

Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,	)	
	)	
Plaintiff,	)	No. CR-15-8060-PCT-SPL (BSB)
	)	
vs.	)	Phoenix, Arizona
	)	March 3, 2016
Michael K. Judy,	)	10:03 a.m.
	)	
Defendant.	)	
	)	

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

CHANGE OF PLEA

APPEARANCES:

For the Plaintiff:

U.S. Attorney's Office
By: **Anthony William Church, Esq.**
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004

For the Defendant:

Gonzalez & Smith
By: **Michael John Smith, Esq.**
2340 West Ray Road, Suite 1
Chandler, Arizona 85224

Navajo Interpreter: Casey Watchman

Official Court Reporter:

Candy L. Potter, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc 36
Phoenix, Arizona 85003-2151
(602) 322-7246

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

CR-15-8060-PCT-SPL - March 3, 2016

1 (Proceedings begin at 10:03 a.m.)

2 THE CLERK: Criminal case 15-8060, United States of
3 America versus Michael K. Judy. This is the time set for
4 change of plea hearing.

5 MR. CHURCH: Good morning, Your Honor, Anthony Church
6 appearing on behalf of Christina Covault for the United States.

10:03:22

7 THE COURT: Mr. Church, good morning to you.

8 MR. SMITH: Good morning, Your Honor, Michael Smith on
9 behalf of Mr. Judy, who is present and in custody.

10 THE COURT: Mr. Smith, good morning to you.

10:03:34

11 Mr. Judy, this is the time set for your change of plea
12 hearing.

13 Sir, what language do you speak and understand the
14 best?

15 THE DEFENDANT: I would prefer in Navajo, sir.

10:03:46

16 THE COURT: And, sir, who are you?

17 THE INTERPRETER: My name is Casey Watchman.

18 THE COURT: Sir, if you'll speak into the microphone,
19 please.

20 THE INTERPRETER: My name is Casey Watchman. I'm a
21 certified court interpreter.

10:03:57

22 THE COURT: Sir, thank you for coming in and assisting
23 us this morning.

24 Sir, what is your true and correct name?

25 THE DEFENDANT: Michael K. Judy.

10:04:07

CR-15-8060-PCT-SPL - March 3, 2016

1 THE COURT: Okay. Sir, if you would move the
2 microphone, Mr. Smith, in front of the interpreter, since he's
3 going to translate everything.

4 And, sir, if you could speak directly into the
5 microphone that would be very, very helpful. 10:04:26

6 Sir, it's very important that you answer all of my
7 questions truthfully this morning. If you don't, the
8 U.S. Attorney's Office, they can prosecute you for the crime of
9 perjury or false statement, and those are both crimes that
10 carry prison sentences. 10:04:43

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: Please administer the oath.

14 THE CLERK: Please raise your right hand.

15 (The defendant is sworn.) 10:05:12

16 THE CLERK: Thank you.

17 THE COURT: Sir, how old are you?

18 THE DEFENDANT: I'll be 62.

19 THE COURT: And how much education do you have?

20 THE DEFENDANT: I went up to 12th grade. 10:05:36

21 THE COURT: Did you obtain your G.E.D.?

22 THE DEFENDANT: No, I did not.

23 THE COURT: Mr. Smith, if you could please lay the
24 foundation as to how the Plea Agreement was explained to your
25 client. 10:06:01

CR-15-8060-PCT-SPL - March 3, 2016

1 MR. SMITH: Yes, Your Honor. Mr. Watchman is --

2 THE COURT: Mr. Smith, my apologies. I'm going to ask
3 you to slow way down, because this is not a real -- he's not a
4 realtime interpreter. What he does is he'll listen to one or
5 two sentences, write them down, and then he'll tell the
6 defendant exactly everything that's going on.

10:06:16

7 MR. SMITH: Yes, Your Honor.

8 I contacted Mr. Casey, as a certified Navajo
9 interpreter. I made arrangements for Mr. Casey to appear
10 telephonically. I met with Mr. Judy on February 29th, 2016, at
11 Correction Corporation of America.

10:06:38

12 Mr. Watchman had been provided with a copy of the Plea
13 Agreement in this matter. Mr. Watchman then via telephone read
14 the entire plea word for word, translating into the Navajo
15 language.

10:07:17

16 THE COURT: Lisa, where's the original Plea Agreement?
17 (Discussion off the record between the Court and courtroom
18 deputy.)

19 MR. SMITH: After completion of reading of the plea, I
20 utilized Mr. Watchman's assistance to answer any questions
21 Mr. Judy may have with regard to the plea.

10:07:38

22 THE COURT: Thank you, Mr. Smith.

23 MR. SMITH: And I guess I should make it clear for the
24 record, Mr. Judy is, I would say, about 95 percent proficient
25 in English. But some of the complicated terms and discussions,

10:07:58

CR-15-8060-PCT-SPL - March 3, 2016

1 we both agreed that Navajo would be appropriate to be utilized
2 to make sure there was no error in understanding.

3 THE COURT: Thank you, Mr. Smith.

4 And I'm going to ask you, sir, to move your microphone
5 as well and speak directly into it. 10:08:17

6 Mr. Judy, in the last 48 hours, have you used any
7 drugs, prescription medication, alcohol, or anything that would
8 make it difficult for you to understand what's being said this
9 morning?

10 THE DEFENDANT: No. 10:08:37

11 THE COURT: Have you ever been treated for a mental or
12 emotional disorder?

13 THE DEFENDANT: No.

14 THE COURT: Does either counsel believe the defendant
15 is not competent to enter a plea? 10:09:13

16 MR. CHURCH: No, Your Honor.

17 MR. SMITH: No, Your Honor.

18 THE COURT: Mr. Judy, I have your original Plea
19 Agreement here. It's a ten-page document. And on page number
20 10 I recognize the signature of the federal prosecutor. On 10:09:33
21 page number 9 I recognize the signature of your lawyer,
22 Mr. Smith. Also on page number 9 above your typewritten name I
23 see another signature.

24 Did you sign off on this Plea Agreement?

25 THE DEFENDANT: I signed my name there. 10:09:57

CR-15-8060-PCT-SPL - March 3, 2016

1 THE COURT: To your Plea Agreement?

2 THE DEFENDANT: Yes, that's what they were asking for.

3 THE COURT: Sir, you told me earlier that you've gone
4 through the -- up to the 12th grade. Did you learn how to read
5 English?

10:10:23

6 THE DEFENDANT: Yes.

7 THE COURT: And your lawyer stated that you could
8 speak English 95 percent proficiently; is that correct?

9 THE DEFENDANT: That's true, but I have problems
10 understanding complicated words, and I have trouble
11 understanding the meanings of those long words.

10:11:04

12 THE COURT: Did you have a chance to review the entire
13 Plea Agreement with your lawyer, Mr. Smith?

14 THE DEFENDANT: Yes.

15 THE COURT: Did Mr. Smith answer any and all questions
16 that you had about your Plea Agreement?

10:11:32

17 THE DEFENDANT: Yes, he made it clear.

18 THE COURT: Do you understand the entire Plea
19 Agreement?

20 THE DEFENDANT: With the exception of the length of
21 sentence, the date when I would have completed my sentence,
22 that I don't understand.

10:11:59

23 THE COURT: Well, sir, you wouldn't be able to
24 understand that yet because none of that has been established.
25 And I'll explain that to you later.

10:12:31

CR-15-8060-PCT-SPL - March 3, 2016

1 THE DEFENDANT: Okay.

2 THE COURT: Has anyone forced, threatened or coerced
3 you into entering into this Plea Agreement?

4 THE DEFENDANT: No.

5 THE COURT: Did anyone make you any promises to get
6 you to enter into this Plea Agreement, other than the promises
7 that are contained in your Plea Agreement?

10:13:02

8 THE DEFENDANT: Yes.

9 THE COURT: What other promises were made to you?

10 My apologies, clearly my question was confusing.

10:13:47

11 You have this ten-page document. It's called a Plea
12 Agreement. It's a contract that you have with the United
13 States Federal Government.

14 My question is: Are all the promises contained only
15 in this document?

10:14:16

16 THE DEFENDANT: If that's the way it's -- if that's
17 the way that I understand, it is fine.

18 MR. SMITH: Your Honor, for clarification, counsel can
19 avow to the Court that there has been no additional promises
20 relayed to Mr. Judy outside the four corners of this document.

10:14:56

21 THE COURT: Is that correct, Mr. Judy?

22 THE INTERPRETER: Your Honor, the interpreter needs to
23 have Mr. Smith restate his -- his presentation.

24 MR. SMITH: Defense counsel promises the Court that no
25 promises have been given to Mr. Judy besides those set forth in

10:15:25

CR-15-8060-PCT-SPL - March 3, 2016

1 the plea.

2 THE COURT: Is that correct, Mr. Judy?

3 THE DEFENDANT: Yes.

4 THE COURT: Are you pleading guilty voluntarily on
5 your own free will because you believe you're guilty of this
6 crime?

10:16:09

7 THE DEFENDANT: Yes, I did it.

8 THE COURT: Sir, your Plea Agreement, it
9 contemplates -- or calls for you to plead guilty to Count
10 No. 12 of the Indictment. And the crime is Aggravated Sexual
11 Abuse of a Minor, which is a Class A felony offense.

10:16:59

12 Is that the crime you wish to plead guilty to?

13 THE DEFENDANT: Yes.

14 THE COURT: Sir, this crime under 18 U.S.C. Section
15 2241 is punishable by a maximum fine of \$250,000, a maximum
16 term of your natural life in federal prison, or both, and a
17 term of supervised release of five years up to life.

10:18:03

18 Do you understand the potential maximum punishment in
19 your case?

20 THE DEFENDANT: Yes.

10:19:02

21 THE COURT: Sir, each supervised release violation may
22 carry a maximum penalty of five years of imprisonment.

23 Do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: In addition to that, at the time of

10:19:35

CR-15-8060-PCT-SPL - March 3, 2016

1 sentencing I will order you to pay a \$100 special assessment
2 for the count of conviction.

3 Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: Sir, I have this document here, it's
6 called the Federal Sentencing Table. There should be a copy of
7 the Federal Sentencing Table on the lectern in front of you.

10:20:04

8 Have you had a chance to review the Federal Sentencing
9 Table with your lawyer, Mr. Smith?

10 THE DEFENDANT: Yes.

10:20:24

11 THE COURT: Sir, your Plea Agreement, it contains
12 certain promises you've made with the United States and they've
13 made with you.

14 THE DEFENDANT: Yes.

15 THE COURT: The first promise is called a stipulation
16 that your sentence will not be less than 120 months or more
17 than 288 months.

10:21:21

18 Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: And that will be followed by a term of
21 lifetime supervised release.

10:21:59

22 Do you understand that?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you also understand that you'll be
25 required to follow sex offender conditions while you're on

10:22:19

~~CR-15-8060-PCT-SPL - March 3, 2016~~

1 supervised release?

2 THE DEFENDANT: Yes, it is written there.

3 THE COURT: And have you gone over section 3b in
4 detail with your lawyer, Mr. Smith?

5 THE DEFENDANT: Yes. 10:22:53

6 THE COURT: There's also a recommendation for what's
7 called acceptance of responsibility.

8 THE DEFENDANT: Yes.

9 THE COURT: Basically if you sit down with the
10 probation officer, and if you provide that officer with
11 truthful information about how you violated the law in the
12 United States, the U.S. Attorney's Office will recommend two
13 level -- a two-level reduction and an additional one-level
14 reduction if you have an offense level of a 16 or more. 10:23:32

15 Do you understand that? 10:24:01

16 THE DEFENDANT: Yes.

17 THE COURT: Any recommendation that you have in your
18 Plea Agreement I'm not required to go along with. And if I
19 reject a recommendation in your Plea Agreement, you cannot
20 withdraw from your plea or your Plea Agreement. 10:24:55

21 Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: The stipulations in your Plea Agreement,
24 they're promises. And if the promises aren't kept, you can get
25 out of your Plea Agreement. 10:25:35

CR-15-8060-PCT-SPL - March 3, 2016

1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: If your plea is accepted and if I impose a
4 sentence permitted by the terms of your agreement --

5 THE INTERPRETER: Your Honor, please.

10:26:17

6 THE COURT: -- you will not be permitted to withdraw
7 from your plea or challenge your judgment and sentence on
8 appeal or in a collateral proceeding --

9 THE DEFENDANT: Yes.

10 THE COURT: -- with the exception of an appeal based
11 on ineffective assistance of counsel or prosecutorial
12 misconduct.

10:26:57

13 Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Marshal, can you tell your fellow marshal
16 to stay awake in my courtroom, please?

10:27:34

17 MARSHAL: Yes, sir.

18 THE COURT: If you need to stand up to stay awake,
19 just stand up, Marshal.

20 Sir, after you serve your prison sentence you'll then
21 be placed on what's called supervised release and you'll be
22 required to follow certain conditions imposed by me.

10:27:44

23 THE DEFENDANT: Yes.

24 THE COURT: If you violate any of those conditions you
25 could receive more time in prison in this case.

10:28:11

CR-15-8060-PCT-SPL - March 3, 2016

1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Mr. Smith, is your client currently on
4 probation, parole or any other punishment?

5 MR. SMITH: He is not.

10:28:36

6 THE COURT: Sir, there's also a section in your Plea
7 Agreement on restitution. And it states, regardless of the
8 resulting loss amount that you will provide full restitution.
9 That includes costs for emotional damage, such as counseling
10 and therapy, but it will not be more than \$100,000.

10:29:07

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: It also states in your Plea Agreement that
14 you agree not to sell, hide, waste, and you'll make a full
15 accounting of your assets.

10:29:52

16 Do you agree to do that?

17 THE DEFENDANT: Yes.

18 THE COURT: And it also goes on to state on page
19 number 4 that you agree to provide your per capita payments.

20 THE DEFENDANT: Yes.

10:30:47

21 THE COURT: After I review your Plea Agreement, if I
22 conclude that any provision is inappropriate, I may reject your
23 Plea Agreement and give you an opportunity to withdraw your
24 Plea Agreement.

25 Do you understand that?

10:31:02

CR-15-8060-PCT-SPL - March 3, 2016

1 THE DEFENDANT: Yes.

2 THE COURT: If you commit another crime against the
3 United States after this one, your conviction in this case
4 could be used to make whatever sentence you receive for the new
5 offense even longer or harsher than it otherwise would be.

10:31:45

6 Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: Sir, as a person accused of a crime here
9 in the United States you have certain rights guaranteed to you
10 by the United States Constitution.

10:32:27

11 THE DEFENDANT: Yes.

12 THE COURT: You have a right to remain silent and to
13 maintain your innocence throughout all stages of your case, as
14 well as to be represented by a lawyer through each phase of
15 your case.

10:32:58

16 THE DEFENDANT: Yes.

17 THE COURT: You have a right to confront and
18 cross-examine Government witnesses, as well as present your own
19 evidence and compel witnesses to come to court and testify on
20 your behalf.

10:33:39

21 THE DEFENDANT: Yes.

22 THE COURT: The burden of proof is always on the
23 United States Government to prove that you're guilty, it never
24 shifts to you for you to prove that you're innocent.

25 Do you understand that?

10:34:55

CR-15-8060-PCT-SPL - March 3, 2016

1 THE DEFENDANT: Yes.

2 THE COURT: Sir, if your plea is accepted and if I
3 impose a sentence permitted by the terms of your Plea
4 Agreement, you will not be permitted to withdraw from your
5 plea.

