No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JOHN ROGERS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

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QUESTIONS PRESENTED

. Mr. John Rogers pleaded guilty to 18 U.S.C. § 924(c) as charged in count 4. The text of the statute of 18 U.S.C. § 924(c) provides in relevant part: [First clause] "Any person who, during and in relation to any crime of violence or drug trafficking crime…uses or carries a firearm, [second clause] **or** who, in furtherance of any such crime, possesses a firearm, shall in addition to the punishment provided for such crime…be sentenced to a term of imprisonment of not less than 5 years."

In this case, during the change of plea proceedings, the district court conflated the two clauses of § 924(c) by informing Mr. Rogers that he could be guilty of § 924(c) if a trier of fact found that he "carried" a firearm (part of the first clause) "in furtherance of" a drug trafficking crime (part of second clause). This cross-matching of elements from two separate sections of § 924(c) impermissibly authorized a conviction of a non-existent offense. The conduct that Mr. Rogers pled guilty to in Count 4 is not a criminal offense and no federal statute criminalizes this conduct. As a result, Mr. Rogers received a 5-year consecutive sentence for conduct that is not criminal under federal law.

The 5th, 6th, 8th, and 10th Circuits have held 18 U.S.C. § 924(c) criminalizes two separate offenses, thus conflating elements from the two

clauses creates a non-existent crime. However, the 9th Circuit, instead, has held that 18 U.S.C. §924(c) defines only one offense, not two. Therefore, conflating the elements of the two clauses would not be impermissible. This circuit split should be resolved to ensure uniformity among the circuits of whether 18 U.S.C. §924(c) creates two separate crimes or a single crime.

The questions presented are:

1. Whether the two clauses in 18 U.S.C. §924(c) creates two separate crimes or a single crime and whether the conflation of the elements of the two distinct clauses in § 924(c) creates a non-existent federal criminal offense?

2. Whether Melendez v. United States, 518 U.S. 120 should be revisited because analyzing the statutory scheme of the substantial assistance statutes--18 U.S.C. §3553(e), 28 U.S.C. § 994 and U.S.S.G. § 5K1.1—and the powers of the Sentencing Commission conferred by Congress, a district court has discretion to depart below the statutory minimum sentencing following a government motion pursuant to U.S.S.G. § 5K1.1?

3. Whether the waiver of appeal provision in the plea agreement is not valid and is unenforceable because both the waiver and the guilty plea in count 4 were not knowingly and voluntarily made and enforcing the waiver would result in a miscarriage of justice because Mr. Rogers was convicted and sentenced on a non-existent offense and there is no federal statute that criminalizes the conduct as alleged in the Indictment?

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On July 11, 2024, the United States Court of Appeals for the Ninth Circuit affirmed and remanded Mr. Rogers' appeal in United States v. John Rogers, No. 22-10323. A copy of this Order is attached hereto as Appendix "A".

JURISDICTION

On July 11, 2024, the United States Court of Appeals for the Ninth Circuit affirmed and remanded Mr. Rogers' appeal. On August 19, 2024,

the Ninth Circuit denied Mr. Rogers' petition for panel rehearing and the petition for rehearing en banc. A copy of this Order is attached hereto as Appendix "B". Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A):

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

18 U.S.C. § 3553 (e):

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

28 U.S.C. § 994(n):

The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation of another person who has committed an offense. 28 U.S.C. § 994(n).

STATEMENT OF THE CASE

On February 2, 2017, Mr. Rogers was charged by Indictment in count one with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). In count 2, Mr. Rogers was charged with possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). In count 3, Mr. Rogers was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (ER-44-46.)[1]

The Indictment further charged in count 4 that Mr. Rogers carried firearms in furtherance of drug trafficking crimes in violation of 18 U.S.C. § 924(c). The Indictment also alleged criminal forfeiture in violation of 21 U.S.C. § 853(a), 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c). (ER-48.)

On May 8, 2018, Mr. Rogers pled guilty to counts 1 and 4. (ER-30.)

[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit, NO. 22-10323.

On November 29, 2022, the district court sentenced Mr. Rogers to a total term of 180 months. This term consists of 120 months on count 1 and 60 months on count 4, to be served consecutively. (ER-15-16.)

Upon motion by the government, the district court dismissed the remaining counts. (ER-18.)

Mr. Rogers filed his timely Notice of Appeal on December 9, 2022. (ER-53.)

On July 11, 2024, the United States Court of Appeals for the Ninth Circuit affirmed and remanded Mr. Rogers' appeal. On August 19, 2024, the Ninth Circuit denied Mr. Rogers' petition for panel rehearing and the petition for rehearing en banc.

