No. 23-___

In the
Supreme Court of the United States

Anderson Garcia,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant who pleads guilty and appeals his sentence, challenging his appeal waiver as unknowing, must show both that the waiver was unknowing and that "he would not have *entered the plea*" if he had understood the waiver. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) (emphasis added).

"There is a circuit split on this issue." *United States v. Kochonies*, 827 F. App'x 108, 111 n.3 (2d Cir. 2020). Four circuits hold explicitly that *Dominguez Benitez* does not apply in this context: to defeat the waiver, the defendant need only show he "did not knowingly, intelligently, and voluntarily waive his right to appeal." *United States v. Lee*, 888 F.3d 503, 508 (D.C. Cir. 2018) (Kavanaugh, J., for the Court). *See also United States v. Corso*, 549 F.3d 921, 929-30 (3d Cir. 2008); *United States v. Murdock*, 398 F.3d 491, 496-97 (6th Cir. 2005); *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004). Four more circuits implicitly agree. *See United States v. Murraye*, 596 F. App'x 219, 227 & 229 (4th Cir. 2015); *United States v. Alvarado-Casas*, 715 F.3d 945, 955-56 (5th Cir. 2013); *United States v. Thompson*, 770 F.3d 689, 690 & 694 (8th Cir. 2014); *United States v. Phanor*, 849 F. App'x 909, 910 (11th Cir. 2021). Three circuits disagree. *See* Pet. App. 1; *United States v. Cook*, 722 F.3d 477, 482-83 (2d Cir. 2013); *United States v. Polak*, 573 F.3d 428, 431-32 (7th Cir. 2009); *United States v. Tanner*, 721 F.3d 1231, 1236 (10th Cir. 2013). And one circuit has confessed its "confusion" over this question. *United States v. Villodas-Rosario*, 901 F.3d 10, 12 (1st Cir. 2018).

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The rulings of the United States Court of Appeals for the Second Circuit are unreported and appear at Petitioner's Appendix ("Pet. App.") 1 and 2-9.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231; the Circuit did under 28 U.S.C. § 1291; and this Court does under § 1254(1).

INTRODUCTION

In 18 U.S.C. § 3582(a), Congress spoke plainly: "imprisonment is not an appropriate means of promoting correction and rehabilitation." Therefore: "Do not think about prison as a way to rehabilitate an offender." *Tapia v. United States*, 564 U.S. 319, 330 (2011).

But "I'm a licensed social worker," the judge here (Berman, J.) said in sentencing Anderson Garcia to 12 years in prison, and "incapacity is sometimes the only thing that enables a person to accept treatment. You got nowhere else to go." Pet. App. 87. I'm aware of Garcia's "cooccurring disorders of mental health and drug abuse," and "it's my obligation to try and fashion a sentence that would help Mr. Garcia overcome them." *Id*. at 74. Garcia's "incapacity, so to speak, is vital . . . to accomplish what needs to be accomplished with someone who has such severe lifelong trauma." *Id*. at 89. "I am very seriously considering the cooccurring disorders." *Id*. at 94. Twelve years in prison is "appropriate" given "the needs for punishment and deterrence but also rehabilitation." *Id*. at 98-99.

Garcia appealed this sentence as violating § 3582(a), but the Second Circuit dismissed his case given his plea agreement's saying he wouldn't appeal a sentence

of 175 months (about 14½ years) or less. At the waiver colloquy, however, the judge had "summarize[d]" Garcia's waiver as foreclosing only an appeal of his "conviction." Pet. App. 33. Given this, along with Garcia's mental illnesses and I.Q. of 55, he didn't "kn[o]w he was waiving the right to appeal his *sentence*." *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004) (emphasis in original).

The Second Circuit didn't disagree. It instead cited *United States v. Cook*, 722 F.3d 477 (2d Cir. 2013), which requires a defendant who pleads guilty and appeals his sentence to show not only that his appeal waiver was unknowing but also that "he would not have *entered the plea*" if he'd understood the waiver. *Id.* at 483 (emphasis added). As Garcia hadn't shown that, the court said the "imprecision in the waiver colloquy does not rise to the level of plain error." Pet. App. 1.

This "would not have entered the plea" requirement comes from this Court's ruling in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). The defendant there sought to withdraw his guilty plea given an error at his plea hearing; to do so, the Court held, he had to "show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 76.