10:35:10

6 Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: I went over your appellate rights earlier,
9 and they're actually listed on page number 5, section number 5.

10 Did you go through all of those appellate rights with
11 your lawyer, Mr. Smith?

10:35:37

12 THE DEFENDANT: Yes.

13 THE COURT: Sir, for Count No. 12, the United States
14 Government would need to prove the following for the crime of
15 Aggravated Sexual Abuse of a Minor:

10:36:14

16 On or between April the 18th, 2001, and April the
17 17th, 2003, in the District of Arizona.

18 Go ahead.

19 The first element they would need to prove beyond a
20 reasonable doubt is that you knowingly engaged in a sexual act
21 with the victim.

10:37:10

22 Second, at the time the victim was a child under the
23 age of 12 years.

24 Third, the offense was committed in the District of
25 Arizona within Indian Country.

10:37:55

CR-15-8060-PCT-SPL - March 3, 2016

1 At the time of the crime you were an Indian,
2 specifically you had a quantum of Indian blood and was a member
3 or was affiliated with the Navajo Nation, which is a
4 federally-recognized tribe, as evidenced by your Certificate of
5 Indian Blood.

10:38:31

6 Here, "sexual act" means contact between the mouth and
7 the vulva.

8 Mr. Judy, do you understand the elements the
9 United States Government would need to prove beyond a
10 reasonable doubt?

10:39:43

11 THE DEFENDANT: Yes.

12 THE COURT: In your own words, tell me exactly why you
13 believe you're guilty of this crime. In other words, what did
14 you do?

15 THE DEFENDANT: Well, first of all, these things that
16 happened should not have happened. But from me, I did it, but
17 I would like to say some more things to try and explain it.

10:40:10

18 THE COURT: Was it a boy or a girl?

19 THE DEFENDANT: It was a girl.

20 THE COURT: How old?

10:42:06

21 THE DEFENDANT: At the time, I don't really know, but
22 it must have been under the age of 12.

23 THE COURT: And where did this occur, what
24 Reservation?

25 THE DEFENDANT: It happened at my area where I live.

10:42:41

CR-15-8060-PCT-SPL - March 3, 2016

1 THE COURT: Where did you live, which Reservation?

2 THE DEFENDANT: It's the Navajo Reservation.

3 THE COURT: In what state?

4 THE DEFENDANT: In Arizona.

5 THE COURT: What was the date?

10:43:13

6 THE DEFENDANT: I don't recall the date.

7 THE COURT: Was it between April the 18th, 2001, and
8 April the 17th, 2003?

9 THE DEFENDANT: I believe it happened between those
10 dates.

10:43:56

11 THE COURT: Mr. Smith, if you could please lay the
12 foundation as to the discovery received in the case and why
13 your client believes that the -- that count occurred during
14 that time frame.

15 MR. SMITH: Yes, Your Honor.

10:44:11

16 Discovery was provided by the Government in this
17 matter. Upon its review there are statements from the victim,
18 Jane Doe 2, and it places the incident occurring within the
19 time frame set forth in the plea.

20 THE COURT: Do you agree with that, Mr. Judy?

10:44:37

21 THE DEFENDANT: Yes.

22 THE COURT: Specifically, Count No. 12, where you're
23 charged with Aggravated Sexual Abuse of a Minor, what did you
24 do to this minor girl?

25 Did you put the child in your truck?

10:45:21

CR-15-8060-PCT-SPL - March 3, 2016

1 THE DEFENDANT: I didn't ask for her to come over.
2 She got in -- she got in by herself.

3 THE COURT: When she was in your truck, did she lay
4 down on her back?

5 THE DEFENDANT: Yeah, she laid on her back. 10:45:53

6 THE COURT: Did you pull her pants down?

7 THE DEFENDANT: No, I didn't, she did it herself.

8 THE COURT: She just got into your truck and pulled
9 her own pants down and she's eight years old?

10 THE DEFENDANT: I don't believe she was eight. I 10:46:21
11 think she was closer to 12 at the time.

12 THE COURT: You didn't answer my question.

13 THE INTERPRETER: Your Honor, perhaps the Court can
14 pose that question again.

15 THE COURT: He just mumbled something. What did he 10:47:09
16 say?

17 THE INTERPRETER: He said, I'll concede to whatever
18 you're saying. If she's eight, then she's --

19 THE COURT: No, you don't concede to anything I'm
20 saying. You either did it or you didn't. 10:47:20

21 Did you put your mouth on her vulva?

22 THE DEFENDANT: I did that, but I did not penetrate.

23 THE COURT: Did you do it on purpose?

24 THE DEFENDANT: I know I did it, but I feel that there
25 was something else compelling. How do you say it? Perhaps I 10:48:46

CR-15-8060-PCT-SPL - March 3, 2016

1 feel like it was out of control.

2 THE COURT: Did you know this was a child?

3 THE DEFENDANT: Yes.

4 THE COURT: Are you Native American?

5 THE DEFENDANT: Yes.

10:49:08

6 THE COURT: How do you know you're Native American?

7 THE DEFENDANT: My mom gave birth to me, and she told
8 me that I am who I am.

9 THE COURT: Mr. Church, is there anything you would
10 like to place on the record to supplement the factual basis in
11 the case?

10:49:33

12 MR. CHURCH: Certainly, Your Honor. I'll read in --
13 for the record I'll read in the factual basis as stated in the
14 Plea Agreement.

15 It's on or between April 18, 2001, and April 17, 2003
16 in the District of Arizona, within the confines of the Navajo
17 Nation, defendant Michael K. Judy, an Indian, took the victim,
18 Jane Doe 2, as named in Count 12 of the Indictment, who was
19 then approximately eight or nine years old, into his truck.

10:49:43

20 Inside the truck he made the victim lay down while he
21 licked her genitalia, that is, put his mouth on her vulva.

10:50:06

22 Defendant further admits that he was an Indian at the
23 time of the crime. Specifically, at the time of the crime
24 defendant had some quantum of Indian blood and was a member of
25 or was affiliated with the Navajo Nation, which is a

10:50:23

CR-15-8060-PCT-SPL - March 3, 2016

1 federally-recognized tribe, as evidenced by the defendant's
2 Certificate of Indian Blood.

3 THE COURT: Mr. Judy, is the factual basis all true?

4 THE DEFENDANT: Yes.

5 THE COURT: Mr. Church, can the United States avow
6 that if this matter were to proceed to trial you could prove
7 each and every element beyond a reasonable doubt?

10:50:44

8 MR. CHURCH: Yes, Your Honor.

9 THE COURT: Mr. Judy, are you satisfied with all the
10 assistance Mr. Smith has provided to you in your case?

10:51:05

11 THE DEFENDANT: Yes, he worked very well for me.

12 The only thing he didn't ask me was what are my living
13 conditions at my home.

14 MR. SMITH: If I could have a moment, Judge.

15 THE COURT: Of course.

10:51:46

16 (Discussion off the record between Mr. Smith and the
17 defendant.)

18 MR. SMITH: And for clarification on the record to
19 just make it clear, he's regarding information that we believe
20 is relevant to sentencing with regard to his upbringing,
21 et cetera. And so we --

10:52:12

22 THE COURT: I didn't hear the last --

23 MR. SMITH: I got something in my throat. I'm sorry.

24 THE COURT: That's okay. Just pull the microphone
25 closer.

10:52:23

CR-15-8060-PCT-SPL - March 3, 2016

1 MR. SMITH: Judge, he was mentioning something that we
2 intend to advise the Court of for sentencing with regard to his
3 upbringing and circumstances that may be mitigating with regard
4 to the sentence. And I advised that this is not the time, but
5 that would be raised at sentencing.

10:52:38

6 THE COURT: Thank you very much.

7 Mr. Judy, would you like to give up your right to go
8 to trial so that you can enter a plea of guilty this morning?

9 THE DEFENDANT: What are -- what are those things that
10 are involved in a trial?

10:53:15

11 THE COURT: Sir, a trial means that the United States
12 Government must come into this room and provide the jury
13 members with sufficient information that would leave each and
14 every jury member firmly convinced of your guilt before any of
15 those jury members can vote in finding you guilty. That's a
16 trial in case you wish to maintain your innocence.

10:53:36

17 I believe what you're trying to do is enter a plea of
18 guilty. You've already told me that you're guilty of this
19 crime. In order to enter the plea of guilty you must waive
20 your right to go to trial.

10:53:57

21 THE DEFENDANT: Yes.

22 THE COURT: So you wish to enter a plea of guilty?

23 THE DEFENDANT: This is where we are now. I will no
24 longer hide this. I will accept the events that happened, what
25 I've done. And this is not something that I wish to hide

10:55:45

CR-15-8060-PCT-SPL - March 3, 2016

1 anymore. I will make -- try to make things right. And in time
2 I wish to be forgiven, and perhaps the Lord will forgive me as
3 well.

4 THE COURT: Do you wish to plead guilty to Count
5 No. 12? Yes or no. 10:56:10

6 THE DEFENDANT: That's correct.

7 THE COURT: Sir, as to Count 12 of the Indictment,
8 charging you with Aggravated Sexual Abuse of a Minor, which is
9 a Class A felony under 18 U.S.C. Section 1153 and 2241(c), sir,
10 how do you wish to plead, guilty or not guilty? 10:56:44

11 THE DEFENDANT: Yes, I plead guilty.

12 THE COURT: Sir, this Court accepts your plea of
13 guilty. This Court also finds that you've knowingly,
14 intelligently and voluntarily entered a plea of guilty, that
15 you understand the charge, and that there's a factual basis for 10:57:19
16 your plea, and also that you're competent to enter a plea of
17 guilty.

18 It's ordered that a Presentence Report be prepared in
19 your case.

20 And your sentencing is set for May the 23rd, 2016, 10:57:59
21 at 2:00 o'clock in the afternoon. Again, May 23rd, 2016, at
22 2:00 o'clock in the afternoon.

23 The trial set for the 5th of April 2016 is vacated.

24 Is there anything else from the United States?

25 MR. CHURCH: No. Thank you, Your Honor. 10:58:23

~~CR-15-8060-PCT-SPL - March 3, 2016~~

1 THE COURT: Mr. Smith?

2 MR. SMITH: No. Thank you, Your Honor.

3 THE COURT: You're welcome.

4 The hearing is adjourned.

5 (Proceedings concluded at 10:58 a.m.)

10:58:28

6

7

-oOo-

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CR-15-8060-PCT-SPL - March 3, 2016

C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 28th day of September, 2016.

s/Candy L. Potter
Candy L. Potter, RMR, CRR

Appendix B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,	)	
	)	
Plaintiff,	)	No. CR-15-8060-PCT-SPL(BSB)
	)	
vs.	)	Phoenix, Arizona
	)	August 8, 2016
Michael K. Judy,	)	10:54 a.m.
	)	
Defendant.	)	
	)	

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING

APPEARANCES:

For the Plaintiff:

U.S. Attorney's Office

By: **Christina Covault, Esq.**

40 North Central Avenue, Suite 1200

Phoenix, Arizona 85004

For the Defendant:

Gonzalez & Smith

By: **Michael John Smith, Esq.**

2340 West Ray Road, Suite 1

Chandler, Arizona 85224

Navajo Interpreter: Casey Watchman - appearing telephonically

Official Court Reporter:

Candy L. Potter, RMR, CRR

Sandra Day O'Connor U.S. Courthouse, Suite 312

401 West Washington Street, Spc 36

Phoenix, Arizona 85003-2151

(602) 322-7246

Proceedings Reported by Stenographic Court Reporter

Transcript Prepared by Computer-Aided Transcription

CR-15-8060-PCT-SPL - August 8, 2016

1 (Proceedings begin at 10:54 a.m.)

2 THE CLERK: This is case number CR-15-8060, United
3 States of America versus Michael K. Judy, on for sentencing.

4 MS. COVAULT: Good morning, Your Honor, Christina
5 Covault for the United States. 10:54:13

6 THE COURT: Miss Covault, good morning to you.

7 MR. SMITH: Good morning, Your Honor, Michael Smith on
8 behalf of Mr. Judy, who is present.

9 THE COURT: Mr. Smith, good morning to you.

10 Christine, who is the interpreter? 10:54:23

11 THE CLERK: Your Honor, it's Casey Watchman.

12 THE COURT: Mr. Watchman, are you there?

13 THE INTERPRETER: I am, Your Honor.

14 THE COURT: Sir, if at any point you're having a
15 difficult time keeping up, just let me know. But I'll make
16 sure the parties go really slow. I'll go really slow. 10:54:32

17 And thank you for helping us.

18 THE INTERPRETER: Your Honor, I have one question.

19 THE COURT: Yes.

20 THE INTERPRETER: Does the interpreter -- does the
21 defendant have a headset, or is this an open mic system? 10:54:45

22 (Discussion held off the record.)

23 THE COURT: It's just open mic.

24 What do you think would work best for you?

25 THE INTERPRETER: I just prefer to know. If he has a 10:55:04

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 headset then I can pretty much follow along simultaneously. If
2 it's an open mic then I need to have English first and then
3 pause for interpreting.

4 THE COURT: Yeah, we're just going to have open mic.
5 That's why it will take a long time. And I'll ask the parties 10:55:25
6 to make sure they're really, really slow when they're talking
7 about everything. Okay?

8 THE INTERPRETER: That's fine, Your Honor.

9 THE COURT: Mr. Smith, does your client speak any
10 English? 10:55:36

11 MR. SMITH: Your Honor, he is fluent in English. We
12 utilize the Navajo interpreter because some concepts, both the
13 religious ceremonies and terms, are necessary in Navajo. And
14 some legal concepts may be a little beyond his grasp. But his
15 English is completely fluent. 10:55:55

16 THE COURT: During the course of your representation,
17 which has been a long time, have you had any difficult -- any
18 difficulty communicating with him in English?

19 MR. SMITH: I have not. In fact, in the last month
20 I've seen him four times, and we've conversed in English. 10:56:07

21 He did express there were some thoughts that had
22 Navajo terms that he had difficulty explaining to me, and it
23 dealt with more religious aspects of his belief system. But
24 other than that we had no difficulty at all.

25 THE COURT: Mr. Judy, your lawyer just indicated that 10:56:25

CR-15-8060-PCT-SPL - August 8, 2016

1 you speak fluent English. But I want to make sure that you're
2 in a position to defend yourself. And I want to make sure you
3 don't miss anything during the course of this sentencing.

4 So, sir, would you like to conduct the sentencing in
5 the English language, but if you have a problem with a concept, 10:56:42
6 would it work for you to talk to Mr. Smith and then we can
7 utilize our interpreter, Navajo interpreter?

8 Hello?

9 THE INTERPRETER: Do you want me to interpret that,
10 Your Honor? 10:57:03

11 THE COURT: No, apparently he speaks fluent English.

12 Did you hear anything I said, Mr. Judy?

13 THE DEFENDANT (In English): Yes.

14 THE COURT: Sidebar.

15 THE DEFENDANT (In English): I understand some -- 10:57:17

16 THE COURT: Sidebar.

17 (At sidebar on the record.)

18 THE COURT: When you interact with him -- when you say
19 something to him, does he take a minute or two to grasp it
20 before he responds? 10:57:35

21 MR. SMITH: He does listen to it and then respond
22 briefly thereafter.

23 Also, every time I initiate with him he is also very
24 reticent to speak for probably five, ten minutes of our
25 meeting, and then he becomes more -- you know, feels more 10:57:49

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 comfortable and speaks more fluently.