STATEMENT OF FACTS

The plea agreement provided the factual basis for the plea:

"If this matter proceeded to trial, the United States would establish the following facts beyond a reasonable doubt:

On January 5, 2017, at about 2:39 p.m., Sheriff's Deputies of the Sacramento County Sheriff's Department observed a white Ford Expedition standing in the intersection at Fair Oaks Boulevard and Grant Avenue, in

Sacramento, during a red light. Mr. Rogers stipulates that this is a violation of California Vehicle Code Section 21453. The Deputies pulled their patrol vehicle behind the Ford Expedition and attempted to conduct a traffic stop; the Ford Expedition initially pulled over to the side of the road, but as the Deputies got out of their patrol vehicle to approach, it sped off. The Ford Expedition led law enforcement on a fourteen-mile chase through Sacramento, at times driving more than eighty miles per hour in areas with posted speed limits of thirty-five miles per hour. Law enforcement was ultimately able to disable the Ford Expedition by laying a 'tire-strip' on Highway 99, which punctured at least one of its tires. The Ford Expedition drove off the road into a grassy area to the side of Highway 99, where it stopped moving. Law enforcement then approached the Ford Expedition and found John Rogers, the sole occupant and driver, in it. They removed Mr. Rogers from the Ford Expedition and placed him under arrest.

In the Ford Expedition, the officers found (i) six pounds of methamphetamine, (ii) twenty pounds of processed marijuana, (iii) drug-distribution paraphernalia, (iv) fourteen firearms, (v) high-capacity magazines, (vi) body armor, (vii) ammunition, and (viii) $10,000 in cash. The officers also found two cellular phones and a Garmin navigational device. Two of the

firearms were in a backpack found at Mr. Roger's feet, and a third was found in a jacket in the front passenger seat. The fourteen firearms were (i) an Inter-American Importers SKS with serial number 85161, (ii) a Bushmaster XM15-E2S rifle with serial number BFIT038219, (iii) a European American Armory Witness pistol with serial number MT12404, (iv) an F.B. Radon 35 pistol with serial number Z1089, (v) a Glock 21 pistol with serial number GCB757, (vi) an Intratec AB-10 semi-automatic pistol with the serial number removed, (vii) a Para Ordnance P10 pistol with serial number SM3323, (viii) a Ruger M1 rifle with serial number 18479114, (ix) a Ruger SR-40 pistol with serial number 34225404, (x) a Ruger LCR pistol with serial number 54096157, (xi) a Smith and Wesson SW9VE pistol with serial number DWWM2112, (xii) a Smith and Wesson 28-2 pistol with serial number N571204, (xiii) a Smith and Wesson 500 pistol with serial number BCE4212, and (xiv) a Taurus PT111 pistol with serial number TVG29255. Subsequent DEA testing also confirmed that the six pounds of methamphetamine was 99 percent pure, and that it comprises at least 2.6 kilograms of actual methamphetamine." (ER-42-43.)

REASONS FOR GRANTING THE WRIT

A. The conviction and the five-year consecutive sentence imposed on count 4 pursuant to 18 U.S.C. § 924(c) should be vacated because "carrying firearm in furtherance of a drug trafficking crime" is a non-existent criminal offense, no federal statute criminalizes this conduct, and there is a circuit split as to whether 18 U.S.C. § 924(c) creates two separate and distinct offenses or a single offense

In count 4 of the Indictment, Mr. John Rogers was charged with violating 18 U.S.C. § 924(c). (ER-47.) The text of the statute of 18 U.S.C. § 924(c) provides in relevant part: [First clause] "Any person who, during and in relation to any crime of violence or drug trafficking crime…uses or carries a firearm, [second clause] **or** who, in furtherance of any such crime, possesses a firearm, shall in addition to the punishment provided for such crime…be sentenced to a term of imprisonment of not less than 5 years." United States v. Hector, 474 F. 3d 1150, 1156 (9th Cir. 2007).

In this case, Mr. Rogers pled guilty to elements that are not listed in any federal criminal statute because during the plea colloquy, the district court erroneously combined the "carries" prong of the statute with the "in furtherance of" prong, thereby failing to list the essential elements of any criminal conduct. See United States v. McGilberry, 480 F. 3d 326, 329 (5th

Cir. 2007).

In other words, "carrying firearms in furtherance of a drug trafficking crime" is a non-existent crime. United States v. Castano, 543 F. 3d 826, 836-837 (6th Cir. 2008). Mr. Rogers pled guilty to conduct not criminalized by any federal statute and is serving a consecutive five-year sentence for an offense that is not a chargeable offense.

"Section 924 refers to someone who either uses or carries a firearm…during and in relation to any drug trafficking crime or someone who in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). United States v. McGilberry, supra, 480 F. 3d at 329.

"When the conduct charged is *possession* of a firearm, the appropriate standard of participation is 'in furtherance of' a crime". However, if the defendant *uses or carries* a firearm, the participation standard is 'during and in relation to' a crime." United States v. McGilberry, supra, 480 F. 3d at 329.

Here, the transcript of the plea colloquy shows that the district court informed Mr. Rogers the incorrect elements of the offense charged in count 4, carrying a firearm during and in relation to drug trafficking offense: The district court to Mr. Rogers: "in count 4 you're charged with the crime of

carrying firearms in furtherance of a drug trafficking crime, a violation of 18 U.S.C. § 924(c). As to that charge, how do you now plead, guilty or not guilty?

Mr. Rogers: Guilty." (ER-30.)