Two circuits in addition to the Second have extended this "would not have entered the plea" requirement to defendants challenging not their pleas but the "appellate waiver that bars their sentencing appeals." *United States v. Kochonies*, 827 F. App'x 108, 111 n.3 (2d Cir. 2020). In those circuits, showing that an appeal waiver was unknowing is not enough to defeat it: the defendant must also show he wouldn't have pleaded guilty at all if he'd understood the waiver. *See United States*

v. Polak, 573 F.3d 428, 431-32 (7th Cir. 2009); *United States v. Tanner*, 721 F.3d 1231, 1236 (10th Cir. 2013). For defendants who don't make that extra showing, the appeal waiver is enforced even if it was unknowing.

Eight circuits refuse to do this. Four hold explicitly that *Dominguez Benitez* has no application here, as it concerned "what a defendant needs to show in order to reverse his *conviction* due to a Rule 11 error at the plea hearing." *United States v. Lee*, 888 F.3d 503, 507 n.2 (D.C. Cir. 2018) (emphasis added). Someone challenging only his *sentence* can defeat his appeal waiver, Justice Kavanaugh has explained, simply by showing he did not "knowingly, intelligently, and voluntarily waive his right to appeal." *Id.* at 508. *See also United States v. Corso*, 549 F.3d 921, 929-30 (3d Cir. 2008); *United States v. Murdock*, 398 F.3d 491, 496-97 (6th Cir. 2005); *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004). Four circuits implicitly agree, as they acknowledge *Dominguez Benitez* but don't require a defendant challenging his sentence to show "he would not have entered the plea" if he'd understood the appeal waiver. 542 U.S. at 83. They instead refuse to enforce a "waiver [that] was neither knowing nor intelligent." *United States v. Murraye*, 596 F. App'x 219, 229 (4th Cir. 2015). *See also United States v. Alvarado-Casas*, 715 F.3d 945, 955-56 (5th Cir. 2013); *United States v. Thompson*, 770 F.3d 689, 690 & 694 (8th Cir. 2014); *United States v. Phanor*, 849 F. App'x 909, 910 (11th Cir. 2021).

Finally, the First Circuit has confessed its "confusion" over the question here. *United States v. Villodas-Rosario*, 901 F.3d 10, 12 (1st Cir. 2018).

An answer is needed. "Ninety-seven percent of federal convictions . . . are the

result of guilty pleas," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), and the 1990s saw a great "rise of the use of appeal waivers in guilty pleas." *United States v. Reyes-Arzate*, 91 F.4th 616, 621 (2d Cir. 2024). Courts thus routinely assess waivers made by people who plead guilty and appeal their sentences. "The right to appeal has long been recognized as sacrosanct," moreover, "particularly in cases involving 'the loss of a chance at an entire appellate proceeding.'" *Thomas v. United States*, 93 F.4th 62, 65 (2d Cir. 2024) (quoting *Campusano v. United States*, 442 F.3d 770, 775 (2d Cir. 2006) (Sotomayor, J., for the Court)).

In three circuits, however, showing that a waiver was unknowing is not enough to get appellate review of a sentence: the defendant must also show he "would not have pleaded guilty" if he'd understood the waiver. *Dominguez Benitez*, 542 U.S. at 80. This extension of *Dominguez Benitez* violates the "fundamental[]" rule that an appeal waiver is not "valid and enforceable" if "it was unknowing." *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019). And people "'whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear.'" *Id.* at 748 (quoting *Rodriquez v. United States,* 395 U.S. 327, 330 (1969)). As Justice Kavanaugh and eight circuits have recognized, a defendant challenging his sentence may defeat his appeal waiver solely by showing he did not "knowingly, intelligently, and voluntarily waive his right to appeal." *Lee*, 888 F.3d at 508.

The Court should resolve the consequential split over this by holding there is no "additional hurdle to clear." *Garza*, 139 S. Ct. at 748.

STATEMENT OF THE CASE

1. In August 2020, a 22-year-old Garcia and three others robbed a drug dealer of his drugs. PSR ¶¶ 10-11. The victim was "pistol-whipped," causing a "traumatic brain injury." PSR ¶ 22. There was no allegation Garcia did this.

He agreed to plead guilty to conspiring to rob in violation of 18 U.S.C. § 1951, and his plea agreement said he wouldn't appeal a "sentence within or below the Stipulated Guidelines Range of 140 to 175 months . . . even if the Court employs a Guidelines analysis different from that stipulated to herein." Pet. App. 13. In making that deal, the government later noted, neither party imagined the judge would violate § 3582(a) or *Tapia*: "Garcia's agreement contains no language relating to *Tapia* or rehabilitation." 2d Cir. 22-2561, Docket Entry 91 at 1.