2 I know he desires to address the Court in Navajo so
3 his concepts are accurate.

4 THE COURT: Okay.

5 MR. SMITH: I know it will be difficult to make sure 10:58:01
6 he understands everything. He prefers to speak in Navajo. I
7 think it's comfortable for him, I have to admit. I think it
8 would be best for the proceeding if it was done in Navajo, just
9 to make sure.

10 To give the Court an example, in the memorandum I 10:58:18
11 said -- all that information I obtained while conversing with
12 him in English, so obviously the details of our conversation is
13 such that I don't have concerns about his understanding of
14 English.

15 But given the seriousness of this, I think it's 10:58:31
16 essential he catch every word here today.

17 THE COURT: Okay. Well, do you have any issues with
18 us going forward only in Navajo?

19 MS. COVAULT: No, Your Honor.

20 THE COURT: Okay. 10:58:43

21 (End of discussion at sidebar.)

22 THE COURT: Mr. Interpreter, we -- it's my plan to
23 conduct the entire hearing in the Navajo language. So when I
24 finish talking, I'll need you to translate to Mr. Judy what I
25 basically just said. 10:59:03

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 So if you can do that.

2 (Navajo interpretation to the Defendant begins.)

3 THE COURT: Before we get to the Presentence
4 Investigation Report, we have a few objections.

5 The defendant, through counsel, objected to paragraph 10:59:37
6 94 and 96 of the Presentence Report. The defendant alleged
7 that the calculation of applicable guidelines for Count 15 was
8 erroneous. The defendant also contends the guideline
9 imprisonment range would be 87 to 108 months. That would be
10 based on a total offense level of 29 and a Criminal History 11:01:06
11 Category of a I.

12 This Court sustains the defense objection. However,
13 the -- sustaining the objection will not change the calculation
14 for the count of conviction.

15 Mr. Smith, do you have any additional objections? 11:01:54

16 MR. SMITH: No, Your Honor.

17 And I did -- I'm sorry. And I did receive the State's
18 response and the changed final Presentence Report, and I did
19 not file --

20 THE COURT: Okay. You're talking a lot. 11:02:16
21 Everything -- everything needs to be translated to the Navajo
22 language.

23 MR. SMITH: Let me start over. And I apologize. It
24 will take me a minute --

25 THE COURT: I'll tell you what, do you have any 11:02:26

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 additional objections?

2 MR. SMITH: I do not.

3 THE COURT: Go ahead, Mr. Smith.

4 MR. SMITH: For the record I did receive the
5 Government's response, and the probation officer's revised
6 Presentence Report. I researched those issues and do not have
7 objections.

11:02:45

8 THE COURT: Mr. Judy, do you understand all of that?

9 THE DEFENDANT (In English): Yes.

10 THE COURT: Sir, I didn't hear you?

11:03:31

11 THE DEFENDANT (In English): Yes, Your Honor.

12 THE COURT: Mr. Smith, if you can move the microphone.
13 And, Mr. Judy, if you can speak directly into it.

14 And I actually appreciate you responding in the
15 English language. But if at any point you come more
16 comfortable responding in the Navajo language, you can
17 certainly do so.

11:03:52

18 Do you understand that, sir?

19 THE DEFENDANT: Yes.

20 THE COURT: Miss Covault, does the United States
21 Government have any objections to the findings in the PSR?

11:04:15

22 MS. COVAULT: No, Your Honor.

23 And I don't want to jump ahead of the Court, but in
24 light of the Court's sustaining --

25 THE COURT: Okay. That's a lot. Everything has to be

11:04:26

CR-15-8060-PCT-SPL - August 8, 2016

1 translated for him to understand what's going on.

2 MS. COVAULT: Yes, sir. No objections.

3 That's all for now, Your Honor.

4 THE COURT: Mr. Judy, this Court finds the following:

5 Based on your crime of conviction, Count No. 12, Aggravated
6 Sexual Abuse of a Minor, I find that your base offense level is
7 a 27. That's based on -- that's pursuant to Sentencing
8 Guideline Section 2A3.1(a).

11:05:15

9 Do you understand that?

10 THE DEFENDANT: Yes.

11:05:59

11 THE COURT: I also find that it's appropriate to add
12 four levels. This Court finds that you used force against
13 victims and threatened her and placed her in fear.

14 Do you understand that?

15 Do you understand that, Mr. Judy?

11:06:38

16 THE DEFENDANT (In English): Yes.

17 THE COURT: So pursuant to Sentencing Guideline
18 Section 2A3.1(b)(1), the four levels will be added.

19 The Court will add four additional levels because the
20 victim was eight or nine at the time of the offense. She had
21 not attained the age of 12. Pursuant to Sentencing Guideline
22 Section 2A3.1(b)(2)(A), the four levels will be added.

11:07:33

23 Do you understand that, Mr. Judy?

24 THE DEFENDANT: Yes.

25 THE COURT: Sir, your adjusted offense level will be a 11:08:37

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 35.

2 Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: Sir, it appears you've accepted
5 responsibility for your criminal conduct. I'm granting you
6 three levels off for acceptance of responsibility.

11:09:06

7 Do you understand that?

8 THE DEFENDANT: Yes.

9 THE COURT: Mr. Judy, your total offense level is a
10 32.

11:09:48

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: Sir, I've had a chance to review every
14 document that's part of your case file. Based on that review I
15 find that your Criminal History Category is a I based on the
16 crimes of conviction that you have in your past.

11:10:22

17 With a total offense level of a 32 and a Criminal
18 History Category of a I, I find that your guideline sentencing
19 range is 121 to 151 months of confinement.

20 Do you understand that?

11:11:01

21 THE DEFENDANT: Yes.

22 THE COURT: Mr. Judy, I've had a chance to review
23 every single document that's part of your case file, to include
24 the objections that you submitted to the Court in document
25 number 48.

11:12:01

CR-15-8060-PCT-SPL - August 8, 2016

1 I've also had a chance to review document number 49,
2 which is the sentencing memorandum.

3 I would like to commend you for your completion of the
4 Life Skills Program Daily Life. Also, congratulations on your
5 completion of the Life Skills Program for Feelings. I also
6 commend you for your completion of the Life Skills Program
7 Healthy Relationships. And last, you completed the Life Skills
8 Program of Core Skills. Congratulations for that.

11:13:06

9 The first three courses were completed the Fall of
10 2015, and the last course was completed this year.

11:14:25

11 Congratulations.

12 Mr. Smith, do you have a sentencing argument?

13 MR. SMITH: Yes, Your Honor.

14 THE COURT: Mr. Smith, I'm going to ask you to pause
15 after every sentence, please.

11:15:12

16 MR. SMITH: Very good.

17 THE COURT: You also need to approach the lectern with
18 your client, Mr. Smith.

19 Mr. Judy, you need to go with your lawyer to the
20 lectern.

11:15:47

21 Go ahead, please, Mr. Smith.

22 MR. SMITH: Yes, Your Honor.

23 And at the completion of my statements I'd ask the
24 Court to hear briefly from his sister also.

25 THE COURT: I will allow that.

11:16:12

CR-15-8060-PCT-SPL - August 8, 2016

1 MR. SMITH: Your Honor, we ask the Court to sentence
2 Mr. Judy to a sentence between 121 and 151 months.

3 THE COURT: Hold on, Mr. Smith.

4 Christine.

5 (Discussion off the record between the Court and courtroom
6 deputy.)

7 THE COURT: Mr. Smith, my apologies. Go ahead.

8 MR. SMITH: Thank you.

9 The rationale behind my argument is that would be
10 within the guidelines at the time of the offense.

11 We feel that the range provided by the 2002 guidelines
12 gives the Court discretion to take into consideration any
13 aggravating and mitigating circumstances.

14 One of the major considerations, as reflected in my
15 presentence memorandum, is the very difficult youth and even
16 into adult life that Mr. Judy had. As I set forth in my
17 pleading, the things that occurred to him are very
18 embarrassing, if you will, or shameful to him. He was not only
19 physically and sexually abused at home, he was also physically
20 and sexually abused while at boarding school.

21 As an adult his relationships were ones of low
22 self-esteem. That is, he allowed many transgressions to occur
23 with his partner. This information is very important given the
24 nature of Mr. Judy's acts.

25 In discussions with Mr. Judy, he has just begun to

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 realize the source of his inappropriate behavior. Even the
2 classes that are available at CCA have helped to open his eyes
3 to want to learn more to get better.

4 It took a long time for Mr. Judy to open up to counsel
5 about the things he has experienced in his youth. He is in 11:22:06
6 need of treatment and counseling to understand not only what
7 has occurred to him, but to understand what he has done to
8 others.

9 As reflected in the Presentence Report, his initial
10 response to what occurred was one of deflection and blaming 11:23:16
11 others. That attitude has changed considerably. Mr. Judy
12 accepts responsibility for what he has done. He desires to
13 have treatment and counseling to understand what drove him to
14 commit these acts. He does not want to hurt anyone again, and
15 desires to have the skills to make sure he never makes these 11:24:56
16 mistakes again in his life.

17 The acceptance of wrongdoing for somebody that is
18 charged with a sex offense is the hardest hurdle to overcome.
19 The desire to understand the actions and to receive treatment
20 shows his amenability to getting better. 11:26:01

21 THE COURT: Mr. Smith, if I can stop you for a moment.

22 I'm looking forward to hearing from your client.

23 You're telling me this morning that he's come to grips
24 with his behavior. What troubles this Court, beyond the
25 brutality that he exhibited to these young girls, was the fact 11:26:55

CR-15-8060-PCT-SPL - August 8, 2016

1 that he blamed the young girls because they wore short shorts
2 and dressed immodestly. And their parents were also to blame.

3 So that's changed, Mr. Smith?

4 MR. SMITH: Yes.

5 THE COURT: The fact that seven- to 11-year-old girls 11:27:34
6 would be calling out to your client to basically ask to be
7 raped is hard to understand.

8 MR. SMITH: Your Honor, that mentality is one that you
9 see in sex offenders that are untreated and have not come to
10 grasp with their actions. The deflection I mentioned is what 11:28:49
11 you saw in those comments, he turned his inappropriate behavior
12 blaming others. And that is what has changed.

13 Even the minimum counseling and taking the courses he
14 has at CCA has helped him to grasp an insight into his own
15 improper actions. 11:29:47

16 He is far from well. However, he has made that first
17 step which is so essential in eventually getting the treatment
18 and having it be effective.

19 If I may go on with my sentencing recommendation.

20 THE COURT: Of course. 11:30:51

21 MR. SMITH: The next reason for the sentence imposed
22 is, Mr. Judy is currently 62 years old. Although age is not a
23 consideration pursuant to guideline policies normally, it would
24 be appropriately considered under 13-3553 with regard to
25 protection of the community. 11:31:4

CR-15-8060-PCT-SPL - August 8, 2016

1 I am recommending basically a ten- to 12-and-a-half
2 year sentence, in that range, to the Court. It is expected
3 Mr. Judy would be in his early to mid seventies, if the Court
4 follows my recommendation, when he is released.

5 The consideration of infirmities and physical
6 abilities as age advances should be considered with regard to
7 will the community be safe upon his release.

11:32:33

8 Along with his treatment that he can receive while in
9 the Bureau of Prisons, he will have supervision and further
10 treatment and help upon his release. We would be recommending
11 the five years of supervised release after his prison sentence.

11:33:36

12 THE COURT: Mr. Smith, my apologies for interrupting
13 you, but I do recall seeing an e-mail about the mistake in the
14 original Plea Agreement. And hopefully the Government has
15 lined through and the three parties have initialled off on
16 that.

11:34:47

17 MR. SMITH: We intended to do that today -- I'm sorry.

18 THE INTERPRETER: Your Honor, I didn't catch your last
19 address, please.

20 MR. SMITH: We intended to do that today. We are
21 aware of the error that lifetime supervision is not available.

11:35:05

22 THE COURT: Go ahead, Mr. Smith.

23 MR. SMITH: That would give a period of at least until
24 he's approximately 80 of supervision and treatment.

25 The next aspect is to avoid sentencing disparity. As

11:35:5

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 the Court is aware, if this had been prosecuted during the time
2 frame of the incident, the guidelines were mandatory at that
3 point.

4 It would be easy to accept the very emotional impact
5 this case can have on a person, but we must look at the case,
6 the guidelines, and the factors set forth in 3553 to fashion a
7 judgment.

11:37:07

8 THE COURT: Mr. Smith, how does the range 121 to 151
9 months take into account the number of victims, the extreme
10 nature of the conduct, and the counts that will be dismissed as
11 part of the Plea Agreement?

11:38:05

12 If your client was standing here today as a
13 40-year-old instead of a 62-year-old, would you have the same
14 argument?

15 MR. SMITH: I would have the same arguments with
16 regard to applying the guidelines at the time of the offense,
17 if that were applicable at the time of the offense. I would
18 not, obviously, make the argument that his age and his physical
19 infirmities upon release are a protective aspect of the
20 community.

11:39:02

11:39:56

21 I would argue the same, that the range of sentence
22 from the low end to the high end give the Court the discretion
23 to consider factors as to where he may fall within that range.

24 I would also make the argument that although there are
25 victims and allegations, the degree of them we have not

11:40:50

CR-15-8060-PCT-SPL - August 8, 2016

1 litigated, and nor is there appropriate objection given that
2 this is what the victims say happened. I would say making the
3 assumption that every single count could be proven would be an
4 inappropriate basis to impose the sentence.

5 I would argue that it is appropriate for the Court to 11:41:37
6 consider that there are multiple victims alleged, and there in
7 all likelihood were injuries inflicted on those victims by my
8 client, but that -- and as the law has developed an
9 understanding of the traumatic nature of the offense has
10 developed, the punishments have increased over the years. But 11:42:37
11 that it would be inappropriate to sentence Mr. Judy in accord
12 with the current laws because of the ex post facto clause in
13 our Constitution.

14 I would argue that the factors the Court asked
15 regarding the multiple victims, et cetera, may give the Court 11:43:37
16 reason to depart, and some reason, that is the Court's
17 discretion. But that departure would be inappropriate for the
18 levels recommended by Probation, which is basically doubling
19 the minimum of the guideline range that's made by the probation
20 officer. 11:44:26

21 And also the Government's recommendation is
22 effectively doubling the high end of the guideline range that
23 was applicable to this offense.

24 I am a believer in rehabilitation. There is an
25 appropriate punitive aspect to our sentencing structure in the 11:45:3

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 that your Criminal History Category is a I, and your guideline
2 sentencing range is 121 to 151 months of confinement.

3 After reading through all the victim statements and
4 listening to Miss Benally, Miss Whitstone, and your own sister,
5 this Court finds that upward departures are needed in your
6 case. 15:16:29

7 This Court will depart upward seven levels based on
8 extreme psychological injury under 5K2.3.

9 I also find that your conduct was extreme under 5K2.8.

10 This Court also finds that there's a need to adjust
11 upward or depart upward based on dismissed or uncharged conduct
12 under 5K2.21. 15:17:32

13 Sir, your new total offense level is a 39 and your
14 Criminal History Category remains a I. This Court finds that
15 your new guideline sentencing range is 262 to 327 months in
16 federal prison. 15:18:53

17 Pursuant to the Sentencing Reform Act of 1984,
18 Mr. Michael K. Judy, it's the judgment of this Court that
19 you'll be committed to the custody of the Bureau of Prisons for
20 a period of 288 months. 15:19:49

21 You shall pay the special assessment of \$100, which
22 shall be due immediately.

23 This Court finds that you don't have the ability to
24 pay the fine so the fine in your case will be waived.

25 Mr. Smith, I know earlier, sir, you placed on the 15:20:36

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 record a discussion about restitution in the case. What was
2 that discussion about again?

