No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

MEHMET BIYIKOGLU,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the Ninth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Was petitioner's appellate waiver enforceable after the district court found him in breach of his plea?

Parties to the Proceeding

The parties to the proceedings in the Ninth Circuit Court of Appeal were the United States of America and petitioner Mehmet Biyikoglu. There were no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Mehmet Biyikoglu, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeal filed on July 23, 2021.

Opinions and Orders Below

The original opinion of the Ninth Circuit Court of Appeal granting the government's motion to dismiss the appeal is attached hereto as Appendix A.

Jurisdiction

The decision of the Ninth Circuit Court of Appeal sought to be reviewed was filed on July 23, 2021. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 131.1. This Court has jurisdiction to review under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law ...."

Statement of the Case

Petitioner Mehmet Biyikoglu entered a guilty plea and was then sentenced for Wire Fraud, in violation of 18 U.S.C. § 1343.

On appeal, petitioner contended that the district court acted prejudicially by finding him in breach of his plea agreement and by refusing to grant defense counsel's request for a continuance so she could adequately prepare for the breach of plea and sentencing hearings. After petitioner filed the opening brief in his appeal, the government moved to dismiss the appeal due to the appellate waiver contained in the plea. (Appendix B.)

The Ninth Circuit Court of Appeal granted the government's motion to dismiss. (Appendix A.)

Reasons for Granting the Writ

This Court Should Allow The Writ In Order To Decide An Important Question Of Law And To Resolve The Conflict In The Federal Circuit Courts of Appeals On This Issue.

A. The Ninth Circuit erred in granting the government's motion to dismiss the appeal because once petitioner was found in breach of his plea, that appellate waiver within that plea agreement was no longer enforceable.

A criminal defendant has a due process right to the enforcement of a plea agreement. Santobello v. New York (1971) 404 U.S. 257. Here, in a unique situation, petitioner's due process rights were violated.

In this case, the District Court sentenced petitioner after finding him in breach of his plea, at the request of the government. As a result, petitioner was potentially sentenced to 24 months more than that stipulated to in the plea agreement. Yet, the manner in which the case proceeded, over defense objection and after the defense repeatedly asked for a continuance, was unreasonable and an abuse of discretion. Specifically, in this case, defense counsel and the government stipulated to a continuance of the sentencing date due to defense counsel's obligations and her impending international travel.

This stipulation occurred prior the government seeking a finding that petitioner was in breach of his plea. Yet, the District Court denied the agreed upon date and instead set the matter for a sentencing hearing the day after defense counsel's return from another country. Yet, while defense counsel was unavailable, as indicated in her timely filed statement of unavailability, several motions and documents were filed that necessitated her attention, legal research, and significant discussions with appellant. ER I pgs. 96-99; 100-126; 142-191. In refusing to continue the sentencing hearing the District Court effectively prohibited defense counsel from adequately preparing herself and her client for this hearing. This was an abuse of discretion.

Moreover, when faced with defense counsel's inability to adequately prepare, the District Court first reprimanded her for her leisure travel and then granted her a mere 23 hours in which she was supposed to wait for her client to be transported from the court back to the jail, enter the jail and visit with her client to prepare him for the hearings, and somehow prepare legal arguments in defense of

appellant. As defense counsel explained to the District Court, this was a woefully inadequate amount of time. Hence, defense counsel was forced to proceed absent the legal briefing that likely could have and would have been filed had the District Court reasonably and rationally granted her request for an agreed upon, brief continuance. Its failure to do so was an abuse of discretion mandating reversal.

It is true that the Ninth Circuit regularly enforces "knowing and voluntary" waivers of appellate rights in criminal cases, provided that the waivers are part of negotiated guilty pleas , *see United States v. Michlin*, 34 F.3d 896, 898 (9th Cir.1994), and do not violate public policy, *see United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996) (cataloguing public policy exceptions). Similarly, the right to collateral review may be waived. *See United States v. Abarca,* 985 F.2d 1012, 1014 (9th Cir.1993). Such waivers usefully preserve the finality of judgments and sentences imposed pursuant to valid plea agreements. *See Baramdyka*, 95 F.3d at 843.