The trial court recited the incorrect elements 18 U.S.C. § 924(c) during the plea colloquy. (ER-30.) This description of the offense in count 4 by the district court resulted from an impermissible combination of the language of the first and second clauses of § 924(c)." United States v. Combs, 369 F.3d 925, 933-934 (6th Cir. 2004). The correct legal description of the offense in count 4 is "carrying a firearm during and in relation to drug trafficking offenses." United States v. Seesing, 234 F. 3d 456, 462 (9th Cir. 2000)

The district court conflated the two clauses of § 924(c) by informing Mr. Rogers he could be guilty of § 924(c) if a trier of fact found that he "carried" a firearm (part of the first clause) "in furtherance of" a drug trafficking crime (part of the second clause). (ER-47, ER-37-48.) This cross-matching of elements from two separate sections of § 924(c) "impermissibly authorized a conviction of a non-existent offense". United States v. Castano, 543 F. 3d 826, 836-837 (6th Cir. 2008).

The "in furtherance of" element and the "during and relation to" element requires different proof. "The 'during and in relation to' element requires that the firearm 'furthered' the purpose or effect of the crime and its presence or involvement was not the result of coincidence." United States v. Combs, 369 F. 3d 925, 932-933 (6th Cir. 2004). The "in furtherance of" requires a higher standard of participation than the "during and in relation to" language, "holding that the government must show the firearm was possessed to advance or promote the commission of the underlying [drug trafficking] offense". United States v. Combs, supra, 369 F. 3d at 933.

Indeed, in the briefing below, the government conceded the district court and the prosecutor during the Rule 11 colloquy, "referred to the § 924(c) offense as 'carrying firearms in furtherance of a drug trafficking crime'". The government attempted to excuse and downplay the district court's and the prosecutor's misstatement of the elements of the crime during the change of plea hearing. The government described the district court's and prosecutor's misstatement of the elements of 18 U.S.C. § 924 (c) as: "Inarticulate references to the statute of conviction". ("AB", p. 21.)[2]

[2] "AB" refers to the Appellee's Brief filed in the Ninth Circuit in case number 22-10323.

The district court's and prosecutor's statements regarding elements of the offense were not just "inarticulate references", the statements were incorrect, not based on the statute, and did not explain to Mr. Rogers the elements of the offense as required by Federal Rule of Criminal Procedure, rule 11.

In addition, the government further argued that: "Misstating the name of the offense of conviction does not undermine a defendant's understanding of the nature of the offense where the contemporaneous record shows that the defendant was accurately advised of the elements of the offense and there was no evidence of confusion on the part of the defendant.", citing to United States v. Covian-Sandoval, 462 F. 3d 1090, 1096 (9th Cir. 2006). ("AB", p. 22.) The district court did not misstate the "name" of the offense of the conviction. The district court misstated the "elements" of the crime at the time Mr. Rogers was pleading guilty. (ER-30.) No where during the plea colloquy was Mr. Rogers accurately advised of the elements of 18 U.S.C. § 924 (c). (ER-20-31.)

In fact, the Supreme Court has held that when the prosecutor and the district court do not correctly understand the "essential elements" of the charged crime, then the guilty plea may be attacked. Bousley v. United States, 523 U.S. 614, 619, 118 S. Ct. 1604, 140 L. Ed 2d 828 (1998).

Conflating the elements of the two separate ways 18 U.S.C. § 924(c) can be violated creates a set of conduct that does not violate any statute. A district court who is reciting the elements or ways a statute can be violated, during a change of plea hearing, must recite the correct elements of that particular crime pursuant to Rule 11. If the district court recites the incorrect elements or conduct of the offense to prove the offense was violated, the defendant is pleading guilty to conduct not criminalized by statute. This is the point that Mr. Rogers makes: When the district court recited the incorrect elements of 18 U.S.C. § 924(c) and then asked Mr. Rogers if his conduct violated these incorrect elements, the district court accepted a guilty plea of conduct that did not violate any federal laws or statutes.

If the grand jury wished to charge Mr. Rogers with both prongs of 18 U.S.C. § 924(c) then it was required to do so in the conjunctive. See United States v. Renteria, 557 F. 3d 1003, 1008 (9th Cir. 2009)("When a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of those acts conjunctively charged may establish guilt.") This is not what happened in this case. (ER-47-48.)

In this case, the Ninth Circuit found: "And this circuit has

consistently held that the conflation of the elements of § 924(c) does not constitute reversible error" citing to United States v. Thongsy, 577 F. 3d 1036, 1043 (9th Cir. 2009). The Ninth Circuit further found that Rogers was adequately apprised of the essential elements of the crime charged. (App. "A", p. 4.) This is because the Ninth Circuit has ruled that 18 U.S.C. § 924(c) defines only one offense, not two. United States v. Arreola, 467 F. 3d 1153, 1159 (9th Cir. 2006). Thus suggesting, the conflation of the elements in 18 U.S.C. § 924(c) does not state the incorrect elements of § 924(c).

The Ninth Circuit has found that 18 U.S.C. § 924 (c) "makes criminal a single offense that can be proven in two ways. United States v. Arreola, 467 F. 3d 1153, 1159 (9th Cir. 2006). "What the statute proscribes as conduct in the first clause is the use or carrying of a gun during (a temporal connection) and in relation to (a substantive connection) a predicate crime. What the statute proscribes in the second clause is possessing a gun in furtherance of (with a particular purpose of advancing) the specified crime." United States v. Arreola, supra, 467 F.3d at 1159.

