

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NOE DE JESUS ARCE-HERNANDEZ

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA United States Postal Service: June 30, 2026

QUESTION PRESENTED

1. Did the district court's oral declaration, during the Petitioner's Rule 11 change-of-plea proceeding, that the Petitioner reserved the right to appeal a sentence that was not in compliance with the United States Sentencing Guidelines permit an appeal based on an asserted misapplication of the Guidelines by the district court, despite the express sentence appeal waiver language in the written plea agreement?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation. The petitioner is Noe De Jesus Arce-Hernandez. The Respondent is the United States of America.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The Petitioner, Noe De Jesus Arce–Hernandez (“ Arce”), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner’s positions asserted herein.

OPINIONS BELOW

The Court of Appeals denied relief in its Memorandum Decision dated January 21, 2026. (Appendix B) The Court of Appeals denied Petitioner’s Motion For Rehearing and Rehearing En Banc on April 2, 2026. (Appendix C)

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying relief was entered on January 21, 2026, and the denial of Petitioner’s Petition For Rehearing and Rehearing En Banc was entered on April 2, 2026. That Court had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Distribution of Methamphetamine (21 U.S.C. § 841(a)(1) and § 841(b)(1)(C))

§ 841. Prohibited acts A

(a) UNLAWFUL ACTS

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) PENALTIES

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

. . .

(1)(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date–Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and

if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both.

Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

Conspiracy to Distribute Methamphetamine (21 U.S.C. § 846)

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy

COURT RULES

Rule 11, Federal Rules of Criminal Procedure

Rule 11(b)

. . .

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO
CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant.*
Before the court accepts a plea of guilty or nolo

contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing

Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea–agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

UNITED STATES SENTENCING GUIDELINES

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy (U.S.S.G. § 2D1.1(a)(5) and (b)(12)).

U.S.S.G. § 2D1.1(a)(5)

(a) Base Offense Level (Apply the greatest):

. . .

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34**, decrease by **3** levels; or (iii) above level **34**, decrease to level **32**.

. . .

U.S.S.G. § 2D1.1(b)(12).

(b) Specific Offense Characteristics

. . .

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

Role In The Offense (U.S.S.G. § 3B1.2)

Mitigating Role U.S.S.G. § 3B1.2

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On December 5, 2023, an Indictment was filed in the United States District Court, District of Arizona, charging Petitioner, Noe De Jesus Arce–Hernandez (“Arce”) with one count of Conspiracy to Distribute Methamphetamine, in violation of 21 U.S.C. § 846 (Count 1), one count of Distribution of Methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (Count 2), and one count of Possession with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (Count 3). The Indictment included a forfeiture allegation. (2–ER–87–90)¹

The government alleged that on or between November 7, 2023 and November 8, 2023, in the District of Arizona, defendants Arce, Juan Carlos Garcia–Bahena (“Garcia”) and Christian Adrian Falomir–Rodriguez (“Falomir”) conspired to distribute a mixture or substance containing a detectable amount of methamphetamine. The government further alleged that on or about November 8, 2023, defendants Arce and Garcia possessed

¹ The abbreviation “Doc.” Refers to docket entries in the District Court Clerk’s Record, and will be followed by the event number designated in the Clerk’s docket. The abbreviation “ER” refers to the Excerpts of the Record, and will be preceded by the volume number, and followed by the relevant page number referenced in Petitioner’s Excerpts of the Record. The abbreviation “PSR” refers to the Presentence Investigation Report, and will be followed by the relevant page and/or paragraph number(s) of that report.

with the intent to distribute, and did distribute, a mixture or substance containing a detectable amount of methamphetamine.

Specifically, the government alleged that Falomir, working with a drug source in Mexico, arranged for the sale of 50 pounds of methamphetamine to a DEA confidential source (“CS”) in Phoenix, Arizona. Arce and Garcia were recruited by Falomir to deliver the packaged methamphetamine to the CS at a designated place and time. When they arrived at the drop site with the methamphetamine, both were arrested by DEA agents, and the methamphetamine was seized. DEA agents then searched a bedroom rented by Falomir, and used by Arce as his residence, and seized additional methamphetamine, cocaine, and packing materials in a closet, and several thousand dollars in cash in a nightstand, within that bedroom. The agents searched another bedroom in the same residence – this one occupied by Falomir – and an automobile owned by Falomir, and seized additional packaged methamphetamine, cocaine, and packing materials. (PSR, pp. 4–5, ¶¶4–13)

IV. CASE HISTORY

On December 5, 2023, the aforementioned Indictment was filed. Arce entered a plea of not guilty on all three counts, and a denial on the forfeiture allegation. The matter was set for trial.