3 MR. SMITH: Yes, Your Honor. The Government presented
4 a new figure based on information received today from the
5 alleged victims for a total of \$5300.

15:21:03

6 THE COURT: And, Mr. Judy, you agree to pay that
7 \$5300?

8 THE DEFENDANT: Yes.

9 THE COURT: Sir, you'll be incarcerated, so the
10 monetary penalties are due at a rate of \$25 per quarter. The
11 payments will be made through the Bureau of Prisons Inmate
12 Financial Responsibility Program. This Court will provide you
13 an address to make the payments.

15:21:35

14 And the Court also waives the imposition of interest
15 and penalties on any unpaid balance.

15:22:32

16 Sir, once you're released from federal prison you'll
17 be placed on supervised release for five years. And once
18 you're released you'll be required to pay -- start making
19 payments 60 days after you're released from imprisonment. And
20 I will provide you with the amount that you will be responsible
21 for.

15:23:17

22 While you're on supervised release you shall comply
23 with the standard conditions of supervision adopted by me in
24 General Order number 12-13.

25 You shall not commit another federal, state or local

15:23:45

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 crime during the term of your supervision.

2 Within 72 hours of your release from the custody of
3 the Bureau of Prisons you shall report in person to your
4 probation office in the District where you're released.

5 You're also ordered to attend and participate in a sex 15:24:37
6 offender treatment program and sex offense specific evaluations
7 as approved by your probation officer. You shall abide by all
8 the policies and procedures of all treatment and evaluation
9 providers.

10 You also shall contribute to the cost of the treatment 15:25:37
11 in an amount that will be determined by your probation officer
12 based on your ability to pay.

13 The sex offender specific treatment and polygraph
14 examination will be required based on the fact that you engaged
15 in the sexual acts with minor female victims. 15:26:35

16 You shall contribute to the cost of the treatment and
17 assessment not to exceed an amount determined to be reasonable
18 by your probation officer.

19 I've ordered this treatment based on the nature of the
20 offenses. And I think the treatment will reduce the likelihood 15:27:41
21 of future victimization by encouraging rehabilitation. And the
22 polygraph examination will support that treatment and aid in
23 your rehabilitation.

24 You shall attend, participate in periodic polygraph
25 examinations as a means to determine compliance with the 15:28:37

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 conditions of your supervision and requirements of your
2 therapeutic program directed by your probation officer.

3 You'll also contribute to the cost of the polygraph
4 examination not to exceed an amount determined to be reasonable
5 by your probation officer based on your ability to pay.

15:29:23

6 The sex offender specific treatment and polygraph
7 examination this Court finds are needed based on the nature of
8 the offense in which you engaged in sexual acts with minor
9 female victims. This treatment is designed to reduce the
10 likelihood of future victimization by encouraging your
11 rehabilitation. And the polygraph will support treatment and
12 aid in your rehabilitation to deter your risk-related behavior.

15:30:31

13 You shall not directly or indirectly contact any of
14 the victims or any of the family members of the victims, which
15 may be difficult for you since this is your family. You need
16 written permission to contact someone in your family.

15:31:14

17 Direct or indirect contact means letters,
18 communication devices, audio or visual devices, or
19 communication through a third party.

20 You shall immediately report any contact to the
21 probation officer.

15:32:23

22 And the reason I have this condition is to protect
23 every victim and the families of the victim so they won't be
24 further victimized by your conduct.

25 You're prohibited from being in the company or having

15:32:40

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 any contact with children who you know are under the age of 18,
2 to include your own family member children. This means
3 letters, communication devices, audio or visual devices, visits
4 or communication through a third party.

5 I find that this condition is needed because your 15:33:39
6 conduct was sexual abuse of children under 12, and a lot of the
7 minor children were your own family members, including your own
8 daughters.

9 You shall not go to or loiter within 100 feet of a
10 school yard, parks, playgrounds, arcades, or other places 15:34:51
11 primarily used for children under the age of 18, unless your
12 probation officer gives you permission to do so.

13 Again, the reason of this -- the reason for this
14 restriction is that you abused several children under the age
15 of 12, some of which were your own children. 15:35:40

16 This Court orders you to register as a sex offender
17 once released, in compliance with all federal, state and tribal
18 or other local laws ordered by me. And failure to comply with
19 the registration laws may result in new criminal charges.

20 And the restriction is needed to assure that you 15:36:17
21 comply with laws -- federal, state, tribal or local laws by the
22 proper authorities.

23 You shall reside -- reside in a residence approved in
24 advance by your probation officer after you're released, and
25 any changes in the residence must be preapproved in writing by 15:37:12

CR-15-8060-PCT-SPL - August 8, 2016

1 your probation officer.

2 The Court orders you to participate in a mental health
3 program as directed by your probation officer, which may
4 include taking prescribed medication. And you also shall
5 contribute to the cost of the treatment in an amount to be
6 determined by your probation officer.

15:37:53

7 You're also prohibited from making major purchases,
8 incurring new financial obligations or entering into any
9 financial contracts without the prior approval of the probation
10 officer.

15:38:47

11 And you need to provide all financial documentation as
12 requested by your probation officer.

13 You also shall submit your person, your property, your
14 house, residence, vehicle, papers or office to a search
15 conducted by your probation officer. And failure to submit to
16 a search may be grounds for revocation of your release.

15:39:39

17 You also shall warn any other occupants that the
18 premises may be subject to a search pursuant to this condition.

19 Mr. Judy, due to your self disclosed -- self
20 disclosure of sexual abuse that you sustained as a child,
21 depression, and your amenability to treatment, this mental
22 health condition is ordered in your case.

15:41:07

23 Mr. Judy, a search condition is ordered to monitor
24 your compliance with your conditions of supervised release.

25 And financial conditions are ordered to ensure your

15:41:57

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 compliance with your restitution payments.

2 Mr. Judy, Mr. Smith will get a copy of the Court's
3 order as it relates to your release conditions and everything
4 else that's happened in the case. But do you understand the
5 orders that I just went over?

15:42:36

6 THE DEFENDANT (In English): Yes.

7 THE INTERPRETER: I couldn't understand his answer,
8 Your Honor.

9 THE COURT: I couldn't either.

10 MR. SMITH: He answered yes in English.

15:43:16

11 THE INTERPRETER: Okay. Thank you.

12 THE COURT: What did you say, Mr. Judy?

13 THE DEFENDANT (In English): Yes.

14 THE COURT: Was that yes?

15 THE INTERPRETER: Yes.

15:43:24

16 THE COURT: Mr. Judy, I find that your sentence is
17 sufficient but not greater than necessary. I also find that it
18 promotes respect for the law and provides you with just
19 punishment, and will serve to protect the public, and reflects
20 the seriousness of the instant offense, and will serve as
21 deterrence for you and others from committing similar crimes.

15:43:39

22 Sir, your crimes were extreme. They caused
23 psychological injury and they changed lives. And that's why
24 this Court departed upward in your case.

25 There's an appeal waiver in your Plea Agreement which

15:44:01

~~CR-15-8060-PCT-SPL - August 8, 2016~~

1 means you've given up your right to appeal as long as the
2 sentence is consistent with what was negotiated by you and your
3 lawyer, and the sentence is not illegal or unconstitutional.

4 Mr. Smith, do you agree that your client has waived
5 his right to appeal, with an exception being an appeal based on 15:45:24
6 ineffective assistance of counsel or prosecutorial misconduct?

7 MR. SMITH: I agree the sentence is within the range
8 that was stipulated in the Plea Agreement and thereby waiving
9 the appeal.

10 THE COURT: Mr. Judy, do you also agree, sir, that you 15:46:11
11 have waived your right to appeal?

12 THE DEFENDANT: I really don't know.

13 THE COURT: Mr. Judy, if you believe you have a right
14 to appeal, you need to file the notice of appeal in writing
15 with the clerk of this court no more than 14 days from the date 15:47:10
16 that your judgment is filed.

17 This Court's had a chance to review the Plea Agreement
18 in the case, and I believe the sentencing is consistent with
19 what was negotiated by you, Mr. Judy. However, if you think
20 I'm wrong and you think there was prosecutorial misconduct or 15:47:41
21 that your lawyer was ineffective, you can certainly plead (sic)
22 if you choose to do so.

23 And if you can't afford to pay the costs of the appeal
24 or the lawyer to assist you, those costs will be paid on your
25 behalf. 15:47:57

CR-15-8060-PCT-SPL - August 8, 2016

1 Do you understand that?

2 Do you understand that, Mr. Judy?

3 THE DEFENDANT (In English): I need to study some
4 more.

5 THE COURT: Mr. Smith, is there anything else from
6 you?

15:49:15

7 MR. SMITH: No, Your Honor.

8 THE COURT: Is there a location where your client
9 would like to be housed?

10 MR. SMITH: He'd like to remain in Arizona or in the
11 southwest, if possible.

15:49:23

12 THE COURT: Mr. Judy, is there anything else from you,
13 sir?

14 THE DEFENDANT: If that's going to happen, what's
15 available?

15:50:15

16 THE COURT: I'm sorry, I didn't understand.

17 THE DEFENDANT: If that's going to happen, what's
18 available?

19 THE COURT: If what's going to happen what's
20 available, Mr. Judy?

15:50:33

21 THE DEFENDANT: I don't know about these processes,
22 these court processes, I don't know about them.

23 THE COURT: Which court processes?

24 THE DEFENDANT: I didn't understand what's going on.

25 THE COURT: When did you stop understanding what was

15:51:4

Appendix C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Michael K. Judy

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-15-08060-001-PCT-SPL

Michael John Smith, (CJA)
Attorney for defendant

USM#: 44885-408

THE DEFENDANT ENTERED A PLEA OF guilty on 3/3/2016 to Count 12 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §§1153, 2241(c), and 2246(2)(B), CIR-Aggravated Sexual Abuse of a Minor, a Class A Felony offense, as charged in Count 12 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED EIGHTY-EIGHT (288) MONTHS** on Count 12, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Count 12. The Court recommends that the defendant be placed in an institution in or near Arizona or the Southwest portion of the United States to facilitate family visitation.

IT IS ORDERED that all remaining counts are dismissed on motion of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$100.00 FINE: WAIVED RESTITUTION: \$5,300.00

The defendant shall pay a special assessment of \$100.00 which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the following victim(s) in the following amount(s):
\$ 2,000.00 to J.B.; \$ 150.00 to S.R.; \$ 1,500.00 to M.W.; \$850.00 to S.L.B.; \$ 800.00 to R.B.

CR-15-08060-001-PCT-SPL
USA vs. Michael K. Judy

Page 2 of 5

The defendant shall pay a total of \$5,400.00 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows: Balance is due in equal monthly installments of \$25.00 months to commence 60 days after the release from imprisonment to a term of supervised release until full amount is paid.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 12 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Count 12.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled

CR-15-08060-001-PCT-SPL
USA vs. Michael K. Judy

Page 3 of 5

substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.

- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall submit your person, property, house, residence, vehicle, papers, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of

CR-15-08060-001-PCT-SPL
USA vs. Michael K. Judy

Page 4 of 5

release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

2. You shall provide all financial documentation requested by the probation office.
3. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.
4. You shall participate in a mental health program as directed by the probation officer which may include taking prescribed medication. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
5. You shall attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by the probation officer. You shall abide by the policies and procedures of all the treatment and evaluation providers. You shall contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
6. You shall attend and participate in periodic polygraph examinations as a means to determine compliance with conditions of supervision and the requirements of your therapeutic program, as directed by the probation officer. No violation proceedings will arise solely on the result of the polygraph test. A valid Fifth Amendment refusal to answer a question during a polygraph examination will not be used as a basis for a violation proceeding. You shall contribute to the cost of such polygraph examination not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
7. You shall reside in a residence approved, in advance, by the probation officer. Any changes in the residence must be pre-approved in writing by the probation officer.
8. You shall register as a sex offender in compliance with all federal, state, tribal or other local laws or as ordered by the Court. Failure to comply with registration laws may result in new criminal charges.
9. You shall not be in the company of or have contact with children who you know are under the age of 18, including your own children. Contact includes, but is not limited to, letters, communication devices, audio or visual devices, visits, or communication through a third party.
10. You shall not directly or indirectly contact any victim(s) and victim(s) family of the instant offense(s) without prior written permission. This also includes victim(s) disclosed in treatment, assessment and/or any other victim identified by the probation officer. Indirect contact includes, but is not limited to letters, communication devices, audio or visual devices, communication

CR-15-08060-001-PCT-SPL
USA vs. Michael K. Judy

Page 5 of 5

through a third party and /or your presence at any location the victim(s) may be known to frequent. You shall immediately report any contact to the probation officer.

11. You shall not go to and/or loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18, without prior written permission of the probation officer.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons and recommends that the defendant be placed in an institution in or near Arizona or the Southwest portion of the United States to facilitate family visitation.

The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Monday, August 08, 2016**

Dated this 8th day of August, 2016.


Honorable Steven P. Logan
United States District Judge

RETURN

I have executed this Judgment as follows: _____

defendant delivered on _____ to _____ at _____, the institution
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal

By: Deputy Marshal

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL K. JUDY,

Defendant-Appellant.

C.A. No. 16-10368

D. Ct. No. CR-15-08060-PCT-SPL

APPELLEE'S MOTION TO DISMISS
APPEAL BASED ON WAIVER IN
PLEA AGREEMENT

Pursuant to Ninth Circuit Rule 27-9.2, the United States of America respectfully moves to dismiss Judy's appeal because he knowingly and voluntarily waived his right to appeal.¹

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In consideration of favorable terms from the government, Judy knowingly and voluntarily entered into a written plea agreement which included a waiver of his right to appeal. Judy was ultimately sentenced within the precise terms of his bargain: a sentencing cap that prevented the imposition of the statutory maximum life sentence and a three-level reduction for acceptance of responsibility. Yet, he

¹ The United States' answering brief is due on August 30, 2017. This motion stays the briefing schedule. Ninth Circuit Rule 27-11. This is the government's first motion to dismiss. Ninth Circuit Rule 27-8.1. The defendant is in the custody of the Bureau of Prisons, and his expected release date is May 16, 2036.

appeals in contravention of his agreement not to do so. The appellate waiver—expressly stated in Judy’s written plea agreement and orally acknowledged at his change of plea—is dispositive of his appeal, which should be dismissed.

The record demonstrates that the district court thoroughly advised Judy and that he understood the rights he was giving up by pleading guilty. Judy’s breach of the agreement should not go unchecked, and his appeal should be dismissed.