Moreover, a defendant's rights to challenge any sentencing errors may be explicitly waived. *See e.g. United States v. Bolinger,*

940 F.2d 478, 480 (9th Cir.1991). Further, where a waiver specifically includes the waiver of the right to attack a sentence, then it also waives "the right to argue ineffective assistance of counsel at sentencing." *U.S. v. Nunez*, 223 F.3d 956, 959 (9th Cir. 2000).

However, there are some types of errors at sentencing that are not waivable. *See e.g. United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir.1991) (sentence violates the terms of the plea agreement); *United States v. Johnson*, 67 F.3d 200, 203 n. 6 (9th Cir.1995) ("sentencing error could be entirely unforeseeable and therefore not barred"); *United States v. Jacobson*, 15 F.3d 19 (2nd Cir.1994) (sentencing disparity among co-defendants based entirely on race); *United States v. Marin*, 961 F .2d 493, 496 (4th Cir.1992) (sentence in excess of maximum statutory penalty or based on a constitutionally impermissible factor such as race); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (sentenced that exceeds the permissible statutory penalty for the crime or violates the Constitution); *U.S. v. Torres*, 828 F.3d 1113 (9th Cir. 2016) (sentence

based on mandatory Sentencing Guideline that violates the Constitution).

Significant to this case, it is widely accepted that once a plea agreement is breached by the government, then the terms of that plea, including the waivers, are no longer enforceable. See *United States v. Gonzalez*, 16 F.3d 985, 990 (9th Cir. 1993). The same reasoning should apply here.

Here, petitioner is in the unique situation in which the government claimed, and the district court found, he breached the plea agreement. Hence, the terms of the plea agreement were no longer enforceable. This must include the waiver the government and then the reviewing court sought to enforce. Indeed, had the government not argued petitioner was in breach of his plea, had defense counsel not asserted she was not ready nor prepared to argue the issue of petitioner's alleged breach of plea, and had the district court not found petitioner breached that plea despite the fact that defense counsel repeatedly asked for more time to prepare, petitioner would not have filed the appeal at issue here. Here, the government created the issue

by claiming petitioner breached the plea. They cannot then ask a reviewing court to enforce the terms of the very plea they argued was breached. Surely, if the plea was not breached, then the government could ask for this dismissal. However, if the plea was not breached, and the government requests this appeal dismissed, then the government is also bound by the terms of the plea agreement and the matter should have been remanded for a new sentencing hearing in which the government strictly complies with the terms of the plea. The government cannot have it both ways.

Moreover, the record supports a finding that the plea waiver is unenforceable as a result of the district court's finding that petitioner breached the plea agreement. At the conclusion of the sentencing hearing, defense counsel specifically objected to the sentence and the terms imposed and advised the district court she would be filing a notice of appeal. Rather than advise her and petitioner that he waived that right, this district court advised counsel to file such a notice within 14 days. ER I pg. 4. Hence, the district court understood what the government does not, namely that once a plea is breached *all* of its

terms are unenforceable, including the appeal waiver. This must be considered when determining whether the government's claim that this appeal should be dismissed has any merit. When analyzing the enforceability of a plea agreement, the reviewing court must look to the totality of the circumstances, including "whether the district court informed the defendant of [his] appellate rights." *United States v. Anglin,* 215 F.3d 1064, 1066 (9th Cir. 2000). An appeal waiver is unenforceable "if: 1) a defendant's guilty plea failed to comply with Fed. R. Crim. P. 11; 2) the sentencing judge informs a defendant that [he] retains the right to appeal; 3) the sentence does not comport with the terms of the plea agreement; or 4) the sentence violates the law." *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (citations omitted). Here, the district court discussed the intent to appeal with defense counsel, supporting the conclusion that the waiver in the plea, that the district court found to be breached, is unenforceable.

In light of the above, petitioner urges that this writ should be allowed so that this Court can decide the very important question of law regarding the United States Constitution.

For all of the above reasons, petitioner respectfully requests the writ be allowed.

Dated: October 19, 2021

Respectfully submitted,

/s/Karren Kenney

Karren Kenney
Kenney Legal Defense
Attorneys for Petitioner

Appendix A

FILED

JUL 23 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MEHMET FATIH BIYIKOGLU, AKA Memhet Fatih Biyikoglu, Defendant-Appellant.	No. 20-50069 D.C. No. 8:18-cr-00108-RGK-1 Central District of California, Santa Ana ORDER

Before: SCHROEDER, SILVERMAN, and MURGUIA, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 21) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable).

