

In the Supreme Court of the United States

ZENIA CHAVEZ, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit*

REPLY BRIEF FOR PETITIONER

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Reply Brief of Petitioner¹

The government does not contest the existence of a circuit split over an important question about a criminal defendant’s right to be present at sentencing: whether a defendant’s waiver of the right to appeal “the sentence” applies to a claim that the oral pronouncement of the sentence conflicts with the written judgment.

The Fifth Circuit answers that question “yes,” reasoning that “the sentence” encompasses both the oral pronouncement and the written judgment. *United States v. Higgins*, 739 F.3d 733, 736 (5th Cir. 2014).

Three other circuits disagree—holding that “the sentence” is the oral pronouncement and that the appeal waiver does not apply to this kind of challenge. *United States v. Shaw*, 139 F.4th 548, 552 (6th Cir. 2025); *United States v. Harris*, 51 F.4th 705, 720 (7th Cir. 2022); *United States v. Singletary*, 984 F.3d 341, 345 (4th Cir. 2021). Two of those circuits explicitly reject the Fifth Circuit’s approach. *Harris*, 51 F.4th at 720; *Shaw*, 139 F.4th at 553.

This Court’s decision in *Hunter v. United States*, 146 S. Ct. 1702 (2026), dealt with the enforceability, not the applicability, of an appeal waiver. It did not, therefore, resolve the split. If the split is allowed to stand, whether an appeal waiver bars a defendant’s complaint that the district court added

¹ The parties to the proceeding and corporate disclosure have not changed. Pet. at ii.

penalties in the written judgment that it never pronounced in her presence will depend on the circuit in which she is sentenced.

I. The split over whether a challenge to the written judgment as inadequately orally pronounced is a challenge to “the sentence,” covered by an appeal waiver, endures despite *Hunter*.

The circuits are split over whether a waiver of the right to appeal “the sentence” applies to a challenge that a trial court’s oral pronouncement of the sentence conflicts with its written judgment. In *Hunter*, the Court defined a limit on the enforceability of an appeal waiver. But, that does not resolve the fundamental issue here: whether the appeal waiver applies to Chavez’s challenge in the first instance.

A. This Court’s opinion in Hunter does not affect the holdings of the Fourth, Sixth, and Seventh Circuits that the written judgment is not “the sentence”; rather, it is merely evidence of what the trial court orally pronounced.

The Fourth, Sixth, and Seventh Circuits have all held that a waiver of “the right to appeal any sentence” does not apply to a defendant’s argument that the written judgment differs from the oral pronouncement. *Shaw*, 139 F.4th at 552; *see also Harris*, 51 F.4th at 720; *Singletary*, 984 F.3d at 345. Notably, each of those circuits relies on an interpretation of “the sentence”—and, thereby, the reach of the appeal waiver—not on the enforceability of the appeal waiver.

Each of the three circuits explicitly reasons that “the sentence” is what the trial court pronounces at sentencing and the written judgment is only evidence

of what the sentence was. In *Harris*, the Seventh Circuit wrote that “a sentencing judge’s unambiguous oral pronouncement—not the written judgment—is the defendant’s actual sentence.” 51 F.4th at 720. In *Singletary*, the Fourth Circuit similarly held that a challenge to a difference between the oral pronouncement and written judgment “is not a claim . . . that the district court erred in the process by which it sentenced [the defendant] . . . or that those conditions cannot reasonably be applied to [the defendant]—matters that would be covered by the appeal waiver. Instead, if [the defendant] is right . . . , then he has never been sentenced” to the conditions that appeared for the first time in the written judgment. 984 F.3d at 345. Finally, the Sixth Circuit most clearly explained, “the punishment announced from the bench in the defendant’s presence ‘is the sentence.’” *Shaw*, 139 F.4th at 552 (quoting *Harris*, 51 F.4th at 720) (emphasis in *Shaw*). “The written judgment, on the other hand, is merely evidence of the sentence. Simply put, a sentencing court may impose one and only one sentence, and the written judgment form is a nullity to the extent it conflicts with the oral sentence.” *Id.* (internal quotes omitted).