2. Judge Berman held the January 27, 2022, plea hearing by telephone. Defense counsel said "Mr. Garcia's preference has always been to be able to be in person with the Court," but Garcia assented to proceeding by phone. Pet. App. 17. The judge asked if Garcia and his lawyer had "gone over" the plea agreement "carefully," and both said yes. *Id*. at 18. *See also id*. at 32 (same). He did not ask if Garcia understood the agreement or had questions about it.

The judge asked Garcia how far he went in school, and he said "Ninth grade." *Id*. at 20. The judge then confirmed he was "under the care of a medical doctor," *id*., but the judge told him not to "go[] into all the details" and just asked if he felt "physically able" to proceed. *Id*. Garcia said yes. The judge then asked: "What about a mental health physician or psychiatrist? Are you under the care of a

mental health physician?" *Id.* "I'm OK," Garcia said. *Id.* "How would you say your . . . mental health" is? *Id.* at 20-21. "Good," he said. *Id.* at 21. "Have you ever been hospitalized or treated for any addiction?" *Id.* "Not that I believe." *Id.* The judge asked: "For example, going to a treatment center, going to a doctor, or going to a hospital for purposes of getting help with your addiction then." *Id.* "Yeah," Garcia said, "I was in a drug program before." *Id.* But he confirmed he hadn't "taken any drugs or medicine or pills or drunk any alcoholic beverages in the past 24 hours." *Id.* The judge then asked defense and government counsel if they had "any doubts or concerns as to Mr. Garcia's competence to plead." *Id.* at 22. They didn't. The judge found Garcia "competent to plead." *Id.*

After going through the constitutional rights Garcia would be giving up by pleading guilty, the charge of robbery conspiracy, the various penalties Garcia could be facing, the nature of supervised release, the logistics of sentencing and the factors to consider, the judge turned to "waivers of appeal." *Id.* at 33.

(A) "In that plea agreement, Mr. Garcia, you agree *not to file a direct appeal*." *Id.* (emphasis added).

(B) "You also agree not to bring what's called *a collateral challenge,* which includes, but is not limited to, an application under Title 28, United States Code, Sections 2255 and/or 2241 – this refers to the so-called habeas corpus provisions – of any sentence that is within or below the stipulated guideline range as found of 140 to 175 months of incarceration." *Id.* (emphasis added).

(C) "Let me just summarize that again. This provision that I have just referred to indicates that you are going to waive certain rights you would otherwise have to appeal or to challenge your *conviction* if the sentence imposed on you is in fact *within* the stipulated guideline range of *147* to 175 months of imprisonment. Do you realize that?" *Id.* (emphasis added). "Yes," Garcia said. *Id.*

The waiver in Garcia's plea agreement says he will not appeal or collaterally challenge a "sentence within or below the Stipulated Guidelines Range of 140 to 175 months." *Id*. at 13. But Judge Berman: (A) said he could not "file a direct appeal" at all; (B) said he was barred from bringing a "collateral challenge" to a sentence of 175 months or less; and (C) then "summarize[d]" that he was barred only from appealing or challenging his "conviction," and only if his sentence was "within" a "range of 147 to 175 months." Each one of these statements was an incomplete or flatly incorrect description of the appeal waiver. Neither side corrected the judge.

3. Garcia's PSR and sentencing submissions documented his childhood of physical and psychological abuse, his myriad lifelong mental-health afflictions – including severe bipolar disorder and major neurocognitive disorder – and his various substance addictions. *See* PSR ¶¶ 87-88, 101, 104-107; S.D.N.Y. 21-cr-402, Report of Dr. Joseph Giardino (under seal in district court).

His I.Q. of 55 places him "in the bottom 1% of individuals in his peer group, in the *very poor* range. He has limited ability to understand basic concepts." Giardino Report at 9 (emphasis in original). He's also a "*severe risk* for suicide," *id*. at 8 (emphasis in original), and should be in a "specialized residential treatment program for individuals with mental illness and addiction problems." *Id*. at 7.

Citing Garcia's "cooccurring disorders of mental health and drug abuse," Judge Berman said "it's my obligation to try and fashion a sentence that would help Mr. Garcia overcome them." Pet App. 74.

Government counsel agreed, flagging Garcia's "serious mental health illness,

and his substance abuse challenges. I think the Court absolutely should take each of those considerations into account." *Id*. at 79. The fact that Garcia's "prior lenient sentences . . . failed to rehabilitate him" is "appropriate to take into account." *Id*. at 81. The "Bureau of Prisons administers the RDAP program, which is an inpatient in-custody substance treatment program which . . . has good rates of success. And unlike in an environment where it's up to Mr. Garcia whether or not he reports to treatment," being "in custody" offers a "better set of circumstances for him ultimately overcoming the issues that he needs to overcome." *Id*. at 81-82.