However, the 5th, 6th, 8th, and 10th Circuits have held differently from the 9th Circuit, and found that 18 U.S.C. § 924(c) creates two separate

crimes. Thus, conflation of the elements of § 924(c) is conduct that is not criminalized by any federal statute and the offense is non-existent. Thus, there is a circuit split as to whether 18 U.S.C. § 924(c) creates a single offense or two separate offenses.

In United States v. Combs, supra, 369 F. 3d at 933-934, the Sixth Circuit held that 18 U.S.C. § 924(c) criminalizes two separate offenses. However, in United States v. Arreola the Ninth Circuit rejected the logic in Combs and ruled instead that 18 U.S.C. § 924(c) defines only one offense, not two. United States v. Arreola, supra, 467 F. 3d at 1159.

In Combs, the Sixth Circuit held that 18 U.S.C. § 924(c) criminalizes two separate offenses: (1) using or carrying a firearm during and in relation to a drug trafficking crime, and (2) possessing a firearm in furtherance of a drug trafficking crime. United States v. Combs, supra, 369 F. 3d at 931-933. The Sixth Circuit reasoned that because the two prongs of the statute are separated by the disjunctive "or," and because the statutory language structures the prohibited acts into distinct depended clauses with different modifiers, the second prohibited act is distinct from the first. United States v. Combs, supra, 369 F. 3d at 931.

The Combs court also considered the legislative history of 18 U.S.C. §

924(c), noting that Congress enacted the current version of the statute in 1998, in response to the Supreme Court's holding in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). Bailey held that in an earlier version of the statute, which prohibited only "using or carrying a firearm during and in relation to" drug trafficking. 18 U.S.C. § 924(c)(1) (1994), the word "use" must mean more than mere possession. United States v. Combs, supra, 369 F. 3d at 932. It was in response to the Bailey holding that Congress added "possession" as a prohibited act, and required a higher standard of participation ("in furtherance of") in order to charge a defendant with that act, thus creating two separate and distinct offenses with different standards of proof. United States v. Combs, supra, 369 F. 3d at 932-933.

The Eighth Circuit has likewise held that 18 U.S.C. § 924(c) creates two separate crimes. United States v. Gamboa, 439 F. 3d 796, 810 (8th Cir. 2006)(holding that there was no Double Jeopardy violation where a defendant was convicted under two separate counts for violations of 18 U.S.C. § 924(c), one count for violating the "used and carried" clause and one for violating the "possessed" clause, since each count required an element not required by the other.) The Gamboa court concluded that the

"using and carrying 'during in relation to' a drug trafficking crime part of 18 U.S.C. § 924(c)(1)(A) and "possession in furtherance" of a drug trafficking crime" part of 18 U.S.C. § 924(c)(1)(A) were separate elements of separate offenses. United States v. Gamboa, supra, 439 F. 3d at 810. As the court summarized, "each count required proof of an element not required by the other". United States v. Gamboa, supra, 439 F. 3d at 809.

Furthermore, the Fifth Circuit in United States v. McGilberry, 480 F.3d 326, 329 (5th Cir. 2007) held that 18 U.S.C. § 924(c) contains and two separate offense. Also, the 10th Circuit has treated 18 U.S.C. § 924(c) as creating two separate criminal offenses. United States v. Avery, 295 F. 3d 1158, 1172 (10th Cir. 2002).

Contrary to the 5th, 6th, 8th, and 10th Circuits, the 9th Circuit has reached different conclusion and holds that 18 U.S.C. § 924(c) defines only one offense, not two. United States v. Arreola, supra, 467 F. 3d 1159. Therefore, the Ninth Circuit held in the present case, that "conflation of the elements of § 924(c) does not constitute reversible error" and therefore, Mr. Rogers was "adequately apprised of the essential elements of the crime charged". (App. A, p. 4.) Under the interpretation of the 5th, 6th, 8th, and 10th Circuits that hold that 18 U.S.C. § 924(c) contains two separate

offenses, the conflation of the elements from the two offenses in § 924 (c) create offenses or conduct that are not criminalized by federal statute and frankly, do not exist. Mr. Rogers pled guilty to an offense that does not exist, exposing him to a five-year consecutive sentence. This Court should grant certiorari to resolve this circuit split and then find that Mr. Rogers was convicted of a crime that does not exist under federal law.