II. PROCEDURAL AND FACTUAL BACKGROUND

On April 14, 2015, a federal grand jury returned an indictment against Judy, charging him with five counts of aggravated sexual abuse of a child, in violation of 18 U.S.C. §§ 1153, 2241(c) and 2245(2)(C) (Counts 1, 2, 4-6); abusive sexual contact in violation of 18 U.S.C. §§ 1153, 2244(a)(1) and (c), and 2245(3) (Count 3); abusive sexual contact in violation of 18 U.S.C. §§ 1153, 2244(a)(1) and (c), and 2246(3) (Count 7); aggravated sexual abuse of a child, in violation of 18 U.S.C. §§ 1153, 2241(c) and 2246(2)(C) (Counts 8, 10); attempted aggravated sexual abuse of a child, in violation of 18 U.S.C. §§ 1153, 2241(c) and 2246(2)(B) (Count 9); and aggravated sexual abuse of a child, in violation of 18 U.S.C. §§ 1153, 2241(c) and 224(2)(B) (Counts 11, 12). (CR 1, ER 164-71.)² The indictment alleged that all of

² “CR” refers to the Clerk’s Record, “RT” refers to Reporter’s Transcript and “ER” refers to Excerpts of Record. Each will be followed by the relevant citation. “PSR” refers to the presentence report and will be followed by the cited paragraph number. This Court’s docket reflects that the PSR was provided by the defendant to the Clerk of the Court under seal via the Ninth Circuit Appellate ECF system.

the crimes occurred within the confines of the Navajo Nation Indian Reservation in Indian Country. (CR 1, ER 164-71.) The charges relate to three victims, two of whom were under the age of 12. (CR 1; ER 164-71.) A change of plea hearing was held on March 3, 2016, at which Judy pleaded guilty to Count 12 pursuant to a plea agreement. (CR 53; ER 37-46.)

A. The Plea Agreement

The plea agreement stipulated that Judy would receive a sentence that was “not less than 120 months and not greater than 288 months.”³ (CR 53; ER 38.) The agreement also contained a stipulation that Judy must register as a sex offender and that certain sex offender conditions of supervised release would be imposed. (CR 53; ER 38.) In addition to the sentencing cap, the government agreed to recommend that Judy receive a two or three level reduction, as appropriate, for acceptance of responsibility. (CR 53; ER 39.)

In consideration of these benefits, Judy agreed to a number of provisions, including a broad waiver of appeal which reads as follows:

5. WAIVER OF DEFENSES AND APPEAL RIGHTS

The defendant waives (1) any and all motions, defenses, probable

³ The plea agreement contained a stipulation to a lifetime term of supervised release. (CR 53; ER 38.) However, the maximum term allowed by statute was 5 years. The stipulation was amended by both parties and the term of supervised release was left to the district court’s discretion. (CR 53; ER 38.) The PSR reflected the correct penalties. (PSR ¶ 81.) Defendant ultimately received a shorter term of supervised release than that to which he had stipulated.

cause determinations, and objections that the defendant could assert to the indictment or information; and (2) any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence, including under Title 18, U.S.C., §3582(c). This waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case. This waiver shall not be construed to bar an otherwise-preserved claim of ineffective assistance of counsel or of "prosecutorial misconduct" (as that term is defined by Section II.B of Ariz. Ethics Op. 15-01 (2015)).

(CR 53; ER 41.)

B. The Change of Plea Hearing

The plea colloquy was conducted with the use of a Navajo interpreter. (RT 3/3/16 2-3; ER 71-72.) The defense attorney explained that the same Navajo interpreter read the entire plea agreement "word for word" to Judy three days earlier. (RT 3/3/16 4; ER 73.) Defense counsel advised that after the plea agreement was read to Judy, the interpreter assisted the defense attorney in answering any questions that Judy had. (RT 3/3/16 4; ER 73.) Defense counsel also noted that Judy is "about 95 percent proficient in English. But some of the complicated terms and discussions, we both agreed that Navajo would be appropriate to be utilized to make sure there was no error in understanding." (RT 3/3/16 5; ER 74.) Judy confirmed he was 95 percent proficient in English, had attended school through the twelfth grade, and he learned how to read English in school. (RT 3/3/16 6; ER 75.)

During the plea colloquy, Judy established he had a clear mind and was competent to plead guilty. (RT 3/3/16 5; 74.) Judy stated he reviewed the entire agreement with his attorney and his questions had been answered, specifically noting that the attorney “made it clear.” (RT 3/3/16 6; 75.) Judy said that he understood the agreement, but was unsure what the length of his sentence would be. (RT 3/3/16 6; 75.) In response to that comment, the district court explained that the sentence had yet to be determined, so Judy could not be expected to know the length of his sentence as this point in the proceedings. (RT 3/3/16 6; 75.) Judy confirmed that no one had forced or threatened him to plead guilty, that all promises made by the government were included within his plea agreement, and that he was voluntarily entering the agreement. (RT 3/3/16 7-8; ER 76-77.)

The district court reviewed with Judy the charge to which he was pleading guilty and the maximum penalties. (RT 3/3/16 8-9; ER 77-78.) The court reviewed the stipulations and recommendations contained in the plea agreement with Judy. (RT 3/3/16 9-11; ER 78-80.) When discussing the possible sentence, the court asked Judy to review a copy of the Federal Sentencing Table and Judy confirmed that he had reviewed the Table with his attorney. (RT 3/3/16 9; ER 78.) Judy understood the stipulations and the recommendations and the repercussions if the district court rejected either one. (RT 3/3/16 10-11; ER 79-80.)

Judy acknowledged that he was giving up various Constitutional rights: to plead not guilty and maintain his innocence, to continued assistance of counsel, to confront adverse witnesses, to a jury trial, to call and subpoena witnesses, and to remain silent. (RT 3/3/16 13, 20; ER 82, 89.) In response to an inquiry from Judy, the district court explained how trials operate. (RT 3/3/16 20; ER 89.)

When asked if he wanted to plead guilty, Judy responded, “This is where we are now. I will no longer hide this. I will accept the events that happened, what I’ve done. And this not something I wish to hide anymore. I will make—try to make things right. And in time I wish to be forgiven, and perhaps the Lord will forgive me as well.” (RT 3/3/16 20-21; ER 89-90.) When asked specifically if he wanted to plead guilty to count 12, Judy stated, “that’s correct...yes, I plead guilty.” (RT 3/3/16 21; ER 90.)

During the plea colloquy, Judy indicated he understood the appellate waiver and that his attorney had explained his appellate rights to him. (RT 3/3/16 11, 14; ER 80, 83.) The district court explained the appeal waiver:

THE COURT: If your plea is accepted and if I impose a sentence permitted by the terms of your agreement . . . you will not be permitted to withdraw from your plea or challenge your judgment and sentence on appeal or in a collateral proceeding

JUDY: Yes.

THE COURT: --with the exception of an appeal based on ineffective assistance of counsel or prosecutorial misconduct. Do you understand that?

JUDY: Yes.

(RT 3/3/16 11; ER 80.) Later in the proceeding, the district court discussed the appellate waiver again, saying “I went over your appellate rights earlier, and they’re actually listed on page number 5, section number 5. Did you go through all of those appellate rights with your lawyer, []?” (RT 3/3/16 14; ER 83.) Judy responded that he had.

The court found Judy: (1) knowingly, intelligently and voluntarily entered a plea of guilty; (2) understood the charge; (3) was competent to enter the plea. (RT 3/3/16 21; ER 90.) Further, the court found that a factual basis existed for the plea. (RT 3/3/16 21; ER 90.)

C. The Sentencing

The sentencing was conducted on August 8, 2016. (RT 8/8/16 1-16, 17-54; ER 9-24, 184-212.) Again, a Navajo interpreter was present for the proceedings. (RT 8/8/16 2; 10.)

Judy stated that he understood the initial guideline. (RT 8/8/16 8; ER 16.) The district court determined that Judy had an initial offense level of 32, resulting in a sentencing range of 121 to 151 months.⁴ (RT 8/8/16 8-9; ER 16-17.) Judy’s sister spoke on his behalf and several victims addressed the court, including Judy’s daughter. (RT 8/8/16 18, 26; ER 185, 193.) After finding that upward departures

⁴ The PSR calculated that absent the plea agreement, the defendant’s guideline calculation would have been a life sentence. (PSR ¶ 99.)

were appropriate for extreme psychological injury (U.S.S.G. § 5K2.3), extreme conduct (U.S.S.G. § K2.8) and dismissed or uncharged conduct (U.S.S.G. § 5K2.21), the district court departed upward 7 levels, resulting in a new offense level of 39, with a range of 262 to 327 months. (RT 8/8/16 44; ER 25.) Judy was sentenced to 288 months' imprisonment and five years of supervised release. (RT 8/8/16 44; ER 25.)

The district court found that Judy had waived his appeal rights, stating, "you've given up your right to appeal as long as the sentence is consistent with what was negotiated by you and your lawyer, and the sentence is not illegal or unconstitutional." (RT 8/8/16 51; ER 32.) Defense counsel agreed that the sentence was within the range stipulated to in the plea agreement and therefore Judy had waived his appeal rights, other than as to claims of ineffective assistance of counsel or prosecutorial misconduct. (RT 8/8/16 51; ER 32.) When asked, Judy indicated that he didn't know if he had waived his appeal rights. (RT 8/8/16 51; ER 32.) The district court then further advised Judy,

Mr. Judy, if you believe you have a right to appeal, you need to file the notice of appeal in writing with the clerk of this court no more than 14 days from the date that your judgment is filed.

This Court's had a chance to review the Plea Agreement in the case, and I believe the sentencing is consistent with what was negotiated by you, Mr. Judy. However, if you think I'm wrong and you think there was prosecutorial misconduct or that your lawyer was ineffective, you can certainly plead (sic) if you choose to do so.

And if you can't afford to pay the costs of the appeal or the lawyer to assist you, those costs will be paid on your behalf.

(RT 8/8/16 51; ER 32.) Later, as the proceeding was concluding, the following exchange occurred:

JUDY: I didn't understand what's going on.

THE COURT: When did you stop understanding what was going on, Mr. Judy?

JUDY: I don't really understand what you mean about the appeal process.

THE COURT: [Defense counsel] will go into great detail with you about the appellate process that this Court finds that you've waived. (RT 8/8/16 52-53; ER 210-11.)

III. ARGUMENT

A. Judy Knowingly and Voluntarily Waived His Right To Appeal

1. Standard of Review

Whether a criminal defendant has waived his right to appeal is a matter of law reviewed *de novo*. *United States v. Rivera*, 682 F.3d 1223, 1227 (9th Cir. 2012).

2. Argument

There is no constitutional right to appeal. *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000). The right to appeal a criminal sentence is statutory and may be waived. *United States v. Portillo-Cano*, 192 F.3d 1246, 1249 (9th Cir. 1999); 18 U.S.C. § 3742(a). A criminal defendant's waiver of appellate rights is enforceable if made knowingly and voluntarily and if the language of the waiver covers the grounds raised on appeal. *United States v. Bibler*, 495 F.3d 621, 623-24 (9th Cir. 2007). Where an appeal raises issues encompassed by a valid, enforceable

appellate waiver, the appeal generally must be dismissed. *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011).

This Court “regularly enforces ‘knowing and voluntary’ waivers of appellate rights in criminal cases, provided that the waivers are part of negotiated guilty pleas. . .” *Anglin*, 215 F.3d at 1066. In order to determine whether a defendant agreed to an appellate waiver knowingly and voluntarily, the Court “look[s] to circumstances surrounding the signing and entry of the plea agreement.” *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995). “Also relevant is whether the district court informed the defendant of her appellate rights and verified her intent to forfeit them.” *Anglin*, 215 F.3d at 1066.

Here, as discussed in Section II.B. *supra*, Judy knowingly and voluntarily entered into the plea agreement. At his guilty plea hearing, Judy acknowledged the written appeal waiver in his agreement, stated that it had been read to him and that he understood that he was relinquishing his right to appeal. (RT 3/3/16 6, 11, 14; ER 75, 80, 83.) Thus, Judy’s appellate waiver was knowingly and voluntarily made.

A knowing and voluntary appellate waiver “is enforceable if the language of the waiver encompasses his right to appeal on the grounds raised...” *United States v. Watson*, 582 F.3d 974, 986 (9th Cir. 2009). “The scope of a knowing and voluntary waiver is demonstrated by the express language of the plea agreement.” *Id.* In *Watson*, where this Court upheld the appeal waiver, the defendant agreed “to

waive *any right* [he] may have to appeal *any aspect of* [his] sentence.” *Id.* See also *United States v. Medina-Carrasco*, 815 F.3d 457, 459 (9th Cir. 2016) (appellate waiver covering “any aspect of the defendant’s sentence—including the manner in which the sentence is determined and any sentencing guideline determinations” was valid and enforceable); *United States v. Joyce*, 357 F.3d 921, 923 (9th Cir. 2004) (defendant’s agreement to “waive [his] right under 18 U.S.C. § 3742 to appeal any aspect of the sentence imposed” enforceable).⁵

The waiver in this plea agreement is broad, preserving only claims of ineffective assistance of counsel and prosecutorial misconduct. Because Judy agreed to waive “...any appeal...that challenges...any aspect of the sentence...,” and because his appeal is not based on the grounds preserved in his waiver, Judy has waived his right to bring this appeal and this Court should dismiss.

B. Judy’s Appellate Waiver Is Valid And Enforceable As No Exception Applies

This Circuit has recognized certain exceptions where knowing and voluntary appellate waivers may be set aside: (1) a defendant’s guilty plea failed to comply

⁵ Although defendant was informed of the sentencing range during the colloquy, to the extent he now argues that he should be excused from his appeal waiver because the sentence was higher than he expected, his argument is foreclosed by this Court’s precedent. See *United States v. Michlin*, 34 F.3d 896, 899 (9th Cir. 1994) (“an erroneous prediction by a defense attorney concerning sentencing does not entitle defendant to challenge his guilty plea” absent gross mischaracterization.).

with Federal Rule of Criminal Procedure 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. *Bibler*, 495 F.3d at 623, *citing Portillo-Cano*, 192 F.3d at 1252 (failure to comply with Rule 11); *Buchanan*, 59 F.3d at 917-18 (judge informed defendant that he retained his right to appeal); *United States v. Bolinger*, 940 F.2d 478, 479-80 (9th Cir. 1991) (sentence not in accord with plea agreement); and *United States v. Gordon*, 393 F.3d 1044, 1050 (9th Cir. 2004) (illegal sentence).

Here, Judy argues that the guilty plea failed to comply with the Rule 11 of the Federal Rules of Criminal Procedure, claiming that the district court failed to advise him of the trial and appellate rights he waived by virtue of the agreement and failed to advise him of the role the guidelines play in determining his sentence. (Op. Br. at 25.) Further, Judy argues that the district court advised him at sentencing that he maintained his appellate rights. (Op. Br. at 30.) The record belies these claims. The district court complied with Rule 11 and adequately advised Judy of the rights he was relinquishing. Even if this Court finds that the district court's colloquy was incomplete, any error was harmless as it did not affect Judy's substantial rights. Furthermore, the district court's comments at sentencing were not ambiguous and are not controlling on the issue of voluntariness. As such, Judy's valid appellate waiver should be enforced and his appeal dismissed.

1. The District Court Complied with Rule 11

Rule 11(b) catalogs the requirements for entering a guilty plea in federal court, and “exists to ensure that guilty pleas are knowing and voluntary.” *United States v. Pena*, 314 F.3d 1152, 1157 (9th Cir. 2003). Before accepting a guilty plea, the court is required by Rule 11(b) to “address the defendant personally” and inform him of the constitutional rights he is waiving by pleading, explain the nature of the charge to the defendant, and advise him of the penalties and consequences he faces if the court accepts the plea. *United States v. Ross*, 511 F.3d 1233, 1235–36 (9th Cir. 2008); *United States v. Roblero-Solis*, 588 F.3d 692, 699 (9th Cir. 2009). The court must also ensure that the defendant understands that he is acting voluntarily and that there is a factual support for the plea. Fed. R. Crim. P. 11(b)(2)-(3).