DISMISSED.

Appendix B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MEHMET BIYIKOGLU, Defendant-Appellant.	C.A. No. 20-50069 D.C. No. 18-00108-RGK (Central Dist. Cal.) **GOVERNMENT'S MOTION TO DISMISS APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiff-Appellee United States of America, by and through its counsel of record, hereby moves under Federal Rule of Appellate Procedure 27 and Ninth Circuit Rules 27-9.2 and 27-11 to dismiss the appeal of Defendant-Appellant Mehmet Biyikoglu ("defendant") on the ground that he knowingly and voluntarily waived his right to appeal his conviction and sentence in his written plea agreement. This case-dispositive motion stays the briefing schedule under Ninth Circuit Rule 27-11(a).

This motion is based on the attached memorandum of points and authorities, defendant's previously filed Excerpts of Record, the files

and records in this case, and such further argument or evidence as may be presented to the Court.

Defendant is in custody serving the sentence imposed in this case.

No court reporter is in default with regard to any designated transcript.

DATED: June 24, 2021

Respectfully submitted,

TRACY L. WILKISON
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UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The broad appellate waiver that Defendant-Appellant Mehmet Biyikoglu ("defendant") knowingly and voluntarily signed explicitly bars his current challenges to the length of his sentence and the manner in which the district court conducted the sentencing hearing. Defendant gave up his right to appeal "the term of imprisonment imposed by the court," pursuant to his written plea agreement. (ER-237.[1]) He likewise waived "the procedures and calculations used to determine and impose any portion of the sentence." (*Id.*) Notwithstanding these waivers, he now appeals his sentence on two grounds: (1) the district court abused its discretion by not continuing the date of his sentencing hearing; and (2) it erred in finding that defendant breached the plea agreement.

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[1] "CR" refers to the Clerk's Record in the district court and is followed by the docket control number. "ER" refers to defendant's previously filed Excerpts of Record, and "AOB" to defendant's opening brief; each is followed by the applicable page references. "PSR" refers to the Amended Presentence Investigation Report filed under seal by the government with this Motion; such references are followed by applicable paragraph citations.

(AOB at 2.) Defendant in his opening brief ignores the existence of his waiver and does not explain why the two issues he raises are not covered by the appellate waiver in his plea agreement.

Defendant's 121-month sentence arises from his guilty plea to one charge of violating 18 U.S.C. § 1343. (ER-2.) Defendant was the leader of a multi-million-dollar scheme that defrauded numerous vulnerable victims.

II. JURISDICTION AND TIMELINESS

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291. The district court entered its judgment and commitment order on March 13, 2020. (CR 180; ER-2-5.) Defendant filed a timely notice of appeal. (CR 182; ER-4.) *See* Fed. R. App. P. 4(b)(1)(A)(i).

III. FACTS

A. Defendant's Criminal Conduct

Defendant was the leader of a sophisticated fraud scheme. (PSR ¶¶ 13-151; ER-218–20.) Defendant was the co-founder and Chief Executive Officer of a financial advisory firm based in Irvine, California called Five Star Financial Services of America, LLC ("Five Star"). (PSR

¶ 14.) Between 2014 and 2016, defendant caused losses of over $3.5 million by the investors, many of whom were elderly, retired, or financially unsophisticated. (PSR ¶¶ 15, 152.) Codefendants Anna Holt and Ida Shagoian assisted defendant in the scheme. (PSR ¶¶ 4, 11-12, 14.) Defendant told investors that their money would be placed in a Chase Bank Certificate of Deposit (the "Chase Bank CD") where it would earn nine to thirteen percent interest with little risk to the investors' principal. (PSR ¶ 16.) But the Chase Bank CDs did not exist, and defendant stole the investors' money. At defendant's direction, Holt typically transferred the victims' money from the Five Star operating account into personal accounts controlled by defendant and Shagoian (defendant's then-wife). (PSR ¶ 17.)

Defendant used the millions of dollars he stole to fund his own lavish lifestyle, which included a Rolls-Royce, home improvements, expensive jewelry, and a semi-professional soccer team. (PSR ¶ 2; ER-120.) At least eight victims lost all or nearly all of their retirement savings. (PSR ¶ 152.)

