate review, and ultimately the sentences should be vacated.

2. **Undisclosed victim impact statements.** The Government's brief itself belies the import of the improperly withheld

victim impact statement. The Government quotes the district court to underscore the court's desire to impose harsh punishment for Zamarripa's cyberstalking offenses. BIO 6 (quoting Sent. Tr. 35–36). But the court, unbeknownst to Zamarripa, was expressing, sometimes verbatim, the concerns raised in the undisclosed victim impact statement. *See* Pet. C.A. Br. 33–34. That statement, which was more detailed and emphatic than any others, played a vital role at Zamarripa's sentencing and blindsided his defense attorney who otherwise could have better addressed the deterrence concerns raised in the statement and developed mitigating circumstances, such as Zamarripa's mental health issues. *See* Pet. C.A. Br. 34.

The court of appeals recently reversed on plain error review for a similar disclosure failure. *See United States v. Johnson*, 956 F.3d 740, 747 (5th Cir. 2020) ("The use of undisclosed facts to justify an above-guidelines sentence seriously affects the fairness, integrity, and public reputation of judicial proceedings."). Zamarripa should have the opportunity for this issue to be reviewed on its merits.

3. **Unreasonable sentence.** The district court sentenced Zamarripa to **32 years** above the Guidelines range and stated doing so was a downward variance. The sentencing factors do not support such a drastic upward variance. Unquestionably, Zamarripa's

online conduct negatively affected the lives of many women. But the 63-to-78-month Guidelines range accounted for the offenses and number of victims. PSR 9–14; *see* U.S.S.G. Ch.3, Pt.D, intro; Pet. C.A. Br. 39–41. His criminal history category adequately reflected his dangerousness, assessing five points for one conviction and the revocation based on the instant conduct. *See* Pet. C.A. Br. 44–46. Other than victims' opinions, the Government presented no evidence Zamarripa's behavior would escalate to contact offenses or that he could not be rehabilitated. *See* Sent. Tr. 9, 11, 14–15. To justify the lengthy sentence, the court placed excessive weight on the need for general deterrence, expressing hope that law enforcement could "put a warning out there on some of these websites: This is what happened to Christopher Zamarripa. You better quit doing this." Sent. Tr. 36.

The court of appeals has reversed other drastic variances. *See, e.g.*, *United States v. Mathes*, 759 F. App'x 205, 211 (5th Cir. 2018) (finding sentence triple the bottom of the Guidelines range substantively unreasonable); *United States v. Hoffman*, 901 F.3d 532, 559 (5th Cir. 2018) (vacating sentence to 60 months' probation for white collar fraud defendant whose Guidelines range was 168 to 210 months' imprisonment). Sentences outside the Guidelines range do not receive the presumption of reasonableness that a

within-Guidelines sentence receives on appellate review. *Hoffman*, 901 F.3d at 554–55. Appellate review helps "avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *United States v. Booker*, 543 U.S. 220, 264–65 (2005). Zamarripa's appeal should be reinstated so the court can determine whether "the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall v. United States*, 552 U.S. 38, 51 (2007). They do not.

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender

Attorney for Defendant-Appellant

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