Minor or technical errors in following required Rule 11 protocols do not require reversal. *United States v. Smith*, 60 F.3d 595, 600 (9th Cir. 1995); Fed. R. Crim. P. 11(h) (providing that a variance from the required procedures of Rule 11 are harmless unless they affect substantial rights). Likewise, if the defendant fails to object to an error during the Rule 11 plea process, reversal is warranted only if the error affected the defendant’s substantial rights, *United States v. Monzon*, 429 F.3d 1268, 1271-72 (9th Cir. 2005), which is to say it had a prejudicial effect on the judicial proceedings. *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004).

To obtain reversal the defendant must show that but for the error, he would not have pled guilty. *Id.* at 83.

Defendant's claim that *United States v. Davila*, 133 S.Ct. 2139 (2013) requires a totality of the circumstances analysis (Op. Br. at 33) is unavailing. In *Davila*, the Supreme Court specifically approved the *Dominguez Benitez* standard that a defendant who fails to object to a claimed plea colloquy omission until the appeal stage must show " 'plain error,' namely, 'a reasonable probability that, but for the [Rule 11] error, he would not have entered the plea.'" *Davila*, 133 S.Ct. at 2142 quoting *Dominguez Benitez*, 542 U.S. at 83. *Davila* holds that a totality of the circumstances review is only necessary where the error at issue occurs before a defendant had decided to plead guilty or stand trial. *Id.* The claimed errors here occurred after Judy decided to plead guilty and he has not established that but for the errors, he would not have abandoned his favorable plea agreement. The Rule 11 colloquy was sufficient and did not affect Judy's substantial rights.

a. *Defendant Fully Advised of his Trial Rights*

A district court must advise a defendant wishing to plead guilty of his basic trial rights. Fed. R. Crim. P. 11(b)(1)(C), (D), (E). Here defendant was advised of the right to a jury trial (ER 89), to be represented by counsel (ER 82), to be confronted by and to cross-examine adverse witnesses (ER 82), to be protected from self-incrimination through his right to silence (ER 82), to testify and present

evidence (ER 82), and to compel the attendance of witnesses (ER 82). Judy was advised that the burden of proof is always on the government. (RT 3/3/16; ER 82, 89.) The district court fully advised Judy of his trial rights and he voluntarily relinquished them.

b. *Appellate Rights*

A district court must advise a defendant wishing to plead guilty of “the terms of any plea agreement provision waiving the right to appeal or collaterally attack the sentence”. Fed. R. Crim. P. 11(b)(1)(N). Here, the district court fully informed Judy of the appeal rights he was relinquishing at the guilty plea hearing and Judy understood the rights he was forfeiting in order to get the benefit of his plea bargain. (RT 3/3/16 11, 14; ER 80, 83.)

Even if this Court finds that the district court failed to comply with Rule 11(b)(1)(N), Judy’s substantial rights were unaffected and the waiver remains valid. *See Watson*, 582 F.3d at 987 (holding there was no plain error in failing to comply with Rule 11(b)(1)(N) given the otherwise “diligent colloquy” and the defendant’s “written assurances that he adequately reviewed the terms of the plea agreement”); *see also United States v. Ma*, 290 F.3d 1002, 1005 (9th Cir. 2002) (holding there was no plain error in failing to comply with Rule 11(b)(1)(N) where “[t]he whole record” disclosed that the defendant knowingly and voluntarily waived her right to appeal).

The plea colloquy and the written plea agreement are sufficient to show that the defendant understood the appellate waiver.

Furthermore, Judy's claims that the district court (a) advised him at sentencing that he retained broad appellate rights and (b) that those comments render the waiver invalid (Op. Br. at 30) are unavailing. As discussed in Section II. C. *supra*, at sentencing the district court advised Judy that he had *waived* his appeal rights. *See*, (RT 8/8/16 51; ER 32) ("you've given up your right to appeal") (RT 8/8/16 53; 211) ("... the appellate process that this Court finds that you've waived.")

While Judy argues that he did not understand his appellate waiver at sentencing, this Court has made clear that the relevant time period in determining whether a defendant has voluntarily entered into an unconditional plea is when the change of plea hearing takes place. *See United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997), *overruled on other grounds by United States v. Jacobo-Castillo*, 496 F.3d 947, 957 (9th Cir. 2007). In *Floyd*, the defendant argued her unconditional guilty plea was involuntary, because she had the mistaken belief she could appeal the order denying her motion to suppress. *Floyd*, 108 F.3d at 204. The *Floyd* Court held that even though the "exchange at the sentencing hearing was ambiguous regarding whether [defendant] could appeal the suppression motion, it occurred over three months after Floyd entered her unconditional guilty plea," and whether the plea was voluntary when entered is "controlling." *Id.*

Here, there is nothing indicating Judy's plea was involuntary at the time it was entered. Judy unequivocally acknowledged he was giving up his appeal rights during the plea colloquy. Only after he was given the maximum sentence permitted by his agreement did Judy express any confusion about the appeal waiver. However, even at that point, the district court made clear that Judy had waived his appeal rights.

Even if the Court finds the district court's comments at sentencing ambiguous, this Court has held that comments by a trial judge will not override an appellate waiver unless the judge "advises a defendant, without qualification, that he has a right to appeal." *Watson*, 582 F.3d at 987-89; *United States v. Aguilar-Muniz*, 156 F.3d 974, 977 (9th Cir. 1998) (enforcing an appellate waiver despite the trial court's statement that "if you believe the waiver is unenforceable, you can present that theory to the appellate court"); *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (enforcing an appellate waiver even though the trial judge commented that it is "up to the Ninth Circuit to decide whether under the circumstances [defendant has] lost his right of appeal.")

Similarly, district court statements that merely suggest the possibility of an appeal do not override an appeal waiver. In *Watson*, the sentencing judge told the defendant that he could "[t]ake an appeal if you – maybe it's waived. I don't know . . ." 582 F.3d at 987. The sentencing judge further stated "[m]aybe [your lawyer will] find a way to get an appeal out of this and declare that unconstitutional." *Id.* at

988. Despite these ambivalent comments from the sentencing judge, this Court enforced the appellate waiver and dismissed the defendant's appeal. *Id.*

Here, the district court informed Judy that he *did not* have a right to appeal, but in light of Judy's failure to acknowledge that, the court advised him what he would need to do to file an appeal. The district court did not "clearly and unequivocally advise" Judy he had a right to appeal his conviction. *See Schuman*, 127 F.3d at 818 (Kozinski, J., concurring) (noting the "glue trap" facing a sentencing judge who must advise the defendant that appeal rights are waived while certain limited appellate rights remain). Judy knowingly, intelligently and voluntarily waived his appeal rights. The district court did not advise him otherwise. Judy has failed to show any exception applies. The waiver should be enforced.

c. *Explanation of Sentencing Procedure*

A district court must advise a defendant of the factors the district court considers at sentencing. Fed. R. Crim. P. Rule 11(b)(1)(M). Here, the district court showed Judy a copy of the Federal Sentencing Table and established that defense counsel had discussed the Table with Judy. The district court explained the "acceptance of responsibility" recommendation, including the use of the term "offense level." The district court also discussed the stipulated sentencing range.

Although the exact mechanism of the guidelines were not specifically discussed, any error is harmless. *See United States v. Graibe*, 946 F.2d 1428, 1434

(9th Cir.1991) (error harmless if “the defendant was aware of the necessary information at the time he entered his plea.”) Judy and defense counsel avowed that the plea had been read to the defendant word-for-word. The plea agreement stated:

The Court is required to consider the Sentencing Guidelines in determining the defendant’s sentence. However, the Sentencing Guidelines are advisory, and the Court is free to exercise its discretion to impose any reasonable sentence up to the maximum set by statute for the crime(s) of conviction, unless there are stipulations to the contrary that the Court accepts.

(CR 53; ER 94.) As such, and in conjunction with the district court’s explanations, Judy was aware of the court’s obligation to consider the guidelines. Furthermore, Judy confirmed that he had discussed the Federal Sentencing Table with his attorney. The sentencing range was discussed and Judy was sentenced within that range. No substantial rights were affected.

C. This Appeal Should Be Dismissed

Plea bargains are “contractual in nature and must be measured by contract law standards. The application of contract law to plea agreements is premised on the notion that the negotiated guilty plea represents a bargained-for quid pro quo.” *United States v. Escamilla*, 975 F.2d 568, 571 (9th Cir. 1992) (internal citations omitted). As such, a plea agreement is like other bargained-for exchanges where each side makes concessions in order to obtain certain advantages. *See United States v. Littlefield*, 105 F.3d 527, 530 (9th Cir. 1997). Judy’s appeal denies the government the benefit of its bargain.

In this case, the parties stipulated that Judy would receive a sentence below the statutory maximum and a reduction for acceptance of responsibility. In consideration for these benefits, Judy agreed, among other things, not to file an appeal. Specifically, Judy waived his right to appeal “the manner in which the sentence is determined...” (CR 53; ER 41.) The plea agreement is clear: “[T]his waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case.” (CR 53; ER 41.) Judy’s refusal now to abide by his promise should not be countenanced.

IV. CONCLUSION

For the foregoing reasons, Judy’s appeal should be dismissed.

Respectfully submitted this 28th day of August, 2017.

ELIZABETH A. STRANGE
Acting United States Attorney
District of Arizona

KRISSA M. LANHAM
Deputy Appellate Chief

/s Rachel C. Hernandez
RACHEL C. HERNANDEZ
Assistant U.S. Attorney
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Tammie R. Holm
TAMMIE R. HOLM
Legal Assistant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL K. JUDY,

Defendant-Appellant.

C.A. No. 16-10368

D. Ct. No. CR-15-08060-PCT-SPL

APPELLEE'S REPLY TO MOTION
TO DISMISS APPEAL BASED ON
WAIVER IN PLEA AGREEMENT

The United States of America respectfully submits the following reply to Appellant's Response to Government's Motion to Dismiss. (Dkt. 29, hereinafter Response.) Judy's appeal should be dismissed because he knowingly and voluntarily waived his right to appeal.

SUMMARY OF ARGUMENT

Judy knowingly and voluntarily entered into a written plea agreement which included a waiver of his right to appeal. By signing his plea agreement, Judy negotiated a benefit that gave him the possibility of being released from prison at the completion of his sentence. In return, he agreed not to file an appeal. The record demonstrates that the district court thoroughly advised Judy at the guilty plea hearing and that Judy understood the rights he was giving up by pleading guilty. Judy's

breach of the agreement should not go unchecked, and his appeal should be dismissed.

ARGUMENT

Where an appeal raises issues encompassed by a valid, enforceable appellate waiver, the appeal generally must be dismissed. *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011). In order to determine whether a defendant agreed to an appellate waiver knowingly and voluntarily, the Court “look[s] to circumstances surrounding the signing and entry of the plea agreement.” *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995); *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997), *overruled on other grounds by United States v. Jacobo-Castillo*, 496 F.3d 947, 957 (9th Cir. 2007).

Judy knowingly and voluntarily entered into the plea agreement. During the plea colloquy, Judy established he had a clear mind and was competent to plead guilty. (RT 3/3/16 5; ER 74.) Judy stated he reviewed the entire agreement with his attorney and his questions had been answered. (RT 3/3/16 6; ER 75.) Judy confirmed that no one had forced or threatened him to plead guilty, that all promises made by the government were included within his plea agreement, and that he was voluntarily entering the agreement. (RT 3/3/16 7-8; ER 76-77.) Judy acknowledged that he was giving up various Constitutional rights: to plead not guilty and maintain his innocence, to continued assistance of counsel, to confront adverse witnesses, to

a jury trial, to call and subpoena witnesses, and to remain silent. (RT 3/3/16 13, 20; ER 82, 89.)

Judy also specifically acknowledged the written appeal waiver in his agreement. He stated that it had been read to him, that he had discussed it with his attorney and that he understood that he was relinquishing his right to appeal. (RT 3/3/16 6, 11, 14; ER 75, 80, 83.)

Contrary to Judy's assertion now, there is no obvious confusion evident in the record. (Response at 17.) The defendant was clear about the waiver of his rights and the meaning of his plea agreement. Not until the sentence was pronounced did he express any confusion, and even then the district court made clear that Judy's appeal was waived. Although Judy may now be disenchanted with his sentence, he has not shown that his substantial rights were violated by any of the claimed errors.

Judy relies on *United States v. Arellano-Gallegos*, 387 F.3d 794 (9th Cir. 2004)¹ and *United States v. Arqueta-Ramos*, 730 F. 3d 1133 (9th Cir. 2013) for the proposition that Rule 11(b) errors can affect substantial rights. (Response at 15.) Those cases are inapposite to Judy's claims. In *Arellano-Gallegos*, the magistrate judge did not discuss the appeal waiver with the defendant whatsoever and made no

¹ Judy cites to *United States v. Arellano-Gallegos*, 351 F.3d 966 (9th Cir. 2003) which was amended and superseded on denial of rehearing by *United States v. Arellano-Gallegos*, 387 F.3d 794 (9th Cir. 2004). In both opinions the facts are inapplicable to this case.

mention of it in his findings and recommendations. *Arellano-Gallegos*, 387 F.3d at 796. Additionally, “neither the magistrate judge nor the district court ascertained whether Arellano’s waiver of appeal was knowing and voluntary ‘before’ the acceptance of the plea.” *Id.* Here, the appeal waiver was discussed twice during the plea colloquy and Judy acknowledged that the waiver had been explained to him and that he understood it. Only after a thorough Rule 11 proceeding did the district court accept the plea.

Similarly, *Arqueta-Ramos* involves an entirely different situation than the case presented here. In *Arqueta-Ramos*, this Court found that an *en masse* change of plea proceeding in which sixty-six defendants entered guilty pleas in one hearing violated the Rule 11(b)(1) requirement that a defendant be addressed personally. *Arqueta-Ramos*, 730 F.3d at 1138. Here, Judy was the sole defendant in a change of plea hearing that lasted 55 minutes. (RT 3/3/16 2, 22; ER 71, 91.)

In this case, the parties stipulated that Judy would receive a sentence below the statutory maximum and a reduction for acceptance of responsibility. In consideration for these benefits, Judy agreed, among other things, not to file an appeal. He has not shown that the plea proceeding was defective in any regard. Moreover, he has not established that his substantial rights were affected. As such, the waiver should be enforced and this appeal should be dismissed.

CONCLUSION

For the foregoing reasons, Judy's appeal should be dismissed.

Respectfully submitted this 13th day of September, 2017.

ELIZABETH A. STRANGE
Acting United States Attorney
District of Arizona

KRISSA M. LANHAM
Deputy Appellate Chief

s/ Rachel C. Hernandez
RACHEL C. HERNANDEZ
Assistant U.S. Attorney
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Melody A. Karmgard

Melody A. Karmgard
Paralegal Specialist

Appendix E

1 **LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.**

2 Michael J. Bresnehan, Esquire (Arizona Bar No. 009415)

3 1761 E. McNair Drive, Ste. 101

4 Tempe, Arizona 85283-5002

(480) 345-7032

Attorney for Defendant-Appellant

6 IN THE UNITED STATES COURT OF APPEALS
7 FOR THE NINTH CIRCUIT

8 UNITED STATES OF AMERICA,) No. 16-10368

9 Plaintiff-Appellee,)

) D.C. No. CR15-08060-PCT-SPL

10 v.)