B. Defendant's Plea Agreement and Guilty Plea

1. The plea agreement

Defendant agreed to plead guilty to count one of the first superseding indictment, which charged a violation of 18 U.S.C. § 3141. (ER-244–50.) The parties entered into a written plea agreement. (ER-225–43.) Defendant, his counsel, and the AUSA assigned to the case all signed the plea agreement. (ER-242.) Along with his signature to the agreement, defendant additionally certified that his guilty plea and approval of the plea agreement was knowing and voluntary. The certification included the following representation: "I have read this agreement in its entirety. I have had enough time to review and consider this agreement, and I have carefully and thoroughly discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms." (ER-243.) Defendant's counsel also signed a certification. (*Id.)*

The plea agreement imposed obligations on both parties. Defendant agreed to plead guilty to count one. (ER-226.) Among other obligations, he also agreed to "Not contest facts agreed to in this agreement" and "Abide by all agreements regarding sentencing

contained in this agreement." (*Id.*) The government agreed to these same conditions. (ER-228.) It also agreed to recommend a low-end sentence under the applicable Guideline range if the ultimate Guideline range used by the district court was level 28 or higher. (*Id.*)

The plea agreement contained a lengthy factual basis that the parties agreed was accurate. (ER-232–34.) Among other facts, the factual basis stated that defendant was the co-founder and Chief Executive Officer of Five Star Financial Services of America, LLC, which defendant used as a vehicle to obtain "investments" from elderly and retired individuals who believed defendant's false statements about the status of the funds they sent to Five Star. (ER-232.) The factual basis listed eleven specific investors who transferred approximately $4,088,338 into the Five Star operating account. (ER-234.) Of these, "Victims H.L., E.R., P.H., M.P., and D.M. lost all or nearly all of their retirement assets, causing them substantial financial hardship." (*Id.*)

The parties agreed to a base offense level and two specific offense characteristics under the Guidelines:

Base Offense Level:	7 [U.S.S.G. § 2B1.1(a)]
Loss over $3.5 million:	+18 [U.S.S.G. § 2B1.1(b)(1)(J)]

> Substantial Financial Hardship: +4 [U.S.S.G. § 2B1.1(b)(2)(B)]

(ER-235.)

Paragraphs 24 and 25 in the plea agreement were in the "BREACH OF AGREEMENT" section. (ER-238–40.) Defendant agreed in this section to the procedure for declaring a breach and the consequences if he breached the agreement:

> All of defendant's obligations are material, a single breach of this agreement is sufficient for the USAO to declare a breach, and defendant shall not be deemed to have cured a breach without the express agreement of the USAO in writing. If the USAO declares this agreement breached, and the Court finds such a breach to have occurred, then: (a) if defendant has previously entered a guilty plea pursuant to this agreement, defendant will not be able to withdraw the guilty plea, and (b) the USAO will be relieved of all its obligations under this agreement.

(ER-239.)

Two sections in the plea agreement addressed appellate waivers. One contained defendant's waiver of any right to appeal his conviction except for a claim that the plea was involuntary. (ER-236.) The second section had the title "LIMITED MUTUAL WAIVER OF APPEAL OF SENTENCE." (ER-237.) This is the waiver that forms the basis for this Motion.

Defendant agreed that the waiver would apply to any sentence of 121 months or less. (ER-237.) The government agreed to waive its right to appeal any sentence that was 97 months or greater. (*Id.*) Accordingly, the appellate waivers in the plea agreement apply to both defendant and the government because his sentence was 121 months.

Among other issues, defendant waived his right to appeal "the procedures and calculations used to determine and impose any portion of the sentence." (ER-237.) Defendant also waived his right to appeal "the term of imprisonment imposed by the Court." (*Id.*)

2. Defendant's change of plea

Consistent with the plea agreement, defendant pleaded guilty to count one of the first superseding indictment at his change-of-plea hearing. (ER-205–24.) The district court incorporated the plea agreement into the change-of-plea proceedings. (ER-210.) The district court also incorporated the government's additional promise that it would recommend a two-level downward variance at the time of sentencing based on defendant's proffer to the government. (ER-211–12.