B. Melendez v. United States, 518 U.S. 120 should be revisited because analyzing the statutory scheme of the substantial assistance statutes--18 U.S.C. §3553(e), 28 U.S.C. § 994 and U.S.S.G. § 5K1.1—and the powers of the Sentencing Commission conferred by Congress, a district court has discretion to depart below the statutory minimum sentence following a government motion pursuant to U.S.S.G. § 5K1.1

1. It is time for this Supreme Court to reconsider its 1996 decision in Melendez v. United States, 518 U.S. 120

In 1996, the Supreme Court in Melendez v. United States, 518 U.S. 120, 125-130, 116 S. Ct. 2057, 125 L. Ed 2d 427 (1996) held that a district court can impose a sentence below a statutory minimum after the government authorizes it by filing a substantial assistance motion pursuant to 18 U.S.C. § 3553(e). The Court held, however, an U.S.S.G. § 5K1.1 substantial assistance motion cannot, on its own, permit a departure below the statutory minimum, it permits a departure only below the sentencing

guideline range. Id. at 125-130. In other words, the Supreme Court authorized prosecutors, after a criminal defendant gave substantial assistance to the government in investigating a crime, to limit the judge's discretion to set the sentence by choosing to file its motion under U.S.S.G. § 5K1.1 rather than 18 U.S.C. § 3553(e).

Prior to Melendez v. United States two circuits analyzed the substantial assistance statutes and sentencing guidelines and concluded that a district court has discretion to depart below the statutory minimum sentence following a substantial assistance motion pursuant to U.S.S.G. § 5K1.1 and that it is not necessary for the government to specify that it is moving under 18 U.S.S.G. § 3553(e) for departure below the statutory minimum once the power of the court has been involved under U.S.S.G. § 5K1.1. United States v. Ah-Kai, 951 F. 2d 490, 492 (9th Cir. 1991), see also United States v. Keene, 933 F. 2d 711 (9th Cir. 1991); United States v. Beckett, 996 F. 2d 70 (5th Cir. 1993).

Mr. Rogers argues that the reasoning and the interpretation of the substantial assistance statutes in the three cases cited above support a finding that a district court has discretion to sentence below the statutory minimum when the government files a substantial assistance motion pursuant to

U.S.S.G. § 5K1.1. Melendez v. United States, supra, 518 U.S. 120, was decided in 1996. There is only one remaining Supreme Court Justice on the bench since Melendez was decided: Justice Thomas. There are eight new Justices serving on the Court. Therefore, this is an appropriate time to ask the Court to reconsider its decision in Melendez and grant a petition for writ of certiorari.

In this case, the government filed substantial assistance motion pursuant to U.S.S.G. § 5K1.1, rather than a motion pursuant to 18 U.S. 3553(e). Further, the record reflects Mr. Roger's four and one-half years extraordinary assistance to the government. Review of the scope and detailed assistance by Mr. Rogers should convince any prosecutor to file a motion pursuant to 18 U.S.C. § 3553(e) in order for the district court to consider a sentence below the statutory minimum. Please read the government's § 5K1.1 motion and especially the defense's sentencing memorandum filed under seal to understand the scope of Mr. Rogers' substantial assistance to the government. (See Government's sentencing recommendation and motion pursuant to §5K1.1 and Defendant's sentencing memorandum both filed under seal with the PSR.)

In this case, the district court indicated that it may have considered a

sentence below the statutory minimum when it was contemplating the defense request for a 108-month sentence. (ER-13.)

During the sentencing hearing, the district court stated that even though there is a §5K1.1 motion, "I'm not sure I'm authorized to still vary below the statutory minimum."

2. Analysis of the statutes show a district court has discretion to sentence below the statutory minimum for substantial assistance when the government filed a motion pursuant to U.S.S.G. § 5K1.1

In United States v. Keene, the court stated that "the issue in this appeal involves the interpretation and interrelation of two statutory provisions and one Guideline section addressing a reduction in sentence based upon a defendant's substantial assistance to authorities: 18 U.S.C. § 3553(e), 28 U.S.C. § 994(n) and U.S.S.G. § 5K1.1. After analyzing the two statutes and guideline, the Keene Court found that all three provisions need to be read together and the court rejected that "the statutory scheme limits the judge's discretion to set the sentence by choosing to file its motion under 5K1.1 rather than § 3553(e)". United States v. Keene, 933 F. 2d 711, 711-714 (9th Cir. 1991)

"The full text of § 3553(e) of title 18 provides:

Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. 18 U.S.C. § 3553(e).

Section 994(n) of title 28 reads as follows:

The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation of another person who has committed an offense. 28 U.S.C. § 994(n).

And the relevant portion of § 5K1.1 is this:

Substantial Assistance to Authorities (Policy Statement)
Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines. U.S.S.G.§ 5K1.1." United States v. Beckett, 996 F. 2d 70, 72 (5th Cir. 1993)

"The commentary accompanying § 5K1.1 contains the following application note:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required

> minimum sentence. U.S.S.G. § 5K1.1, comment n. 1. United States v. Beckett, supra, 996 F. 2d at 72.

The defendant in Beckett pleaded guilty to a criminal statute which carried a mandatory minimum and gave substantial assistance to the prosecution. Therefore, the case involved both 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. "The underlying question to be resolved is whether these two provisions provide for separate and distinct methods of departure, or whether they are intended to perform the same function." United States v. Beckett, supra, 996 F. 2d at 72.