Judge Berman agreed. "I'm a licensed social worker," and "incapacity is sometimes the only thing that enables a person to accept treatment. You got nowhere else to go." *Id*. at 87. "[I]f you're incapacitated, there is are [*sic*] more of a likelihood that you can accept and take in the treatment." *Id*. Garcia's "incapacity, so to speak, is vital . . . to accomplish what needs to be accomplished with someone who has such severe lifelong trauma." *Id*. at 89.

Defense counsel tried to explain that Garcia needed "treatment in a setting that is an inpatient setting . . . within the community," *id*., and that, when "talking about the jails and prisons . . . we are not talking about treatment facilities." *Id*. at 89-90. "Incapacitation in this sense," for "the length of time that the government has requested and the guidelines considered, I think would do far more harm than good." *Id*. at 90. The defense sought a 48-month prison term so Garcia could sooner get the treatment he needs. The judge was unmoved.

"I am very seriously considering the cooccurring disorders of mental health

and drug abuse." *Id.* at 94. He imposed a prison term of "145 months." *Id.* at 95. "I think this sentence is appropriate, given the very seriousness [*sic*] and violence and injury caused by the offense and the needs for punishment and deterrence but also rehabilitation." *Id.* at 98-99. "[M]ost importantly, I am going to recommend that he go to a facility where they can treat and do treat mental health disorders and drug disorders cooccurring." *Id.* at 99. "[P]aramount for me is he [be] at a place" that "treats mental disorder and . . . drug disorders." *Id.* at 100.

4. Garcia appealed this sentence. The government moved to dismiss, seeking to enforce the appeal waiver in his plea agreement. *See* 2d Cir. 22-2561, Docket Entry 40. Garcia responded that Judge Berman's erroneous description of the waiver at the plea hearing, along with the violation of § 3582(a), rendered the waiver unenforceable. *See id.,* Docket Entry 48. The government did not reply.

The Second Circuit (Nardini, Robinson, Pérez, JJ.) found Garcia's waiver "[]enforceable" and dismissed his appeal: "The unobjected-to imprecision in the waiver colloquy does not rise to the level of plain error. *See United States v. Cook*, 722 F.3d 477, 481, 483 (2d Cir. 2013)." Pet. App. 1. This order did not address the § 3582(a) violation, so Garcia moved for reconsideration.

The Circuit again ruled "Garcia's appellate waiver is enforceable." *Id.* at 8. It noted that "'sentencing without proffered reasons would amount to an abdication of judicial responsibility'" invalidating an appeal waiver. *Id.* at 7 (quoting *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)). Yet it said violating § 3582(a) "cannot be described as 'sentencing *without* proffered reasons,' but rather, as

sentencing *with* a rationale deemed improper by Congress. A *Tapia* error therefore does not implicate a total abdication of duty, but the misapplication of a sentencing court's duty." *Id*. (emphasis in ruling; quoting *Yemitan*, 70 F.3d at 748).

Garcia sought rehearing en banc, which was denied. Pet. App. 115.

REASONS FOR GRANTING THE PETITION

I. The Circuits are Split over Whether *Dominguez Benitez* Applies Here

When a defendant pleads guilty and appeals his sentence, what must he do to defeat the government's invocation of his appeal waiver?

In the Second Circuit, showing the waiver was unknowing isn't enough: to demonstrate plain error, the defendant must also show the judge's erroneous description of the waiver "'affected his substantial rights,'" *Cook*, 722 F.3d at 481 (quoting *United States v. Youngs*, 687 F.3d 56, 59 (2d Cir. 2012)), by showing a "'reasonable probability that, but for the error, he would not have entered the plea.'" *Id*. at 482-83 (quoting *Youngs*, 687 F.3d at 59).

This language comes from this Court's opinion in *Dominguez Benitez*. *See Youngs*, 687 F.3d at 59 (The "defendant must demonstrate 'that there is "a reasonable probability that, but for the error, he would not have entered the plea."' *United States v. Vaval,* 404 F.3d 144, 151 (2d Cir. 2005) (quoting *United States v. Dominguez Benitez,* 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004)).").

The defendant in *Dominguez Benitez* sought "to withdraw his plea of guilty," 542 U.S. at 76, and the Court said nothing about appeal waivers.