The district court discussed the plea waivers with defendant and confirmed that he knew they were in the plea agreement:

> THE COURT: Are there any waiver of appeal rights, and if so, where are they found?
>
> [AUSA]: Yes, Your Honor. They are found in paragraphs 18 and 19 of the plea agreement.
>
> THE COURT: In the plea agreement at the paragraphs we've just described, you're waiving rights you have to appeal. An appeal is a right to take something that happens in this court to a different court, sometimes called a higher court and to argue that a mistake was made and ask that the mistake be fixed.
>
> So do you understand under the plea agreement you're waiving rights to appeal?
>
> THE DEFENDANT: Yes, Your Honor.

(ER-214–15.)

The AUSA re-stated the factual basis contained in the plea agreement. (ER-221–24.) These facts included: (1) defendant's spending the victims' money on personal luxuries; (2) his direction to coconspirator Anna Holt to make large cash withdrawals from the Five

Star operating account for defendant's personal use; (3) eleven victims placed $4,088,338 into the Five Star operating account; and (4) five victims lost all or nearly all of their retirement assets causing them substantial financial hardship. (*Id.*)

C. Defendant's Sentencing Hearing and Related Issues

The two issues defendant raises in his appeal arise from the determination of his sentence. The Probation Office issued an original PSR and a Revised PSR. Defendant filed 38 objections to the original PSR. (ER-151–56.) Defendant also filed a sentencing brief that repeated many of these arguments. (ER-126–30.)

The government believed that some of defendant's objections to the PSR and his sentencing arguments flatly contradicted the terms of the plea agreement. The government therefore requested the district court to find that defendant had breached the terms of the plea agreement. (ER-139–48.) In particular, the government stated there was a breach because: (1) defendant's calculation of the base offense level used a loss amount of over $1.5 million (USSG § 2B1.1(b)(1)(I)) rather than the over $3.5 million contained in the plea agreement (USSG § 2B1.1(b)(1)(J)); (2) defendant said there was only one victim

(H.L.) who suffered substantial financial hardship (USSG § 2B1.1(b)(2)(A)) rather than the five persons (H.L., E.R., P.H., M.P., and D.M.) explicitly identified in the plea agreement (USSG § 2B1.1(b)(2)(B)); and (3) defendant stated that codefendant Anna Holt did not act under his direction when she withdrew large amounts of cash from the Five Star operating account, which supported his request for a minor-role adjustment. (ER-144–46.)

The government also filed a sentencing brief in which it disputed defendant's arguments regarding the calculation of his offense level and Criminal History category under the Guidelines. (ER-97–122.) It did not make a final sentencing recommendation because the district court had not yet determined whether defendant had breached the plea agreement and released the government from its sentencing recommendations. (ER-110.)

Defense counsel largely was unavailable from February 29, 2020 to March 8, 2020. (ER-138.) The district court continued the sentencing hearing to March 9, 2020 at the request of the parties, although they had requested a later date. (ER-190.) At the hearing on March 9, 2020 the district court heard testimony from three victims, who recounted

the heart-rending effect defendant's fraud had inflicted on them and their families. (ER-69–83.) The district court continued the rest of the sentencing hearing until March 10, 2020 so defense counsel could have an opportunity to speak to her client and prepare to argue the remaining issues. (ER-66–67.)

The district court held the second part of the hearing on March 10, 2021. (ER-9–46.) The court heard argument from the government about how defendant had breached the plea agreement. (ER-11–13.) Defense counsel had defendant explain why the defense had made arguments that were inconsistent with the plea agreement, but defense counsel did not make any legal or substantive argument beyond defendant's statements. (ER-14–15.) After hearing this "argument" the court found that the plea agreement had been obviously breached in four or five matters and released the government from its obligations to make the sentencing recommendations contained in the plea agreement. (ER-15.)

The government then argued for various sentencing enhancements, consistent with its briefing, but still recommended a low-end Guideline sentence even though it was not required to do so.

(ER-28–29.) It still also agreed to dismiss the remaining counts against defendant. (ER-44.) The government did not make a recommendation for a "third point" for acceptance (ER-27–28), but the district court granted it anyway in its Guideline calculations (ER-35). The government did not make the motion for a two-level variance that had been memorialized at the change-of-plea hearing and calculated defendant's adjusted offense level to be level 33. The district court accepted some of the government's proposed Guideline calculations while rejecting others and determined defendant's adjusted offense level to be level 30. (ER-35–36.) It sentenced defendant to the low end of the applicable Guideline range – 121months. (ER-42.)