The Beckett court noted that other circuits have tackled this issue. In United States v. Cheng Ah-Kai, 951 F. 2d 490 (2nd Cir. 1991), the court was confronted with facts very similar to ours. The defendant pleaded guilty to violating two criminal statutes, one of which carries a mandatory minimum sentence. In exchange for the defendant's cooperation with the government the government agreed to request the sentencing court to depart below the sentencing guidelines. Prior to sentencing, the government sent a letter to the district court recommending a downward departure from the guidelines; it made no mention, however, of a departure below the statutorily required minimum sentence. On appeal both the government and the defendant

agreed that the letter was the equivalent of a 5K1.1 motion. United States v. Beckett, supra, 996 F. 2d at 72-73.

At sentencing, the defendant requested a sentence below the statutory minimum, and the government objected. The government took the position it now takes today, that §5K1.1 and § 3553(e) are separate and distinct methods of departure and that in the absence of a 3553(e) motion, the district court does not have the authority to depart below the statutory minimum sentence. The district court 'reluctantly' agreed with the government and sentenced the defendant to the statutory term. United States v. Beckett, supra, 996 F. 2d at 73.

On appeal, the Second Circuit reviewed the language of sections 3553(e), 994(n), and 5K1.1, as well as the Ninth Circuit decision in United States v. Keene, supra, 933 F. 2d 711 (9th Cir. 1991) and the Fourth Circuit's decision in United States v. Wade, 936 F. 2d 169 (4th Cir. 1991) and came to the following conclusion:

> Analyzing the statutory scheme and the powers of the Sentencing Commission conferred by Congress, we likewise hold that a district court has discretion to depart below the statutory minimum sentence following a government motion pursuant to § 5K1.1. In our view, it is not necessary for the government to specify that it is moving under § 3553(e) for departure below the statutory minimum, once the power of the court has been invoked under § 5K1.1. United States v. Beckett, supra, 996 F. 2d at 73, citing to United States v. Cheng Ah-Kai, supra, 951 F. 2d at 492.

"In reaching this conclusion, the Court found that § 5K1.1 implements the directive of § 994(n) and § 3553(e), and all three provisions must be read together. It found that Application Note 1 to § 5K1.1 supported this reading. More specifically, it found that by the inclusion of Application Note 1, the Sentencing Commission intended § 5K1.1 to be the 'conduit' through which § 3553(e) may be applied." United States v. Beckett, supra, 996 F. 2d at 73.

"The Ninth Circuit engaged in much the same analysis described above. It first found that there is nothing in the legislative history, nor in the language of § 3553 or § 994 to suggest that Congress intended to vest with the prosecutor not only the authority to make a substantial assistance motion, but also the authority to set the parameters of the court's sentencing discretion by choosing to move under § 5K1.1, rather than § 3553(e). The Court then examined the statutory relationship between §3553(e), § 5K1.1, Application Note 1 to §5K1.1, and § 994(n) and came to the following conclusion:

"In light of the substantial cross references between 5K1.1, 3553(e) and 994 (n), we conclude that 994(n) and 5K1.1 do not create a separate ground for a motion for reduction below the guidelines exclusive of 3553(e)'s provision for reduction below the statutory minimum. Rather

5K1.1 implements the directive of 994(n) and 3553(e), all three provisions must be read together in order to determine the appropriateness of a sentence reduction and the extent of departure." United States v. Beckett, supra, 996 F. 2d at 74, citing to United States v. Keene, supra, 933 F. 2d at 714.

"Therefore, we hold that when the prosecution moved under a § 5K1.1 for a downward departure from the guidelines based on Beckett's substantial assistance, the district court was authorized to depart below the statutory minimum sentence." This holding is based on our conclusion that § 5K1.1 is the appropriate tool by which § 3553(e) may be implemented." United States v. Beckett, supra, 996 F. 2d at 75.

Based on the foregoing, a combined reading of the statutes and guideline section at issue states that if the government moves under §5K1.1 for a downward departure for substantial assistance, the district court is authorized to depart below the statutory minimum sentence. The government should not have the power to limit the scope of the district court's discretion when sentencing a criminal defendant after the defendant provided substantial assistance to the government. This Court should grant certiorari to revisit Melendez v. United States, 518 U.S. 120 (1996).

C. The waiver of appeal provision in the plea agreement is unenforceable because both the waiver and the guilty plea in count 4 were not knowingly and voluntarily made and enforcing the waiver would result in a miscarriage of justice because Mr. Rogers was convicted and sentenced on a non-existent offense and there is no federal statute that criminalizes the charged conduct

In this case, Mr. Rogers and the government entered into a plea agreement, which contained a waiver of appeal provision. (ER-33, 40.)

A defendant's waiver of his rights to appeal is generally enforced 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." Davies v. Benov, 856 F. 3d 1243, 1246 (9th Cir. 2017).

"Principles of contract law control our interpretation of a plea agreement." "We therefore will generally enforce the plain language of a plea agreement if it is clear and unambiguous on its face." However, "claims that the plea or waiver itself was involuntary or that ineffective assistance of counsel rendered the plea or waiver involuntary, however, may not be waived". Davies v. Benov, supra, 856 F. 3d at 1246-1247, n.2.

Mr. Rogers retains "the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary". Garza v. Idaho, 139 S. Ct. 738, 745, 203 L. Ed. 2d 77 (2019).