On October 23, 2024, after several continuances of the trial date, Arce appeared in Court for his change-of-plea proceeding. There, Arce pled guilty

to Count 2 of the indictment pursuant to a written plea agreement. (1–ER–34–55)

In the Rule 11(c)(1)(C), Fed.R.Crim.P., plea agreement, the parties stipulated that, for United States Sentencing Guidelines (“U.S.S.G.”) purposes, the quantity of methamphetamine attributable to Arce was 4.5 kilograms or more of methamphetamine (actual), and that Arce was a “minor participant” in the offense of conviction. The parties further stipulated that Arce’s prison sentence, if any, would not exceed 46 months, and the remaining counts in the Indictment would be dismissed. Additionally, the government agreed to make a non-binding recommendation of a two or three-level reduction in Arce’s Guidelines Offense Level upon Arce’s acceptance of responsibility for the count of conviction. (2–ER–77–78)

During the change-of-plea colloquy, the Judge advised Arce, as follows, regarding his appeal waiver:

THE COURT: Now, in addition to those rights, written in your plea agreement, with two exceptions, you are also giving up your right to appeal to a higher court than this court or to challenge in any court the conviction that will result from your guilty plea today or any matter pertaining to the government's prosecution of its case against you and the sentence that will be imposed so long as that sentence complies with the written terms of your plea agreement *and the Sentencing Guidelines*.²

The two exceptions to your giving up your rights of appeal are you do maintain a possible appeal of ineffective assistance of your counsel or a claim of prosecutorial

² The obverse of that being Arce was free to appeal any sentence that was *not* in compliance with the United States Sentencing Guidelines.

misconduct. With those two exceptions, do you understand that you are giving up the right to appeal the judgement and sentence in your case?

THE DEFENDANT: Understood, Your Honor.

(1-ER-40-41) (emphasis added)

The written plea agreement included the following appeal waiver:

WAIVER OF DEFENSES AND APPEAL RIGHTS

The defendant waives (1) any and all motions, defenses, probable 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 18 U.S.C. § 3582(c) (except for the right to file a compassionate release motion under 18 U.S.C. § 3582(c)(1)(A) and to appeal the denial of such a motion). 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 IIB of Ariz. Ethics Op. 15-01 (2015)).

(2-ER-79)

At the change-of-plea proceeding, the district court found that Arce's guilty plea was knowingly, intelligently and voluntarily made, and that there was a sufficient factual basis for the plea. The court accepted Arce's guilty plea, and entered it of record. Arce did not object to that finding. The court

deferred acceptance of the plea agreement. (1–ER–53)

On December 23, 2024, prior to the sentencing proceeding, a Presentence Investigative Report (“PSR”) was prepared by the Probation Department. Applying the November 1, 2024 United States Sentencing Guidelines, the PSR writer calculated Arce’s total offense level to be 33, and determined that his prior criminal history placed him in Criminal History Category I. (PSR p. 8, ¶ 35)

On January 8, 2025, Arce filed a pleading titled “Sentencing Memorandum And Objections To PSR And Request For Downward Variance Or Departure”. (2–ER–62–74) There, Arce argued that applying the relevant facts to the 18 U.S.C. § 3553(a) factors, Arce should receive a sentence of 24 months in custody, followed by a 36–month term of supervised release. (2–ER–74) Arce objected to the Probation Department’s characterization of his role in the offense as “average”, and that Arce “maintained premises for the purposes of manufacturing or distributing a controlled substance.” (2–ER–68–69) Thus, Arce posited that his Base Offense Level should have been four levels lower, pursuant to U.S.S.G. § 2D1.1(a)(5)(A), two additional levels lower for minor role, pursuant to U.S.S.G. § 3B1.2(b), and he should not have received a two–level increase under U.S.S.G. § 2D1.1(b)(12). This would have produced a Total Offense Level of 25, and a Guidelines prison sentencing range of 57–71 months. (2–ER–68–69)

The government filed a response to that pleading, *essentially agreeing*

with Arce's objections, but recommended a prison sentence of 46 months. (2–ER–57–61)

The Probation Department filed its final PSR on January 13, 2025, recommending the court overrule Arce's objections to the PSR, and sentence Arce to 57 months custody, followed by a three-year term of supervised release. (PSR, pp. 19–20)

On January 14, 2025, Arce appeared in court for sentencing. The district court overruled Arce's aforementioned objections, but because the plea agreement contained a stipulation that, for Guidelines purposes, Arce would be entitled to a minor role adjustment, the district court gave Arce the options of withdrawing his guilty plea, or proceeding with the plea agreement, modified only by the court's decision to score Arce as an average participant under U.S.S.G. § 3B1.2. Arce elected not to withdraw his guilty plea, but rather to proceed under the remaining terms of the plea agreement.