IV. ARGUMENT

A. Standard of Review

This Court reviews de novo whether a defendant has validly waived his statutory right to appeal. *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016).

B. Defendant's Appeal Waiver Precludes Any Appeal of the District Court's Sentence or His Conviction

Appellate waivers in plea agreements are more than technical obligations. As this Court has noted, enforcement of such waivers

serves vital public interests. *See United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). The "proper enforcement of appeal waivers serves an important function in the judicial administrative process by 'preserv[ing] the finality of judgments and sentences imposed pursuant to valid plea agreements.'" *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996) (quoting *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992)). Hence, this Court has repeatedly and consistently held that if an appeal raises issues encompassed by a valid waiver of appeal, the appeal must be dismissed. *See Lo*, 839 F.3d at 795; *United States v. Odachyan*, 749 F.3d 798, 804 (9th Cir. 2014); *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011); *United States v. Joyce*, 357 F.3d 921, 925 (9th Cir. 2004); *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999). Moreover, this Court "will enforce a valid waiver even if the claims that could have been made absent that waiver appear meritorious, because [t]he whole point of a waiver . . . is the relinquishment of claims regardless of their merit." *Lo*, 839 F.3d at 783 (internal quotation omitted, emphasis in original).

"A defendant's waiver of his appellate rights is enforceable if (1) the language of the waiver encompasses his right to appeal on the

grounds raised, and (2) the waiver is knowingly and voluntarily made." *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011) (citation omittegd). Both requirements are satisfied here.

1. Defendant's waivers were knowing and voluntary

Defendant did not claim in his opening brief that his waivers were involuntary. Indeed, defendant does not acknowledge the existence of the waiver provisions in his appeal at all and does not present even a cursory argument for why these provisions do not apply. Defendant therefore has waived any such argument. *United States v. Seschillie*, 310 F.3d 1208, 1217 (9th Cir. 2002 (arguments not raised in the opening brief are deemed waived); *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived."); *United States v. Martini*, 31 F.3d 781, 782 n.2 (9th Cir. 1994) (court does not reach issue first raised at oral argument). This general rule applies to waiver arguments. *United States v. Kelly*, 874 F.3d 1037, 1051 & n.9 (9th Cir. 2017).

Even if defendant had claimed involuntariness, the claim would fail because the record demonstrates that the appeal waiver was

knowingly and voluntarily made. This Court looks "to the circumstances surrounding the signing and entry of the plea agreement to determine whether the defendant agreed to its terms knowingly and voluntarily." *Lo*, 839 F.3d at 783-84 (quoting *Baramdyka*, 95 F.3d at 843). "[A] waiver of the right to appeal is knowing and voluntary where the plea agreement as a whole was knowingly and voluntarily made." *United States v. Jeronimo*, 398 F.3d 1149, 1154 (9th Cir. 2005), *overruled on other grounds by United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (en banc).

As the government demonstrated *supra*, the text of the waiver provisions in the plea agreement, the representations and certifications of defendant and defense counsel in the plea agreement, their affirmation of these representations and certifications at the change-of-plea hearing, and the discussion of the waiver provisions at the plea hearing all conclusively prove that defendant's decision to enter into the plea agreement in general and the waiver provisions in particular was knowing and voluntary. Defendant himself confirmed this fact at his sentencing hearing: "I just wanted to point out, I have no objections to the plea agreement. I am all for it." (ER-14.)

2. The language of the waiver covers any appeal of defendant's conviction

Because there is no question that defendant's waivers were knowing and voluntary, the remaining issue is whether defendant's appeal is covered by the language of the waivers.

The government believes that defendant is appealing just his sentence and not his conviction. Defendant's Notice of Appeal states that he is appealing "his sentence only" and the "imposed sentence" of 121 months. (ER-4.) Defendant states in one part of the brief that he has suffered prejudice from the district court's decisions because in their absence he might have received a sentence that was 24 months lower than the sentence he received, which is a reference to the government's decision not to recommend a downward variance. (AOB at 7.) The substance of defendant's arguments also appears to address just his sentence rather than his conviction.