In *Hunter*, this Court cabined the enforceability of an appeal waiver. Specifically, the Court held “that an agreement not to appeal a sentence is unenforceable when it would result in a miscarriage of justice—meaning, when it would leave in place the kind of egregious error that would bring the judicial

system into disrepute.” 146 S. Ct. at 1708. As Chavez urged in her petition, “[t]his case presents a distinct issue from *Hunter*.” Pet. at 14. In *Hunter*, the trial court had included a condition of supervised release that required the defendant to take any medication prescribed as part of a mental-health treatment program. 146 S. Ct. at 1709. Hunter objected, the district court overruled his objection, and the district court informed him that he could appeal his sentence. *Id.* The Fifth Circuit dismissed Hunter’s appeal because the government invoked the appeal waiver, and the Fifth Circuit found it enforceable. *Id.*

This petition concerns the applicability of the appeal waiver, not its enforceability. The government’s argument that *Hunter* resolves this case assumes the resolution of the split. The question of whether the appeal waiver applies must be decided before courts can determine whether it is enforceable. Thus, *Hunter* will only bear on this case if the Court adopts the Fifth Circuit’s approach—applying the appeal waiver and then asking whether it results in a miscarriage of justice. If, however, the Court adopts the approach urged by the Fourth, Sixth, and Seventh Circuits, the appeal waiver does not apply and its enforceability is never reached.

For those reasons, the split will endure. The Fourth, Sixth, and Seventh Circuits will continue to hold that the appeal waiver does not apply to this dispute. The Fifth Circuit, however, will continue to hold that the appeal

waiver does apply and, after *Hunter*, will consider only whether the waiver is enforceable, *i.e.*, whether its enforcement would result in a miscarriage of justice.

B. The decision in Hunter will not change the Fifth Circuit’s divergent decision on the applicability of the appeal waiver or its enforcement of the appeal waiver to bar Chavez’s challenge.

The Fifth Circuit has repeatedly held, “the fact that the oral pronouncement prevails when there is variation does not mean the written pronouncement is not also the ‘sentence’ for purposes of appeal.” *Higgins*, 739 F.3d at 738. Thus, the Fifth Circuit holds “the nature of the appeal for conflict between the two sentences suggest that such an appeal *is* an appeal of the sentence.” *Id.* (emphasis original); *see also United States v. Chavez*, No. 24-50548, 2026 WL 116671, at *1 (5th Cir. Jan. 15, 2026) (“Because Chavez’s appeal waiver, which the Government invokes, bars her only challenge to her sentence, her appeal is DISMISSED.”). The Court’s holding in *Hunter* cannot change the Fifth Circuit’s holding that the oral pronouncement and written judgment are both part of the sentence and, therefore, the appeal waiver applies to an argument that the two conflict.

Moreover, the Fifth Circuit’s reading of *Hunter* to date suggests that the conflicting outcomes, as well as the conflicting reasoning, will persist—the Fifth Circuit will find the appeal waiver enforceable in this case. The Court

wrote in *Hunter* that “the kinds of sentences that raise miscarriage-of-justice concerns . . . are rare in our justice system.” *Hunter*, 146 S. Ct. at 1714. This Court has indicated that the miscarriage-of-justice standard may apply when the trial court imposed a sentence “without some minimum of civilized procedure.” *Id.*

Here, the district court held a sentencing hearing at which Chavez and her counsel participated. To be sure, the difference between the oral pronouncement and the written judgment raises constitutional concerns. In *Shaw*, the Sixth Circuit rooted its analysis in the due process right: “A criminal defendant has the right—rooted in the Fifth Amendment’s Due Process Clause—to be present at his sentencing. So the punishment announced from the bench in the defendant’s presence is the sentence.” 139 F.4th at 552 (quotes omitted).

Nonetheless, the Fifth Circuit will not find that the district court’s failures to orally pronounce some of the conditions of supervised release are the “types of errors [that] jeopardize the justice system’s basic integrity.” *United States v. London*, __ F.4th __, 2026 WL 2452236, at *1 (5th Cir. 2026) (quoting *Hunter*, 146 S. Ct. at 1714); see also *United States v. Brann*, __ F.4th __, 2026 WL 2333927, at *11 (5th Cir. 2026) (finding that the miscarriage-of-justice standard did not apply because the sentence was not “imposed without some minimum of civilized procedure”). Here, the Fifth Circuit is unlikely to find that

Chavez was deprived of a minimum of civilized procedure, though the other circuits would find that the conditions of supervised release imposed in the written judgment, while unannounced at sentencing, must be stricken from the written judgment.