After listening to the arguments of both counsel, the district court adopted the Probation Department's Guidelines calculations, and imposed a sentence of 42 months custody at the Bureau of Prisons, to be followed by a consecutive 36-month term of supervised release, with conditions. The court also imposed a \$100.00 special assessment, and ordered all seized money forfeited. (Appendix A, pp. 1 – 5)

The district court went on to give Arce the following instructions regarding his right to appeal the court's judgment and sentence:

Now, in your plea agreement, with two exceptions, you did give up your right to appeal the judgement and sentence in your case if the sentence you received complied with the written terms of your plea agreement. You received a sentence that does comply with the terms of your plea agreement, so do you understand that you have given up your right to appeal the judgement and sentence in your case?

THE DEFENDANT: I understand.

THE COURT: Now, even though you've given up *certain of your appeal rights*, if for some reason you still feel that you wish to appeal, you only have 14 days in which to file your Notice of Intent to do so, and Mr. Rumold can advise you with regard to that.

(1–ER–31–32) (emphasis added)

On January 27, 2025, Arce filed a timely Notice of Appeal from the January 14, 2025 Judgment and Sentence. (2–ER–98) On appeal, Arce argued that the Court had jurisdiction to grant the relief requested herein by Arce, as the district court judge who conducted Arce’s change-of-plea proceeding had informed Arce, in so many words, that he could appeal a sentence that *did not comply with the U.S.S.G.s*. Because the district court’s erroneous application of the U.S.S.G.s was, in fact, the basis of Arce’s appeal, any appeal waiver in Arce’s plea agreement purporting to prevent a challenge to the district court’s application of the Sentencing Guidelines was not knowing and voluntary, and was void on due process grounds.

Arce also argued that the district court’s sentence was procedurally erroneous, as the court failed to apply properly U.S.S.G. §§ 3B1.2(b) and 2D1.1(a)(5) (minor role adjustments), and 2D1.1(b)(12) (maintaining premises

for the purpose of manufacturing or distributing a controlled substance) in arriving at its Guidelines prison sentencing range, and that the case should be remanded for resentencing with instructions to resentence after properly scoring Arce's Guidelines prison range.

Finally, Arce argued that the district court's prison sentence was substantively unreasonable, given Arce's personal history, and his limited role in the crime of conviction, and that certain of the district court's factual findings relevant to sentencing were clearly erroneous. Thus, he argued, the prison sentence imposed was greater than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a), and the resulting sentence constituted an abuse of discretion.

In its Answering Brief, the government, *without explanation*, abandoned its earlier positions supporting Arce's proposed application of the Guidelines, and opposed all requested relief.

The Ninth Circuit Panel reviewed *de novo* the issue of whether Arce waived his right to appeal. Upon review, the Panel concluded that the district court's comments during the change-of-plea proceeding regarding Arce's right to appeal his sentence were not sufficiently clear and unequivocal to constitute an exception to Arce's appeal waiver. The Panel dismissed the appeal, ruling, in pertinent part, as follows:

Arce–Hernandez entered into a valid plea agreement in which he waived his right to appeal “any aspect of [his] sentence.” However, Arce–Hernandez contends that the district court vitiated this waiver when it stated during

a change of plea hearing that Arce–Hernandez was waiving his right to appeal “so long as [his] sentence complie[d] with the written terms of [his] plea agreement and the Sentencing Guidelines.” *See United States v. Nishida*, 53 F.4th 1144, 1149 (9th Cir. 2022) (reviewing de novo “whether the district court has vitiated a valid appeal waiver”) (citation omitted).

To vitiate an “otherwise valid appeal waiver,” a court’s oral pronouncements must be “unambiguous and without qualification.” *Id.* (reasoning that only “clear, unequivocal statements that contradict waiver, such as ‘you have the right to appeal findings which I make today regarding sentencing,’” vitiate a waiver) (citation omitted)). The court’s pronouncement to Arce–Hernandez was not sufficiently “clear [and] unequivocal” to vitiate Arce–Hernandez’s waiver. *Id.* (explaining that “equivocal statements that do not directly conflict with waiver, such as ‘you may have a right to appeal the sentence,’” do not vitiate a waiver) (citation omitted).