Mr. Rogers argues that the waiver of the appeal and the guilty plea were not knowingly and voluntarily made because Mr. Rogers was convicted and sentenced on a non-existent offense and there is no federal statute criminalizing the conduct the government accuses him of doing. Mr. Rogers argues that the panel's decision conflicts with the Supreme Court's decision in Garza v. Idaho, supra, because the record shows that Mr. Rogers' guilty plea and waiver of appeal was unknowing and involuntary because he was convicted of conduct not criminalized by federal statute.

Even though plea agreements are contracts, "application of these contract principles is tempered by the constitutional implications of an agreement". "A defendant must enter into a plea agreement and waiver knowingly and voluntarily for these agreements to be valid." United States v. Andis, 333 F. 3d 886, 890 (8th Cir. 2003). This is the same standard the Supreme Court has required for all guilty pleas.

United States v. Andis, supra, 333 F. 3d at 890, citing to Parke v. Raley, 506 U.S. 20, 28, 113 S. Ct. 517, 121 L. Ed 2d 391 (1992). In this case, Mr. Rogers' guilty plea and waiver of appeal were involuntary because he was convicted and sentenced on an offense in count 4 that does not exist under federal law.

In this case, the panel concluded that:

"Rogers nevertheless contends that his plea was not knowing and voluntary because the *title* of the charge in the Indictment was *mislabeled* as carrying a firearm "in furtherance of" instead of carrying a firearm "during and in relation to" a drug trafficking crime, thus conflating the two clauses of 18 U.S.C. § 924(c). He argues that this conflation, which the district court repeated at the plea colloquy, deprived him of fair notice of the criminal charges against him. We disagree. (App. A, p. 3.)

The panel's characterization of Mr. Rogers' argument is incorrect. Mr. Rogers' argument is that the offense pled in the Indictment in count 4 and the "offense" that he pled guilty to does not exist and the conduct is not criminalized by federal statute. The charge in count 4 was not simply mislabeled: the charge as written does not exist and there is no federal statute criminalizing the conduct alleged in count 4.

Furthermore, Mr. Rogers' guilty plea and waiver of appeal are involuntary and not knowingly made because the plea colloquy shows that Mr. Rogers pled guilty to a non-existent offense.

involuntary and not knowingly made because the plea colloquy shows that Mr. Rogers pled guilty to a non-existent offense.

This petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Mr. Rogers respectfully submits that the petition for writ of certiorari should be granted.

Dated: November 26, 2024

Respectfully Submitted,

Karyn H Bucur

Karyn H. Bucur
Attorney for Petitioner

NOT FOR PUBLICATION

FILED

JUL 11 2024

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. JOHN ROGERS, Defendant - Appellant.	No. 22-10323 D.C. No. 2:17-cr-00018-JAM-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John Mendez, District Judge, Presiding

Submitted May 15, 2024**
San Francisco, California

Before: LEE and BRESS, Circuit Judges, and NAVARRO,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Gloria M. Navarro, United States District Judge for the District of Nevada, sitting by designation.

App A

John Rogers appeals his conviction, following a guilty plea, for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and carrying a firearm "during and in relation to" a drug trafficking crime,[1] in violation of 18 U.S.C. § 924(c)(1)(A). Rogers asks that we vacate his sentence and remand to the district court for further proceedings. We have jurisdiction under 28 U.S.C. § 1291, and we affirm Rogers's sentence and conviction. However, we remand to the district court for the limited purpose of correcting the typographical error in his Judgment of Conviction to reflect the elements of the offense charged in the Indictment.

1. Rogers waived his right to bring this appeal. "An appeal waiver in a plea agreement is enforceable if the language of the waiver encompasses the defendant's right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made." *United States v. Minasyan*, 4 F.4th 770, 777–78 (9th Cir. 2021) (citation, internal quotation marks, and alterations omitted). Here, both conditions are met. The language of the appeal waiver in Rogers's Plea Agreement provided that he "g[a]ve up the right to appeal the guilty plea, conviction, and the sentence imposed . . . as long as the sentence does not exceed the applicable statutory maximum sentences." The appeal waiver encompasses Rogers's challenges to both

[1] There is a typographical error in the Judgment of Conviction. It should read carrying a firearm "during and in relation to" a drug trafficking crime instead of carrying a firearm "in furtherance of" the same.

his conviction and his sentence. Rogers and his counsel signed the Plea Agreement, and Rogers acknowledged that his decision to plead guilty was made voluntarily, with a full understanding of the agreement. And at the plea colloquy, Rogers affirmed he understood that he was waiving his right to appeal.

Rogers nevertheless contends that his plea was not knowing and voluntary because the title of the charge in the Indictment and Plea Agreement was mislabeled as carrying a firearm "in furtherance of" instead of carrying a firearm "during and in relation to" a drug trafficking crime, thus conflating the two clauses of 18 U.S.C. § 924(c). He argues that this conflation, which the district court repeated at the plea colloquy, deprived him of fair notice of the criminal charges against him. We disagree.