Nonetheless, defendant states at the start of his brief that he is appealing his "guilty plea and sentence for Wire Fraud." (AOB at 1.) He also states at the end of his brief that the he seeks to have the judgment of the district court "reversed." (AOB at 22.) He does not explicitly state that the relief he seeks is to have a new sentencing

hearing in which the government is required to make a two-level variance request to the district court.

Nonetheless, it seems unlikely that defendant really is appealing his guilty plea or conviction. But such an appeal in any event must be dismissed if it exists. Defendant waived his right to appeal his plea or conviction except for a claim that his plea was involuntary. (ER-236.) Defendant does not claim that his plea was involuntary for the reasons previously discussed. Nor can there be any dispute that the language of this waiver would apply to any appeal of his guilty plea or conviction that raises any other issue. Any challenge to his conviction in his appeal therefore should be dismissed.

3. The language of the sentencing waiver covers the two issues raised in defendant's appeal

As part of the plea agreement, defendant waived his right to appeal his sentence, provided that the district court imposed a sentence of 121 months or less. (ER-237.) Here, the district court sentenced defendant to the low end of the applicable Guideline range, which was 121 months. Thus, the sentence imposed fell within the sentencing range that invoked defendant's waiver of a sentencing appeal.

Plea agreements are interpreted according to contract-law principles. *United States v. Odachyan*, 749 F.3d at 804. Ambiguities in the waiver are construed against the drafter, which in plea agreements normally will be the government. *Lo*, 839 F.3d at 785. But a contract is not ambiguous unless it remains reasonably susceptible to at least two reasonable but conflicting meanings after applying established rules of interpretation. *CNH INDUS. N.V. v. Reese,* __U.S.__, 178 S. Ct. 761, 765 (2018). That two parties offer conflicting interpretations of a contract does not make it ambiguous. *United States v. Turner Construction Company*, 946 F.3d 201, 209 (4th Cir. 2019). The burden is on the party claiming ambiguity to show the necessary indefiniteness of meaning. 11 Williston on Contracts, § 30:5 (4th ed. 2021).

Defendant in his opening brief did not argue that the issues he raised in his appeal were outside the scope of the waivers. Once again, therefore, it is too late for him to argue that the waivers do not apply to these issues. This failure, standing alone, is a sufficient basis to dismiss the appeal.

Moreover, there is no ambiguity or lack of clarity in the scope of the sentencing waiver. Defendant waived any appeal of "the procedures

and calculations used to determine and impose any portion of the sentence" and "the term of imprisonment imposed by the Court" if the sentence was no greater than 121 months. (ER-237.) Nonetheless, defendant's appeal attempts to do just that by challenging the district court's determination of the date of the sentencing hearing (the procedures used to impose any portion of the sentence) and the lack of a two-level variance based on defendant's proffer (the calculations used to determine the sentence and the sentence imposed by the court). As defendant stated in his Notice of Appeal, his appeal is under 18 U.S.C. § 3742 ("Review of a sentence"). (ER-4.) He also is appealing the "Sentence imposed: 121months." (*Id.)* Defendant's appeal therefore is covered by the unambiguous terms of his waiver and his appeal must be dismissed. *See United States v. Kelly*, 874 F.3d at 1042, 1051 (defendant waived right to appeal the calculation of his criminal history because his waiver included any appeal of a sentence "imposed within or below the applicable Sentencing Guideline range as determined by the Court," as well as "the manner in which the Court determined that sentence").

V. CONCLUSION

For the foregoing reasons, this Court should dismiss defendant's appeal.

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Respectfully submitted,

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Appendix C

18 U.S. Code § 1343 - Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(Added July 16, 1952, ch. 879, § 18(a), 66 Stat. 722; amended July 11, 1956, ch. 561, 70 Stat. 523; Pub. L. 101–73, title IX, § 961(j), Aug. 9, 1989, 103 Stat. 500; Pub. L. 101–647, title XXV, § 2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub. L. 103–322, title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub. L. 107–204, title IX, § 903(b), July 30, 2002, 116 Stat. 805; Pub. L. 110–179, § 3, Jan. 7, 2008, 121 Stat. 2557.)