The Panel did not rule on the sentencing issues raised by Arce, viewing them as moot. (Appendix B, pp. 6 – 8)

On March 6, 2026, Arce filed a Petition For Rehearing and Rehearing En Banc. That petition was denied on April 2, 2026 (Appendix C, pp. 9-10)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals’ decision in the instant case conflicts with decisions in other Circuit Courts of Appeals requiring this Court’s intervention. On facts similar to those in the instant case, the First Circuit Court of Appeals in *United States v. McCoy*, 508 F.3d 74, 78 (1st Cir.

2007)³, and the Fourth Circuit Court of Appeals, in *United States v. Bowden*, 975 F.2d 1080, 1081 n.1 (4th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993)⁴, held that appeal waivers with express or implied carve outs for sentences improperly arrived at through the district court’s misapplication of the Sentencing Guidelines do not operate to preclude sentencing appeals based specifically on that ground.

Alternatively, the Ninth Circuit Court of Appeals’ determination that the appeal waiver carve out asserted by Arce was too ambiguous to permit Arce’s appeal so far departed from the accepted and usual course of judicial proceedings, or permitted such a departure by the lower court, as to call for the Supreme Court’s supervisory power.

ARGUMENT

There is no constitutional right to appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). The right is purely statutory. *Abney v. United States*, 431 U.S. 651, 656 (1977). Before the passage of the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq., defendants appealed their sentences pursuant to 28 U.S.C. § 1291. If, however, the district court imposed a sentence within the statutory limits, it was “generally not subject to review.” *United States v. Tucker*, 404 U.S. 443,

³ See, also, *United States v. Santiago–Burgos*, 750 F.3d 19, 23 (1st Cir. 2014).

⁴ See, also, *United States v. Tate*, 845 F.3d 571, 577 (4th Cir. 2017).

447 (1972). When Congress passed the 1984 Sentencing Reform Act, it greatly expanded a defendant’s right to obtain appellate review of his sentence. Under the authority of 18 U.S.C. § 3742(a), courts of appeals may now review certain sentences, including those “imposed in violation of law...[and those] imposed as a result of an incorrect application of the Sentencing Guidelines.”

An express waiver of the right to appeal in a negotiated plea of guilty is generally valid and enforceable. *United States v. Navarro–Botello*, 912 F.2d 318 (9th Cir. 1990). In *Navarro–Botello*, the Ninth Circuit held that since “it is not a due process violation for a defendant to waive constitutional rights as a part of a plea bargain, then a defendant’s waiver of a non–constitutional right, such as a statutory right to appeal a sentence, is also waivable.” *Id.*

A waiver of appeal is valid if it was knowingly and voluntarily executed, and if enforcement would not result in a miscarriage of justice if enforced. *Sotirion v. United States*, 617 F.3d 27, 33 (1st Cir. 2010); *United States v. Teeter*, 257 F.3d 14, 24–25 (1st Cir. 2001). But “[e]ven a knowing and voluntary appeal waiver only precludes appeals that fall within its scope.” *United States v. McCoy*, 508 F.3d at 77; *see, also, United States v. Acosta–Roman*, 549 F.3d 1, 3 (1st Cir. 2008); *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000). Thus, an appeal waiver would not prevent an appeal where the sentence imposed was not in accordance with the

negotiated plea agreement. *United States v. Navarro–Botello*, 912 F.2d at 322.

In the instant case, while the appeal waiver in the written plea agreement was very broad, and included “challenges to any aspect of the defendant’s sentence, including the manner in which the sentence is determined”, it did not foreclose the relief sought by Arce, as the judge who handled the change–of–plea proceeding advised Arce, in open court, that he would be waiving his appeal rights “so long as that sentence *complies with* the written terms of the plea agreement *and the Sentencing Guidelines*.”⁵ (1–ER–40), thus, requiring any “determination” of Arce’s sentence to be in compliance with the Guidelines.

Arce asserted, in his appeal, that the district court’s sentence was procedurally erroneous *because of the district court’s misapplication of the Sentencing Guidelines in arriving at it’s sentence*.

The district court judge’s statement qualifying Arce’s appeal waiver was clear and unequivocal, and occurred during Arce’s change–of–plea proceeding. Arce was entitled to rely upon the judge’s *oral* characterization of his appeal waiver in deciding whether to waive his right to a trial by pleading guilty.

⁵ The obverse of that being that Arce *could* appeal any sentence *not* in compliance with the Sentencing Guidelines.