Any typographical conflation in the title of the offense did not deprive Rogers of fair notice because the Indictment and Plea Agreement consistently tracked the required statutory elements of the offense charged. That is, Rogers was accurately advised of the elements of the charge against him. *See Bradshaw v. Stumpf*, 545 U.S. 175, 182–83 (2005). And none of the exceptions Rogers raises to the appellate waiver apply here. Because Rogers's appeal is barred by the waiver of appellate rights contained in the Plea Agreement, we affirm his conviction. *See Minasyan*, 4 F.4th at 777–78.

2. Even if we overlooked the waiver in the Plea Agreement and proceeded to

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the merits, Rogers's claims still fail. First, Rogers argues he was charged with a non-existent federal criminal offense. Reviewing for plain error, we conclude there was none. *See United States v. Qazi*, 975 F.3d 989, 992 (9th Cir. 2020). Rogers was not charged with a non-existent federal offense. The Indictment and Plea Agreement referenced the correct charging statute and set forth the essential elements of the offense the Government intended to prove. *See United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000) ("[T]he test of sufficiency of the indictment is not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards."). And this Circuit has consistently held that conflation of the elements of § 924(c) does not constitute reversable error. *See, e.g., United States v. Thongsy*, 577 F.3d 1036, 1043 (9th Cir. 2009). Rogers was adequately apprised of the essential elements of the crime charged, and sufficient evidence supported the conviction of the charged offense.

3. Next, Rogers argues his guilty plea lacked an adequate factual basis to support his 18 U.S.C. § 924(c) conviction in violation of Federal Rule of Criminal Procedure 11(b)(3). We review Rogers's unpreserved Rule 11(b)(3) challenge for plain error and find none here. *See United States v. Monzon*, 429 F.3d 1268, 1271 (9th Cir. 2005). The facts stated in Rogers's Plea Agreement provided sufficient factual basis to support his conviction for carrying a firearm "during and in relation to" a drug trafficking offense.

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4. Rogers further argues that the district court's plea colloquy violated Fed. R. Crim. P. 11(b)(1)(G) because the conflation in the title of his offense deprived him of fair notice of the essential elements of the charges against him. Even assuming a Rule 11 violation occurred, this claim fails because any error did not affect Roger's substantial rights.

Rule 11 requires the court to "address the defendant personally in open court[] . . . and inform [him] of, and determine that [he] understands . . . the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G). Because Rogers did not object below, on plain error review, he bears the burden of showing that any Rule 11 error affected his substantial rights. *See United States v. Monzon*, 429 F.3d 1268, 1271–72 (9th Cir. 2005); *compare id. with United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139 (9th Cir. 2013) ("Because Arqueta–Ramos preserved her Rule 11 objection, the government has 'the burden of persuasion with respect to prejudice.'" (citation omitted)).

The record does not demonstrate a reasonable probability that the prosecutor and district court's mislabeling of the title of the charged offense impacted Rogers's plea decision. At sentencing, Rogers expressed no confusion or desire to disavow his plea. And the facts presented in the factual basis section of the Plea Agreement supported a conviction for carrying a firearm "during and in relation to" a drug trafficking offense. So even assuming there was a Rule 11 violation, Rogers has

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failed to show that any error affected his substantial rights. *See Monzon*, 429 F.3d at 1271–72.

5. Rogers's final challenge is that the Government violated his due process rights by improperly refusing to file a motion for sentence reduction under 18 U.S.C. § 3553(e) based on his substantial assistance. We review *de novo* the legality of a sentence and affirm. *United States v. Murphy*, 65 F.3d 758, 762 (9th Cir. 1995).

Rogers does not make a "substantial threshold showing" that the Government had unconstitutional motives or acted arbitrarily. *See Wade v. United States*, 504 U.S. 181, 185–86 (1992); *see also Murphy*, 65 F.3d at 764 ("Maintaining the effectiveness of the plea negotiation process is a legitimate governmental interest."). To show the Government's alleged bad faith, Rogers relies on a presentation of evidence demonstrating the extent of his assistance. But a prosecutorial decision not to move pursuant to § 3553(e) when a cooperator has provided substantial assistance is not enough to suggest improper motive, nor is the "failure to acknowledge or appreciate [the cooperator's] help . . . ." *Wade*, 504 U.S. at 187. Without more, Rogers has not met his substantial burden of showing that the Government's failure was wholly unrelated to any governmental interest. *See id.* at 186.

For these reasons, we affirm the district court's sentence and Rogers's Judgment of Conviction. We remand to the district court to correct the typographical

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error in the Judgment from "in furtherance of" to "during and in relation to" to properly reflect the elements of the § 924(c) offense charged in the Indictment. *See United States v. Kilbride*, 584 F.3d 1240, 1259 (9th Cir. 2009).

AFFIRMED and REMANDED.

App. A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 19 2024

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN ROGERS, Defendant-Appellant.	No. 22-10323 D.C. No. 2:17-cr-00018-JAM-1 Eastern District of California, Sacramento ORDER

Before: LEE and BRESS, Circuit Judges, and NAVARRO,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Lee and Judge Bress have voted to deny the petition for rehearing en banc, and Judge Navarro has recommended denying the petition. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Gloria M. Navarro, United States District Judge for the District of Nevada, sitting by designation.

App. B