The Seventh and Tenth Circuits nonetheless agree with the Second that

Dominguez Benitez requires a defendant challenging his sentence, and his appeal waiver as unknowing, to show he wouldn't have pleaded guilty if he'd understood the appeal waiver. *See United States v. Polak*, 573 F.3d 428, 431-32 (7th Cir. 2009) (An appellant seeking "resentencing," and alleging his appeal waiver was unknowing, "must 'show a reasonable probability that, but for the error, he would not have entered the plea,'" yet "Polak admits that he still wants to plead guilty (he just wants to be resentenced)" so "we therefore uphold his appellate waiver.") (quoting *Dominguez Benitez*, 542 U.S. at 76); *United States v. Tanner*, 721 F.3d 1231, 1236 (10th Cir. 2013) (An appellant seeking resentencing, and alleging his appeal waiver was unknowing, "'must show a reasonable probability that, but for the error, he would not have entered the plea,'" yet Tanner "does not tell us why he would probably change his plea" so his "waiver of appeal rights is enforceable.") (quoting *Dominguez Benitez*, 542 U.S. at 83). *See also Cook*, 722 F.3d at 482-83 ("Nourse also fails to establish plain error for a second, alternative reason: . . . Nourse admits that he does *not* want to withdraw his plea.") (emphasis in original).

The D.C. Circuit disagrees. In an opinion by then-Judge Kavanaugh, the court said a defendant appealing his sentence may show an inadequately described appeal waiver "affected his substantial rights" by "demonstrat[ing] that he did not knowingly, intelligently, and voluntarily waive his right to appeal." *United States v. Lee*, 888 F.3d 503, 508 (D.C. Cir. 2018). As for *Dominguez Benitez*, the court said it concerns only "what a defendant needs to show in order to reverse his *conviction* due to a Rule 11 error at the plea hearing." *Id.* at 507 n.2 (emphasis added). The

court thus didn't require Lee to show "he would not have entered the plea." *Cook*, 722 F.3d at 483. *See also Lee*, 888 F.3d at 510 ("Lee does not seek reversal of his conviction but merely to void the appellate waiver," and "[t]his court has yet to apply *Dominguez Benitez* in that context.") (Rogers, J., dissenting on other grounds).

The Third Circuit agrees with Justice Kavanaugh. A "'defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea.'" *United States v. Corso*, 549 F.3d 921, 929 (3d Cir. 2008) (quoting *Dominguez Benitez*, 542 U.S. at 83). "But where, as here, the defendant does not seek the reversal of his conviction (i.e., does not seek to withdraw his guilty plea) but only challenges the validity of his appellate waiver so that he may appeal from his sentence, he is obliged to show a reasonable probability that the Rule 11 error 'precluded him from understanding that he had a right to appeal and that he had substantially agreed to give up that right.'" *Id*. (quoting *United States v. Goodson*, 544 F.3d 529, 541 (3d Cir. 2008)).

The Sixth Circuit also agrees. "At oral argument, the government urged us to hold that the Supreme Court's recent decision in *United States v. Dominguez Benitez* . . . requires Murdock to show a reasonable probability that, but for the Rule 11 violation by the district court, he would not have entered a plea of guilty." *United States v. Murdock*, 398 F.3d 491, 496 (6th Cir. 2005). But *Dominguez Benitez* held "'that a defendant *who seeks reversal of his conviction* after a guilty plea, on the ground that the district court committed plain error under Rule 11,

must show a reasonable probability that, but for the error, he would not have entered the plea.'" *Id.* (quoting *Dominguez Benitez*, 542 U.S. at 83; emphasis in *Murdock*). "We decline to adopt the government's view of this issue, and instead conclude that *Dominguez Benitez* is inapplicable here because Murdock is not seeking to reverse his conviction, but merely to void the appellate waiver provision in order to challenge his sentence." *Id.* Such a "defendant can prove that his substantial rights are affected when he shows that the district court failed to comply with the key safeguard in place to protect those rights and that there was no functional substitute for that safeguard." *Id.* at 497. The "key safeguard" is "an inquiry into the appellate waiver by the district court" confirming "that Defendant's waiver was knowing." *Id.* at 498. The "plea agreement" alone is "insufficient" and thus not a functional substitute. *Id.*

The Ninth Circuit also agrees *Dominguez Benitez* does not apply when a defendant "does not appeal his conviction" but "only appeals from his *sentence*." *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004) (emphasis in original). He can show his "substantial rights were affected" by showing he did not "kn[o]w he was waiving the right to appeal his *sentence*." *Id.* (emphasis in original).