II. This is an ideal vehicle to resolve the split.

In the Fifth Circuit, Chavez raised the conflict between the oral pronouncement of the sentence and the written judgment. *Chavez*, 2026 WL 116671, at *1. Chavez argued “that the district court erred by failing to sufficiently orally pronounce or explain its reasons for imposing the standard conditions of supervised release and the intermittent confinement condition included in her written judgment.” *Id.* The Fifth Circuit did not analyze whether the district court adequately orally pronounced the standard conditions of supervised release or the intermittent confinement condition. *Id.* Instead, the Fifth Circuit dismissed Chavez’s appeal in reliance on the appeal waiver in Chavez’s plea agreement. *Id.*

The Fifth Circuit’s holding is in direct and recognized conflict with the other courts to address this issue. As the Seventh Circuit has written, “We are not persuaded by the government’s request to instead adopt the Fifth Circuit’s contrary view in *United States v. Higgins*.” *Harris*, 51 F.4th at 720 (citing *Higgins*, 739 F.3d at 739). The Sixth Circuit has also explicitly rejected the Fifth

Circuit’s reasoning, writing “[t]he Fifth Circuit’s opinion” in *Higgins* “does not address” the established principle that “only a district court’s oral pronouncement is the sentence, and any conflicting written judgment is a nullity.” *Shaw*, 139 F.4th at 553 (quotes omitted).

The government urges the Court to deny the petition because “no such inconsistency” between the oral pronouncement and the written judgment “exists in this case.” Gov’t Br. at 6.

First, the Fifth Circuit did not address that issue, so it is properly considered only on remand after plenary review by this Court. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider arguments that “were not addressed by the Court of Appeals” because “we are a court of review, not of first view”).

Second, the Fifth Circuit’s cases suggest that Chavez’s challenge will be successful on remand if the Court adopts the position of the Fourth, Sixth, and Seventh Circuits. As outlined in Chavez’s petition, Pet. at 10–14, the Fifth Circuit requires a district court to expressly identify and adopt the specific supervised release conditions it imposes on the defendant. *United States v. Martinez*, 47 F.4th 364, 368 (5th Cir. 2022). The district court’s judgment contained “standard conditions” and an “additional condition[]” that had not been expressly identified or adopted previously.

The presentence investigation report made a vague reference to “standard conditions of supervision adopted by the Court,” without explaining what they were or where they could be found. C.A. ROA 38. And, at sentencing, the district court merely stated, “I’m gonna follow [your sentence of imprisonment] with three years of supervised release under standard conditions which this Court adopts.” C.A. ROA 260. Chavez’s written judgment, in turn, contained sixteen conditions of supervision that appeared for the first time in the judgment, never having been expressly identified or adopted. C.A. ROA 150.

Further, the “additional condition[]” appeared entirely for the first time in the written judgment, purporting to require Chavez to “remain in the custody of the Federal Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release as directed by the Court.” C.A. ROA 152. This condition of supervision grants the district court authority to order Chavez to spend an additional year incarcerated, or any nights, weekends, or other intervals it deems appropriate during that year.

The condition, as written, appears nowhere else in the record. The closest the record comes is a short statement by the district court at sentencing that,

“I’ll include the special condition that you submit to up to one year of intermittent confinement as directed by the Court pursuant to law.” C.A. ROA 261. That brief reference was not sufficient to expressly identify and adopt the condition that later appeared in the judgment.

Finally, the intermittent confinement condition illustrates the importance of this issue. The condition, as it appears in the written judgment, is contrary to the law. Intermittent confinement may be imposed as a condition of supervised release only after a finding of a violation of supervised release, not as part of the original sentence. “[A] condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available.” 18 U.S.C. § 3583(d). As it appears in Chavez’s written judgment, the district court may order Chavez to spend up to an additional year incarcerated during her first year of supervised release. That was not announced at her sentencing and is contrary to the law.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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