)

) DEFENDANT-APPELLANT'S

12 MICHAEL K. JUDY,)

) RESPONSE TO GOVERNMENT'S

) MOTION TO DISMISS

14 Defendant-Appellant.)

15 COMES NOW the defendant-appellant, Michael K. Judy, by and through the
16 undersigned attorney, and hereby opposes to the government's motion to dismiss,
17 all for the reasons set forth in the accompanying memorandum of points and
18 authorities.
19

20
21 RESPECTFULLY SUBMITTED this 7th day of September, 2017, by

22 **MICHAEL J. BRESNEHAN, P.C.**

23
24 s/ Michael J. Bresnehan

Attorney for Defendant-Appellant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **THE APPEAL WAIVER IN THE PLEA AGREEMENT DOES NOT BAR THE**
3 **RELIEF SOUGHT BY APPELLANT.**

4 Generally, this Court retains jurisdiction over an appeal by a defendant
5 who has signed an appeal waiver, although it will not exercise that jurisdiction
6 to review the merits of [a defendant's] appeal if it concludes that he knowingly
7 and voluntarily waived his right to appeal. *United States v. Jacobo Castillo*, 496
8 F.3d 947, 957 (9th Cir. 2007) (en banc) (quoting *United States v. Gwinnett*, 483
9 F.3d 200, 203 (3d Cir. 2007) (alteration in original)). Additionally, a defendant
10 may attack the voluntary and intelligent character of a plea agreement even after
11 an unconditional plea. *United States v. Reyes-Olatero*, 224 F.3d 1112, 1115 (9th
12 Cir. 2000). Moreover, "An appeal waiver will not apply if: 1) a defendant's
13 guilty plea failed to comply with Fed.R.Crim.Proc. 11; 2) the sentencing judge
14 informs a defendant that she retains the right to appeal; 3) the sentence does not
15 comport with the terms of the plea agreement; or 4) the sentence violates the
16 law." *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007).

17 An appeal waiver in a plea agreement will not be enforced if it is not
18 "made knowingly and voluntarily." *United States v. Tsosie*, 639 F.3d 1213,
19 1217 (9th Cir. 2011) (citing *United States v. Gordon*, 393 F.3d 1044, 1050 (9th
20 Cir. 2004)).
21
22
23
24
25
26
27
28

1 In the instant case, defendant-appellant, Michael Judy ("Judy"), asserts
2 that the district court judge who presided over the change of plea proceeding
3 failed, in certain important respects, to comply with the provisions of Rule
4 11(b)(1), Fed.R.Crim.Proc. In so doing, the judge failed to establish that Judy
5 understood the trial and appellate rights he was waiving, and the role of the
6 Sentencing Guidelines in the sentencing process. In fact, the record strongly
7 suggests that Judy's plea was anything but the product of a knowing and
8 voluntary waiver of his legal rights. Were this Court to so find, then Judy's
9 appeal waiver would not act to bar this appeal, or the relief requested herein. *Id.*

13 Finally, the district court judge's statements during the sentencing
14 proceeding regarding Judy's right to appeal left Judy with a "reasonable
15 expectation" that he *could* appeal his judgment and sentence. *United States v.*
16 *Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995).

19 **JUDY'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY AND**
20 **INTELLEGENANT, AND THE DISTRICT COURT ERRED IN FINDING**
21 **OTHERWISE.**

22 A valid guilty plea must be made voluntarily and knowingly. *Boykin v.*
23 *Alabama*, 395 U.S. 238, 242-44 (1969); see, also, Rule 11, Fed.R.Crim.Proc. To
24 this end, Rule 11 is "Meant to ensure that a guilty plea is knowing and
25 voluntary, by laying out the steps a trial judge must take before accepting such a
26 plea." *United States v. Vonn*, 535 U.S. 55, 58 (2002). In particular, the record
27
28

1 must affirmatively disclose that the defendant entered his guilty plea with full
2 awareness of his privilege against self-incrimination, his right to a trial by jury,
3 and his right to confront his accusers. *Boykin*, 395 U.S. at 241. "We cannot
4 presume a waiver of these three important federal rights from a silent record".
5

6 *Id.*

7
8 Rule 11(b)(1), Fed.R.Crim.Proc., provides in pertinent part as follows:

9 Before the court accepts a plea of guilty...the court must address
10 the defendant personally in open court. During this address, the court
11 must inform the defendant of, and determine that the
12 defendant understands ...(C) the right to a jury trial...(E) the right at trial
13 to confront and cross-examine adverse witnesses, to be protected from
14 compelled self-incrimination, to testify, and present evidence,
15 and to compel the attendance of witnesses; (F) the defendant's waiver of
16 these trial rights if the court accepts a plea of guilty or nolo
17 contendere...(M) in determining a sentence, the court's obligation to
18 calculate the applicable sentencing-guideline range and to consider
19 that range, possible departures under the Sentencing Guidelines, and
20 other sentencing factors under 18 U.S.C. §3553(a)...(N) the terms
21 of any plea-agreement provision waiving the right to appeal or to
22 collaterally attack the sentence...*Id.*

23 From the record in this case, it seems clear that Judy did not fully
24 understand his trial and appellate rights, and, therefore, any purported waiver by
25 Judy of those rights pursuant to a plea agreement was invalid, and is
26 unenforceable.

27 Judy, who completed his education through high school on the Navajo
28 Indian Reservation in northern Arizona, and who's primary language was/is

1 Navajo (CR 52; PSR, ¶¶ 72-73, p. 16),¹ at times clearly did not fully
2 comprehend certain important concepts discussed during his change-of-plea and
3 sentencing proceedings.

4
5 The change-of-plea and sentencing proceedings were conducted by the
6 Honorable Steven P. Logan, district court judge. A Navajo interpreter was
7 present at both proceedings to assist Mr. Judy.

8
9 During the change-of-plea colloquy, Judy asserted that he understood the
10 plea agreement "with the exception of the length of sentence, the date when I
11 would have completed my sentence, that I don't understand". The colloquy
12 continued, in relevant part, as follows:
13

14
15 THE COURT: Did anyone make you any promises to get
16 you to enter into this Plea Agreement, other than the promises that
17 are contained in your Plea Agreement?

18 THE DEFENDANT: Yes.

19 THE COURT: What other promises were made to you? My
20 apologies, clearly my question was confusing. You have this ten-
21 page document. It's called a Plea Agreement. It's a contract
22 that you have with the United States Federal Government. My
23 question is: Are all the promises contained only in this document?

24 THE DEFENDANT: If that's the way it's – if that's the way I
25 understand, it is fine.

26
27
28 ¹The abbreviation "CR" refers to the Clerk's Record, and will be followed by the
event number designated in the Clerk's file. The abbreviation "ER" refers to the
Excerpts of the Record, and will be followed by the relevant page number referenced
in the Appellant's Excerpts of the Record. The abbreviation "PSR" refers to the
Presentence Investigation Report, and will be followed by the relevant page and
paragraph numbers of that report. "R.T." refers to the Court Reporter's Transcript, and
will be followed by the relevant date and page number of the transcript.

1 MR. SMITH: Defense counsel promises the Court that no promises
2 have been given to Mr. Judy besides those set forth in the plea.

3 THE COURT: Is that correct, Mr. Judy?

4 THE DEFENDANT: Yes.

5 (CR 61; R.T. 3/03/16, pp. 7-8; ER VOL. II, pp. 76-77)

6 In discussing the statutory sentencing range, the judge engaged in the
7 following colloquy:

8 THE COURT: Sir, this crime under 18 U.S.C. Section 2241 is
9 punishable by a maximum fine of \$250,000, a maximum term of
10 your natural life in federal prison, or both, and a term of supervised
11 release of five years up to life.

12 Do you understand the potential maximum punishment in your
13 case?

14 THE DEFENDANT: Yes.

15 THE COURT: In addition to that, at the time of sentencing I will
16 order you to pay a \$100 special assessment for the count of
17 conviction.

18 Do you understand that?

19 THE DEFENDANT: Yes.

20 (CR 61; R.T. 3/3/16, pp. 8-9; ER VOL. II, pp. 77-78)

21 Page one of the plea agreement described the statutory sentencing ranges
22 which included "a term of supervised release of *five years to life* pursuant to 18
23 U.S.C. § 3583(k)." (CR 53; ER VOL. II, p. 37). It should be noted that, at the
24 time of the offense, 18 U.S.C. § 3583 (supervised release statute) allowed for a
25 period of supervised release of "not more than five years." Pub. L. 100-182, §
26 8(1).
27
28

1 As mentioned *supra*, when asked, during his change-of-plea proceeding,
2 whether he understood the plea agreement, Judy asserted that he understood the
3 plea agreement “with the exception of the length of sentence, the date when I
4 would have completed my sentence, that I don’t understand,” suggesting that he
5 did not understand the nature of the Sentencing Guidelines and their role in the
6 sentencing process. This should have prompted the judge to explain the court’s
7 obligation to calculate the applicable sentencing-guidelines range, and to
8 consider that range, possible departures under the Sentencing Guidelines, and
9 other sentencing factors under 18 U.S.C. § 3553(a), as required under Rule 11
10 (b)(1)(M); but the judge failed to do so.
11

12 Judy seemed confused when asked whether all of the agreements between
13 the government and Judy were contained in the written plea agreement (CR 61;
14 R.T. 3/03/16, p. 7-8; ER VOL. II, pp. 76-77); and when asked whether he was
15 pleading voluntarily of his own free will and because he believed he was guilty
16 of the crime, he provided a somewhat non-responsive “Yes, I did it.” (CR 61;
17 R.T. 3/03/16, p. 8; ER VOL. II, p. 77).
18

19 During his explanation of the plea agreement, the judge told Judy that
20 after he had served a prison sentence ranging between 120 months and 288
21 months, he would serve a *life-time term of supervised release* (again, not
22 permitted under the applicable statute). (CR 61; R.T. 3/03/16, p. 9; ER VOL. II,
23
24
25
26
27
28

1 p. 78)² The parties later stipulated to strike the lifetime supervised release tail
2 from the plea agreement. (CR 62; R.T. 8/08/16, p. 14; ER VOL. I, p. 22) (CR
3 53; ER VOL. II, p. 38)
4

5 At the change of plea proceeding, the judge explained Judy's appellate
6 waiver as follows:
7

8 THE COURT: If your plea is accepted and if I impose a sentence
9 permitted by the terms of your agreement --

10 THE INTERPRETER: Your Honor, please.

11 THE COURT: -- You will not be permitted to withdraw from
12 your plea or challenge your judgment and sentence on appeal or in
13 a collateral proceeding.

14 THE DEFENDANT: Yes.

15 THE COURT: -- with the exception of an appeal based on
16 ineffective assistance of counsel or prosecutorial misconduct.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 (CR 61; R.T. 3/03/16, p. 14; ER VOL. II, p. 83)
20

21 During the change of plea colloquy, the judge advised Judy that he has a
22 right to "be represented" by an attorney throughout all stages and through each
23 phase of his case, but omitted any mention of who would have to bear the cost
24 of that representation. (CR 61; R.T. 3/03/16, p. 13; ER VOL. II, p. 82).
25

26 ²While the government might claim that this mistake was later waived by Judy at his
27 sentencing proceeding, it provides additional context for Judy's claim that he did not
28 fully understand the proceedings, the rights he was waiving, and how his sentence
would be determined.

1 It should be noted that while advising Judy of his constitutional rights,
2 the judge did not do so in the specific context of a trial. The relevant colloquy
3 unfolded, as follows:
4

5 THE COURT: Sir, as a person accused of a crime here in the
6 United States you have certain rights guaranteed to you by
7 the United States Constitution.

8 THE DEFENDANT: Yes.

9 THE COURT: You have a right to remain silent and to maintain
10 your innocence throughout all stages of you case, as well as to be
11 represented by a lawyer through each phase of your case.

12 THE DEFENDANT: Yes.

13 THE COURT: You have a right to confront and cross-examine
14 Government witnesses, as well as present your own evidence and
15 compel witnesses to come to court and testify on your behalf.

16 THE DEFENDANT: Yes.

17 THE COURT: The burden of proof is always on the United States
18 Government to prove that you're guilty, it never shifts to
19 you for you to prove that you're innocent.

20 Do you understand that?

21 THE DEFEDNANT: Yes.

22 (CR 61; R.T. 3/03/16, pp. 13-14; ER VOL. II, pp. 82-83)³

23 During the change-of-plea colloquy, the judge made no mention of the
24 court's obligation to calculate the applicable sentencing-guideline range, and to
25 consider that range, possible departures under the Sentencing Guidelines, and
26 other sentencing factors under 18 U.S.C. § 3553(a), all as required under Rule

27 ³ While Judy acknowledges that the written plea agreement contains information
28 regarding Judy's trial and appellate rights, and the court's obligation to consider the
Sentencing Guidelines, he argues that Rule-11 requires the court to determine, in open
court, that Judy truly understood those rights. Clearly, the judge did not.

1 11 (b)(1)(M), Fed.R.Crim.Proc. (CR 61; R.T. 3/03/16, pp. 1-23; ER VOL. II,
2 pp. 70-92).

3
4 Later, when asked by the judge whether Judy would like to give up his
5 right to a trial, the following colloquy ensued:

6 THE DEFENDANT: *What are – what are those things that are*
7 *involved in a trial?*

8 THE COURT: Sir, a trial means that the United States
9 Government must come into this room and provide the
10 jury members with sufficient information that would leave each
11 and every jury member firmly convinced of your guilt before any
12 of those jury members can vote in finding you guilty. That's a trial
13 in case you wish to maintain your innocence.

14 I believe what you're trying to do is enter a plea of guilty. You've
15 already told me that you're guilty of this crime. In order to enter
16 the plea of guilty you must waive your right to go to trial.

17 THE DEFENDANT: Yes.

18 THE COURT: So you wish to enter a plea of guilty?

19 THE DEFENDANT: This is where we are now. I will no longer
20 hide this. I will accept the events that happened, what I've done.
21 And this is not something that I wish to hide anymore. I will make
22 – try to make things right. And in time, I wish to be forgiven, and
23 perhaps the Lord will forgive me as well.

24 THE COURT: Do you wish to plead guilty to Count No. 12?

25 THE DEFENDANT: That's correct.

26 THE COURT: Sir, as to Count 12 of the Indictment, charging you
27 with Aggravated Sexual Abuse of a Minor, which is a
28 Class A felony under 18 U.S.C. Section 1153 and 2241(c), sir, how
do you wish to plead, guilty or not guilty?

THE DEFENDANT: Yes, I plead guilty.

THE COURT: Sir, this court accepts your plea of guilty. This
Court also finds that you've knowingly, intelligently and
voluntarily entered a plea of guilty, that you understand the charge,
and that there's a factual basis for your plea, and also that you're
competent to enter a plea of guilty. It's ordered that a Presentence
Report be prepared in your case.

1 (CR 61; R.T. 3/03/16, pp. 20-21; ER VOL. II, pp. 89-90)

2 Judy's obvious confusion regarding the nature of a trial is truly
3 disconcerting given the advanced stage of the proceedings, and the fact that
4
5 Judy was about to waive that very important right. Moreover, the Judge
6 responded with a brief and inadequate description of a trial, and immediately
7
8 moved on without first confirming, as required under Rule 11 (b)(1)(E), that
9 Judy understood the things the judge had just said.

10
11 Judy clearly did not understand his appeal rights either. When asked at
12 the sentencing proceeding by the sentencing judge whether he (Judy) had
13 agreed to waive his appeal rights, Judy responded: "I really don't know." The
14
15 judge did not pause to explore this with Mr. Judy. Rather, the judge simply
16 continued with the sentencing colloquy. The sentencing proceeding transcript
17
18 contains the following exchange:

19 THE COURT: Mr. Judy, do you also agree, sir, that you have
20 waived your right to appeal?

21 THE DEFENDANT: I really don't know.

22 THE COURT: *Mr. Judy, if you believe you have a right*
23 *to appeal, you need to file the notice of appeal in writing*
with the clerk of this court no more than 14 days from the
date that your judgment is filed.