Four more circuits implicitly agree with the four just above, as they acknowledge *Dominguez Benitez* but don't require a defendant appealing his sentence to show "he would not have entered the plea" if he'd understood his waiver. 542 U.S. at 83. *See United States v. Murraye*, 596 F. App'x 219, 227 & 229 (4th Cir. 2015) (affirming conviction because defendant did not show "he would have not pled

guilty," but denying government's motion to enforce appeal waiver: "waiver was neither knowing nor intelligent"); *United States v. Alvarado-Casas*, 715 F.3d 945, 955-56 (5th Cir. 2013) (affirming conviction because defendant did not show "he would not have pleaded guilty," but not requiring that showing when assessing appeal waiver in context of sentence challenge: "'waiver was both knowing and voluntary'") (citation omitted); *United States v. Thompson*, 770 F.3d 689, 690 & 694 (8th Cir. 2014) (affirming conviction because defendant did not show "he would not have entered a guilty plea," but refusing to enforce appeal waiver: "waiver w[as] not entered into knowingly and voluntarily"); *United States v. Phanor*, 849 F. App'x 909, 910 (11th Cir. 2021) (affirming conviction because defendant did not show he "would not have entered the plea," but not requiring that showing when assessing appeal waiver in context of sentence challenge: "waiver of his appellate rights was knowing, voluntary, and fully informed").

Finally, the First Circuit has noted its "confusion" over the question here. *United States v. Villodas-Rosario*, 901 F.3d 10, 12 (1st Cir. 2018). It has cited *Dominguez Benitez*'s "would not have entered the plea" requirement when the appellant challenged only his sentence, but it didn't "address whether he ha[d] [] met [that] burden" given the lack of an "obvious" error. *Sotirion v. United States*, 617 F.3d 27, 36 (1st Cir. 2010). And in another sentencing appeal, the Circuit recognized this Court's "requirement that a defendant 'must show a reasonable probability that, but for the error, he would not have entered the plea,' was articulated in the context of 'a defendant who seeks reversal of his conviction.'"

Villodas-Rosario, 901 F.3d at 16 (quoting *Dominguez Benitez*, 542 U.S. at 83).

"Arguably, then," the "plain-error standard articulated in *Dominguez Benitez*" should not apply when "the conviction itself is not at issue." *Id.* at 17. The question should be whether the judge "ensure[d] that 'the defendant freely and intelligently agreed to waive her right to appeal her [] sentence' by inquiring 'specifically at the change-of-the-plea hearing.'" *Id.* at 15 (citation omitted). But "we do not resolve this dispute because Villodas-Rosario's effort to escape the appellate waiver is unavailing even under th[at] more defendant-friendly [] test." *Id.* at 17.

II. Justice Kavanaugh is Right

"We hold," this Court said in *Dominguez Benitez*, "that a defendant who seeks reversal of his *conviction* after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83 (emphasis added). The decision thus concerns only "what a defendant needs to show in order to reverse his *conviction* due to a Rule 11 error at the plea hearing." *Lee*, 888 F.3d at 507 n.2 (emphasis added). *See also Corso*, 549 F.3d at 929 (same); *Murdock*, 398 F.3d at 496 (same); *Arellano-Gallegos*, 387 F.3d at 797 (same).

When a "defendant does not seek the reversal of his conviction (i.e., does not seek to withdraw his guilty plea) but only challenges the validity of his appellate waiver so that he may appeal from his sentence," *Corso*, 549 F.3d at 929, he may defeat the waiver simply by "demonstrat[ing] that he did not knowingly, intelligently, and voluntarily waive his right to appeal." *Lee*, 888 F.3d at 508. *See*

also Murdock, 398 F.3d at 497-98 (same); *Arellano-Gallegos*, 387 F.3d at 797 (same); *Murraye*, 596 F. App'x at 229 (same); *Alvarado-Casas*, 715 F.3d at 956 (same); *Thompson*, 770 F.3d at 694 (same); *Phanor*, 849 F. App'x at 910 (same).

Indeed, it is "fundamental[]" that "defendants retain the right to challenge whether the waiver itself is valid and enforceable— for example, on the ground[] that it was unknowing." *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019). For a "waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "[N]othing less than an intelligent waiver is required by elementary fairness." *Moser v. United States*, 341 U.S. 41, 47 (1951).

Not a word of *Dominguez Benitez* suggests the Court was revoking this cardinal rule or opening the door to enforcing unknowing appeal waivers. The Court instead emphasized that, because a prerequisite of any valid waiver is that the defendant "understood 'the rights at issue,' . . . assessing a claim that an error affected a defendant's decision to plead guilty must take into account any indication that the [error] misled him." 542 U.S. at 84 (citation omitted). And "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed. We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id*. at 84 n.10 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

Such unconstitutionality wasn't alleged in *Dominguez Benitez*: "the violation claimed was of Rule 11, not of due process." *Id.* at 83. Specifically, Dominguez sought to withdraw his guilty plea given his judge's not telling him that he "could not withdraw his plea if the court did not accept the Government's [sentencing] recommendations." *Id.* at 78 (citing Fed. R. Crim. P. 11(c)(3)(B)). This warning was in the plea agreement, which was "read to Dominguez in his native Spanish," *id.* at 85, but "the judge failed to mention" it at his plea hearing. *Id.* 78. Dominguez made no objection, yet then claimed on appeal that this omission required his conviction to be thrown out.

This Court granted certiorari "on the question '[w]hether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.'" *Id.* at 80. The Court's answer was yes. It explained that requiring defendants to show an effect on their "substantial rights" in this way would "reduce wasteful reversals," honor the "particular importance of the finality of guilty pleas," and was appropriate given "the fact, worth repeating, that the violation claimed was of Rule 11, not of due process." *Id.* at 82-83.

Yet in cases like Petitioner's, the claim of an unknowing waiver is indeed one "of due process," there is no request to disturb the "finality of [a] guilty plea[]," and reversal of an "improper" sentence, Pet. App. 7, would not be "wasteful" but just. There's consequently no basis for requiring Petitioner to show "he would not have entered the plea" if he'd understood the appeal waiver. *Cook*, 722 F.3d at 483.

As Justice Kavanaugh explained in *Lee*, the prejudice of enforcing an unknowing waiver in this context is denying appellate review without the defendant "knowingly, intelligently, and voluntarily waiv[ing] his right to appeal." 888 F.3d at 508. That denial is what "affect[s] his substantial rights." *Id.* As *Lee* and cases like it thus hold, "*Dominguez Benitez* is inapplicable here." *Murdock*, 398 F.3d at 496. A defendant who shows his waiver was unknowing shouldn't also have to show he wouldn't have pleaded guilty if he'd understood it. "'Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear.'" *Garza*, 139 S. Ct. at 748 (quoting *Rodriquez v. United States,* 395 U.S. 327, 330 (1969)).

III. Petitioner's Appeal Should be Heard

Garcia demonstrated the requisite prejudice. Given the confusing stream of contradictory descriptions of his appeal waiver that his judge delivered by phone – along with his bipolar disorder, neurocognitive disorder and I.Q. of 55 – he didn't "kn[o]w he was waiving the right to appeal his *sentence*." *Arellano-Gallegos*, 387 F.3d at 797 (emphasis in original). Indeed, his judge "summarize[d]" his waiver by saying it barred only an appeal of his "conviction." Pet. App. 33. His waiver wasn't knowing, and there is no "'additional hurdle to clear.'" *Garza*, 139 S. Ct. at 748 (quoting *Rodriquez,* 395 U.S. at 330). As an "unknowing" waiver isn't "enforceable," *id.* at 745, the Circuit erred by enforcing Garcia's.

This is so even putting the waiver colloquy aside. A "'valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope,'" *id.* at 744

(citation omitted), and in "determining the scope of a waiver," courts look to the "'parties' reasonable expectations.'" *Plunkett v. Sproul*, 16 F.4th 248, 253 (7th Cir. 2021) (citation omitted). Courts accordingly "will not enforce an appeal waiver where – as here – the 'sentencing decision . . . was reached in a manner that the plea agreement did not anticipate.'" *United States v. Woltmann*, 610 F.3d 37, 40 (2d Cir. 2010) (citation omitted).

Garcia's waiver said he wouldn't appeal a sentence of "175 months" or less "even if the Court employs a Guidelines analysis different from that stipulated to." Pet. App. 13. He never agreed to a sentence premised on a "rationale deemed improper by Congress." *Id*. at 7. The judge's imposing a sentence that Congress and this Court have told jurists to not even "think about," *Tapia*, 564 U.S. at 330, "was not part of the bargain." *United States v. Gottesman*, 122 F.3d 150, 152 (2d Cir. 1997). *See also* Government Letter, 2d Cir. 22-2561, Docket Entry 91 at 1 ("Garcia's agreement contains no language relating to *Tapia* or rehabilitation.").

It's no answer that Garcia got a sentence below the 175-month ceiling in his appeal waiver: had his 145-month prison term been based on his race, for example, no court would enforce the waiver. *See, e.g., United States v. Johnson*, 347 F.3d 412, 415 (2d Cir. 2003) (A sentence is reviewable, despite an appeal waiver, if "'based on some constitutionally impermissible factor, such as race.'") (quoting *United States v. Andis*, 333 F.3d 886, 894 (8th Cir. 2003) (en banc)).