24 *This Court's had a chance to review the Plea Agreement in*
25 *the case, and I believe the sentencing is consistent*
26 *with what was negotiated by you, Mr. Judy. However, if you think*
27 *I'm wrong and you think there was prosecutorial*
28 *misconduct or that your lawyer was ineffective, you can certainly*
plead [sic] if you chose to do so.

1 And if you can't afford to pay the costs of the appeal or the lawyer
2 to assist you, those costs will be paid on your behalf.

3 Do you understand that?

4 Do you understand that, Mr. Judy?

5 THE DEFENDANT: (In English) *I need to study some more.*

6 THE COURT: Mr. Smith, is there anything else from you?

7 MR. SMITH: No, Your Honor.

8 THE COURT: Is there a location where your client would like to
9 be housed?

10 MR. SMITH: He'd like to remain in Arizona or in the southwest,
11 if possible.

12 THE COURT: Mr. Judy, is there anything else from you, sir?

13 THE DEFENDANT: If that's going to happen, what's available?

14 THE COURT: If what's going to happen what's available, Mr.
15 Judy?

16 THE DEFENDANT: *I don't know about these processes, these
17 court processes, I don't know about them.*

18 THE COURT: Which court processes?

19 THE DEFENDANT: *I didn't understand what's going on.*

20 THE COURT: When did you stop understanding what was going
21 on, Mr. Judy?

22 THE DEFENDANT: *I don't really understand what you mean
23 about the appeal process.*

24 THE COURT: Mr. Smith will go into great detail with you about
25 the appellate process that this Court finds that you've waived.
26 This Court also finds that you've knowingly, intelligently and
27 voluntarily entered your plea of guilty on your case, that you
28 understood the charge in your case, and as I found months ago, that
there was a factual basis for your plea. And I also found that you
were competent, just like I find that your competent today,
Mr. Judy.

(CR 62; R.T. 8/08/16, pp. 51-53; ER VOL. I, pp. 32-33; ER VOL. III, p. 211)

Thus, not only did Judy not understand his appeal rights, the judge
arguably left Judy with a "reasonable expectation" that he could still appeal his
judgment and sentence. See, e.g., *United States v. Buchanan*, 59 F.3d at 917.

1 (CR 62; R.T. 8/08/16, pp. 51-53; ER VOL. I, pp. 32-33; ER VOL. III, p. 211)

2 Given Judy's apparent lack of sophistication and his obvious confusion

3 regarding his appeal rights, this Court's earlier rulings in *United States v.*

4 *Watson*, 582 F.3d 974 (9th Cir. 2009), *United States v. Aguilar-Muniz*, 156 F.3d

5 974 (9th Cir. 1998), and *United States v. Schuman*, 127 F.3d 815 (9th Cir. 1997)

6 (cited by the government) do not foreclose this Court from concluding that the

7 district court's statements regarding Judy's right to appeal likely left Judy with

8 the impression that he *could* appeal his judgment and sentence.

9 Despite his brief, affirmative responses to the judge's appeal waiver

10 questions at the change of plea proceeding, Judy clearly did not understand his

11 appeal rights, and, thus, could not have knowingly and voluntarily waived them.

12 While the relevant time period in determining whether a defendant has

13 knowingly and voluntarily entered into an unconditional plea is when the plea

14 takes place, *United States v. Floyd*, 108 F.3d 202, 20 (9th Cir. 1997), Judy's

15 obvious confusion at his sentencing proceeding regarding his appeal rights is

16 compelling evidence that he never truly understood those rights.

17 Finally, at the change of plea proceeding, the judge never made an

18 express and specific finding that Judy had knowingly, intelligently, and

19 voluntarily waived his trial and appeal rights. (CR 61; R.T. 3/03/16, p. 21; ER

20 VOL. II, p. 90)

1 In summary, the change of plea proceeding was, in certain respects, in
2 clear violation of Rule 11(b)(1), Fed.R.Crim.Proc. These Rule 11 violations, in
3 turn, deprived Judy of a clear understanding of the trial and appellate rights he
4 was waiving under the plea agreement, thus rendering the plea invalid, and the
5 plea agreement unenforceable.
6

7
8 The district court had a duty under Rule 11(b)(1), Fed.R.Crim.Proc., and
9 under the Due Process Clause of the United States Constitution, to determine
10 that Judy understood his trial and appeal rights, and that he wished to waive
11 these rights in order to plead guilty. The district court's failure to do so
12 constituted error. *Id.*; *Boykin v. Alabama*, 395 U.S. at 242-43 (due process
13 requires that a guilty plea be knowing and voluntary).
14

15
16 The district court had a further duty, under Rule 11 (b)(1)(M), and,
17 arguably, under the Due Process Clause, to determine that Judy understood the
18 district court's obligation to calculate the applicable sentencing-guideline
19 range, and to consider that range, possible departures under the Sentencing
20 Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a). *Id.*; *Boykin*
21 *v. Alabama, supra*. The district court's failure to do so was error.
22
23

24
25 In it's motion to dismiss, the government argues that Judy answered
26 "yes" at the right times when questioned about his understanding of the trial
27 and appellate rights he was waiving. The government further argues that Judy's
28

1 attorney explained Judy's rights to Judy, and Judy expressed a clear desire to
2 plead guilty. However, these are "form over substance" arguments that must be
3 viewed against the backdrop of Judy's obvious confusion about his trial and
4 appellate rights, and the role and operation of the Sentencing Guidelines.
5

6 The government goes on to argue that even if the district court failed to
7 comply with the requirements of Rule 11(b), that error was harmless, as it did
8 not affect Judy's substantial rights – an argument that goes beyond the scope of
9 a motion to dismiss based on an appeal waiver. If the plea was not knowing and
10 voluntary, then the appeal waiver is not enforceable, and the appeal should be
11 determined on its merits. Nevertheless, Judy will address the government's
12 argument here.
13
14
15

16 Rule 11(b) errors can affect a defendant's substantial rights. See, e.g.,
17 *United States v. Arellano-Gallegos*, 351 F.3d 966, 968 (9th Cir. 2003) (where
18 this Court found that the district court's failure to properly advise the defendant
19 regarding his appeal waiver affected defendant's substantial rights). See, also,
20 *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1135 (9th Cir. 2013) (where
21 this Court held that the district court's failure to individually advise the
22 defendant of his trial rights constituted a violation of a substantial right in the
23 absence of proof to the contrary).
24
25
26
27
28

1 Ultimately, Rule 11 “exists to ensure that guilty pleas are knowing and
2 voluntarily”. *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1061 (9th Cir.
3 2011) (quoting *United States v. Pena*, 314 F.3d 1152, (9th Cir. 2003). More
4 specifically, Rule 11(b)(1) serves to ensure that the defendant knows and
5 understands the rights he is giving up, and the consequences of entering a guilty
6 plea. *United States v. Aguilar-Vera*, 698 F.3d 1196, 1201 (9th Cir. 2012). In
7 other words, Rules 11(b)(1) and (b)(2) address the Supreme Court’s concern
8 that “[i]gnorance, incomprehension, coercion, terror, inducements, subtle or
9 blatant threats might be a perfect cover-up of unconstitutionality” in a
10 conviction by a guilty plea. *Boykin v. Alabama*, 395 U.S. at 242-43. Where, as
11 here, a defendant clearly states in the record that he does not understand his trial
12 and appeal rights, or how his sentence will be calculated, and the district court
13 does not take effective steps to ameliorate the problem, a proper record
14 preserving those claims has arguably been made, thus calling for the harmless
15 error standard of review (Judy’s attorney’s inexplicable silence in the face of
16 Judy’s obvious confusion notwithstanding). See, e.g., *United States v. Aguilar-*
17 *Vera*, 698 F.3d at 1201. (where defense counsel asked the judge to make a Rule
18 11(b)(2) finding, but did not object after the judge failed to do so- harmless
19 error standard was found to apply, as the Rule 11(b)(2) issue was deemed to be
20 preserved). See, also, *United States v. Gray*, 581 F.3d 749, 752 (8th Cir. 2009)
21
22
23
24
25
26
27
28

1 (where the Court found defendant's *pro se* post-plea statements to the district
2 court that he did not realize that his plea would trigger a mandatory minimum
3 15-year prison sentence to constitute an "objection" to the district court's
4 alleged failure to comply with Rule 11(b)(2), thus allowing for harmless error
5 review). In demonstrating harmless error, "it is not enough to negate an effect
6 on the outcome of the case". *United States v. Dominguez Benitez*, 542 U.S. 74,
7 81 n. 7(2004). Rather, the Government must prove that the error was harmless
8 beyond a reasonable doubt. *Id.* Because of the district court's failure to comply
9 with Rule 11(b)(1), and Judy's *de facto* objections to the court's Rule 11
10 colloquy, the government bears the burden of identifying evidence in the record
11 that Judy's guilty plea was, in fact, both knowing and voluntary, and that any
12 violations of Rule 11 were harmless beyond a reasonable doubt. Judy posits that
13 there is no clear evidence in the record that the Rule 11(b)(1) errors by the
14 district court were remedied, or that Judy's obvious confusion regarding the
15 trial, sentencing and appeal processes did not affect his decision to proceed with
16 his guilty plea. Thus, in the absence of evidence establishing that the errors here
17 were harmless beyond a reasonable doubt, and that Judy's guilty plea was
18 knowing and voluntary, Judy is entitled to the relief requested.

26 Even under the plain error standard of review, Judy is entitled to relief.
27 The district court's failure to comply with Rules 11(b)(1)(E), (F), (M) and (N)
28

1 was error. The error was plain or obvious. *United States v. Olano*, 507 US. 725,
2 734 (1993) (“Plain” is synonymous with “clear”, or equivalently, “obvious”).
3 The error affected Judy’s substantial due process right to a knowing and
4 voluntary waiver of his ^{trial} ~~trial~~ and appeal rights, and prejudiced Judy.
5

6 It should be noted here that the proper prejudice analysis is not a simple
7 “but for” (i.e., but for the error, the defendant probably would not have pled
8 guilty) calculation. In arriving at its prejudice standard, the Supreme Court, in
9 *United States v. Davila*, 133 S.Ct. 2139, 2143 (2013), relied on *United States v.*
10 *Dominguez Benitez*, *supra*, where the Supreme Court held that the defendant
11 need only establish that based on the totality of the circumstances, “the
12 probability of a different result is sufficient to undermine confidence in the
13 outcome of the proceeding.” *Id.* See, also, *United States v. Myers*, 801 F.3d
14 1116, 1125 (9th Cir. 2015) (adopting the *Dominguez Benitez* prejudice
15 standard).
16
17
18
19

20 Where a defendant informs the district court that he does not understand
21 the trial, sentencing and appeal processes, and his related rights, and the court
22 does not take effective steps to ensure and determine that the defendant has a
23 clear understanding of those processes and rights, and the plea deal would
24
25
26
27
28

1 likely result in something tantamount to a natural life sentence,⁴ “the
2 probability of a different result is sufficient to undermine the confidence in the
3 outcome of the proceeding.” *Dominguez Benitez, supra*.

4
5 Even if going to trial would have been objectively foolish given the
6 strength of the government’s case, the clear prospect of a “natural life” sentence
7 pursuant to a guilty plea would likely have caused Judy to opt for trial. *Id.*

8
9 In *Dominguez Benitez*, the Supreme Court explained that, to determine
10 whether Rule 11 error affected the defendant’s substantial rights, this Court
11 should consider “record evidence tending to show that a misunderstanding was
12 inconsequential to a defendant’s decision, or evidence indicating the relative
13 significance of other facts that may have borne on his choice regardless of any
14 Rule 11 error.” *Id.* at 84 (citation omitted). The inquiry shall include “the
15 overall strength of the Government’s case and any possible defenses that appear
16 from the record.” *Id.* The Court further explained:
17
18
19
20
21

22 ⁴Even a sentence at the low end of the prison range stipulated to under the plea
23 agreement (10 years) would likely have been close to a natural life sentence for Judy,
24 given his age, and a clear understanding of the likely impact of the Sentencing
25 Guidelines on his (Judy’s) sentence would have alerted Judy to the real possibility of a
26 sentence substantially greater than ten years. It would be counterintuitive to believe
27 Judy would not have sought a better deal, or gone to trial, given those prospects.
28 Moreover, even if Judy fully understood that the shortest sentence he could possibly
get under the plea agreement was ten years, if, nevertheless, he held a reasonable
belief that he could appeal any sentence higher than ten years, his guilty plea was not
knowingly and voluntarily.

1 The point of the question is not to second-guess a defendant's actual
2 decision; if it is reasonably probable he would have gone to trial absent
3 the error, it is no matter that the choice may have been foolish. The point,
4 rather, is to inquire whether the omitted warning would have made the
5 difference required by the standard of reasonable probability.

6 *Id.*

7 Finally, the district court's acceptance of Judy's guilty plea, absent the
8 required findings under Rule 11(b)(1)(C), (E), (F), (M) and (N) seriously
9 affected the fairness, integrity or public reputation of judicial proceedings,
10 particularly in the face of the in-court statements made by Judy indicating that
11 he did not understand the trial process, the appeal process, and the role and
12 probable impact of the Sentencing Guidelines on Judy's sentence.
13

14 CONCLUSION

15 The appeal waiver in Judy's plea agreement does not bar this appeal, or
16 the relief requested herein, because Judy's guilty plea, and his purported appeal
17 waiver, were not knowing and voluntary, and, hence, his plea is invalid and the
18 plea agreement is unenforceable.
19

20 The government's motion to dismiss should be denied, and the appeal
21 should proceed, and be decided on the merits.
22

23 RESPECTFULLY SUBMITTED this 7th day of September, 2017, by
24

25 **MICHAEL J. BRESNEHAN, P.C.**

26 s/ Michael J. Bresnehan
27 Attorney for Defendant-Appellant
28

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2017, I electronically filed the foregoing Response To Government's Motion To Dismiss with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that the defendant-appellant is not a registered CM/ECF user. I have caused one copy of the Response to be mailed, postage prepaid, to: Michael K. Judy, Register No. 44885-408, FCI Safford, Federal Correctional Institution, P.O. Box 9000, Safford, AZ 85548.

s/ Michael J. Bresnehan
Attorney for Defendant-Appellant

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 21 2017

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL K. JUDY,

Defendant-Appellant.

No. 16-10368

D.C. No. 3:15-cr-08060-SPL
District of Arizona,
Prescott

ORDER

Before: CANBY, TROTT, and GRABER, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 28) is granted. Contrary to Judy's claim, the record reflects that his plea and appellate waiver were knowing and voluntary. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (appeal waiver is enforceable if its language encompasses the right to appeal on the grounds raised and the waiver is knowingly and voluntarily made). Moreover, the district court's statements at the sentencing hearing did not negate the written waiver. *See United States v. Arias-Espinosa*, 704 F.3d 616, 619-20 (9th Cir. 2012).

DISMISSED.

Appendix G

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAR 19 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL K. JUDY,

Defendant-Appellant.

No. 16-10368

D.C. No. 3:15-cr-08060-SPL

District of Arizona,

Prescott

ORDER

Before: CANBY, TROTT, and GRABER, Circuit Judges.

Appellant has filed a petition for panel rehearing and rehearing en banc, which we treat as a motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 34).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.