It's also no answer to say Garcia's § 3582(a) claim isn't a constitutional one. On the contrary, "his sentence is constitutionally deficient because it rests

improperly upon his status." *Id*. But for Garcia's "cooccurring disorders of mental health and drug abuse," there would've been no need for a 12-year prison term to "help Mr. Garcia overcome them." Pet. App. 74. Even presuming the lowest level of constitutional scrutiny, there's no rational basis for this unequal treatment: whether someone is afflicted by illness and addiction or not, "imprisonment is not an appropriate means of promoting correction and rehabilitation." § 3582(a).

And Constitution aside, § 3582(a) operates as a categorical ban on certain sentences just as a statutory maximum does: its rule against imprisonment to "promot[e] correction and rehabilitation" is, just like a statutory maximum, a limitation baked into every sentencing. Thus, just as appeal waivers don't bar review of a sentence that "'exceeds the statutory maximum,'" *Garza*, 139 S. Ct. at 745 n.6 (citation omitted), they don't bar review of one that violates § 3582(a).

Finally, courts construe plea agreements and the appeal waivers in them "against a general background understanding of legality. That is, we presume . . . the non-contracting 'party' who implements the agreement (the district judge) will act legally." *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996). The judge's not doing so here, and instead imposing a 12-year prison sentence based on a "rationale deemed improper by Congress," Pet. App. 7, was not "'within [the] scope'" of Garcia's appeal waiver. *Garza*, 139 S. Ct. at 744 (citation omitted).

The Circuit erred by enforcing the waiver. The rulings here, moreover, undermine "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

Judge Berman's ruling was explicitly personal: "I'm a licensed social worker," and "I have experience in these subjects. The incapacity is sometimes the only thing that enables a person to accept treatment. You got nowhere else to go." Pet. App. 87. There's "more of a likelihood that you can accept and take in the treatment," which "should be the focus, in my opinion, of prisons." *Id.* "[I]t's my obligation to try and fashion a sentence that would help Mr. Garcia overcome" his "disorders." *Id.* at 74. Twelve years is "appropriate" given Garcia's "need[] for . . . rehabilitation." *Id.* at 98-99. "[P]aramount for me is he [be] at a place" that "treats mental disorder and . . . drug disorders." *Id.* at 100.

This was a "policy choice." *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting). Yet Congress made a different one 40 years ago. Federal sentencing was once "premised on a faith in rehabilitation," but that eventually "fell into disfavor." *Tapia*, 564 U.S. at 324. "Congress accordingly enacted the Sentencing Reform Act of 1984," part of which says "'imprisonment is not an appropriate means of promoting correction and rehabilitation.'" *Id.* at 325-26 (quoting § 3582(a)). The judge here thinks that was the wrong call, but "[w]hen judges abandon legal judgment for political will we . . . risk undermining public confidence in the courts." *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

Likewise, the Second Circuit's refusing to review a sentence premised on a "rationale deemed improper Congress," Pet. App. 7, fails to inspire "the public's willingness to respect and follow its decisions." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445-46 (2015). As the Circuit acknowledged, "'sentencing without proffered

reasons would amount to an abdication of judicial responsibility'" invalidating an appeal waiver. Pet. App. 7 (citation omitted). Necessarily, then, sentencing for an "improper" reason, *id.*, voids a waiver too: that's *worse* than giving no reason.

"A *Tapia* error," the Circuit nonetheless said, "does not implicate a total abdication of duty, but the misapplication of a [] duty." *Id.* Yet a judge who gives no reason for a sentence, and another who gives an "improper" one, *id.*, are both "abandoning" their "responsibility" to follow the law. https://www.merriam-webster.com/dictionary/abdication. Under the Circuit's rule, however, the unexplained sentence is reviewed but the "improper" one stands?

The illogic of this is perhaps why a different Circuit panel (Livingston, Ch. J., joined by Wesley and Carney, JJ.), "assume[d] without deciding that [an] appeal waiver is unenforceable" when there's a claim of "*Tapia* error." *United States v. Crum*, 843 F. App'x 404, 405 (2d Cir. 2021). Not reviewing a "sentence 'imposed in violation of law' would 'invite disrespect for the integrity of the courts' and 'discredit' the legitimacy of the sentencing process." *Ready*, 82 F.3d at 556 (quoting, respectively, *Wheat v. United States*, 486 U.S. 153, 162 (1988), and *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995)) (cleaned up). It would simultaneously deny the "'defendant's individual [] rights'" and impair "'public confidence in the fair administration of justice.'" *Id.* at 558 (citation omitted).

Petitioner's appeal should be heard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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