As the Ninth Circuit noted in *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1994):

A defendant may waive the statutory right to appeal his sentence. *Navarro–Botello*, 912 F.2d at 321. However, an express waiver of the right to appeal a sentence is valid only if knowingly and voluntarily made. *Bolinger*, 940 F.2d at 480; *Navarro–Botello*, 912 F.2d at 322. We look to circumstances surrounding the signing and entry of the plea agreement to determine whether the defendant agreed to its terms knowingly and voluntarily. See, e.g., *Navarro–Botello*, 912 F.2d at 321.

Buchanan, 59 F.3d at 917.

In *Buchanan*, the sentencing judge erroneously advised the defendant that he had a right to appeal his sentence despite contrary language in the written plea agreement. The defendant appealed his sentence, and this Court held, in pertinent part, as follows:

Because of the district court judge's statements, Buchanan could have a reasonable expectation that he could appeal his sentence. In *United States v. Munoz–Dela Rosa*, 495 F.2d 253 (9th Cir. 1974), the district court judge, at sentencing, incorrectly informed Munoz–Dela Rosa that his federal sentence would run concurrently with a sentence previously imposed by a magistrate. *Id.* at 254. The subsequent written judgment correctly stated that the sentences were to run consecutively. *Id.* We held that, where there is a direct conflict between a trial judge's unambiguous oral pronouncement of sentence and the written judgment, the oral pronouncement must control, even if erroneous. *Id.* at 256. In discussing the Munoz–Dela Rosa court's reasoning, we explained, "In Munoz–Dela Rosa, the defendant was told to his face that the

sentences would run concurrently. He, therefore, had a reasonable expectation that they would run concurrently." *United States v. O'Brien*, 789 F.2d 1344, 1347 (9th Cir. 1986).

Similarly, here, the oral pronouncement must control. The district court twice stated that Buchanan had a right to appeal his sentence. Indeed, Buchanan's answer of "Yes, sir" to the district court's question of whether he understood that he had a right to appeal indicates Buchanan's expectation that he could appeal his sentence and evinces a misunderstanding of the substance of his plea agreement. We note also that the government did not object to the district court's erroneous statements. Thus, Buchanan could have no reason but to believe that the court's advice on the right to appeal was correct.

Litigants need to be able to trust the oral pronouncements of district court judges. Given the district court judge's clear statements at sentencing, the defendant's assertion of understanding, and the prosecution's failure to object, we hold that in these circumstances, the district court's oral pronouncement controls and the plea agreement waiver is not enforceable.

Buchanan, 59 F.3d at 918.

Several other Circuits have held that oral pronouncements by district courts control in this context. *See, e.g., United States v. Wood*, 378 F.3d 342, 349 (4th Cir. 2004) (oral pronouncement by court worked to amend written provision in plea agreement); *United States v. Goodman*, 165 F.3d 169, 174 (2nd Cir. 1999) ("[The district Judge] suggested, contrary to the language of the agreement, that [the defendant] would retain the right to appeal her sentence...". But, see *United States v. Fleming*, 239 F.3d 761 (6th Cir. 2001);

United States v. Atterberry, 144 F.3d 1299 (10th Cir. 1998); and *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992). At the change-of-plea proceeding, Arce orally acknowledged the district court judge's in-court pronouncements regarding Arce's appeal waiver, and the government did not object to the judge's apparent misstatement. The fact that the pronouncement may have been inadvertent does not lessen its import. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

The district court's oral pronouncement at the change-of-plea proceeding in the instant case effectively stating that Arce could appeal a sentence that failed to comply with the Sentencing Guidelines was objectively unambiguous and without qualification.

Nor can it be said that the judge's statements during the subsequent sentencing proceeding cured the judge's earlier apparently erroneous advisement at the change-of-plea proceeding. The damage was done. Arce had waived his right to a jury trial, and pled guilty based, in part, on the judge's in-court statements at the change-of-plea proceeding. The judge accepted Arce's guilty plea and modified plea agreement prior to his final pronouncements at the sentencing proceeding regarding Arce's purported appeal waiver.

In *United States v. Bowden*, *supra*, the defendant, Glen Bowden, appealed from the sentence imposed upon him by the United States District Court for the Eastern District of North Carolina following his conviction on

pleas of guilty to federal firearms charges. Bowden received an enhanced sentence as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4. He challenged that enhancement, claiming that certain of his prior state convictions should not be counted as predicate “violent felonies” as defined in § 924(e). Finding no merit in this argument, the district court affirmed.

On appeal, the government argued, as a preliminary matter, that the Court should dismiss this appeal on the ground that Bowden waived his statutory right to appeal his sentence. The plea agreement that Bowden signed contained the following provision:

By this agreement Defendant waives any appeal and the right to exercise any post–conviction rights provided under Title 28, United States Code, Section 2255 if the sentence imposed herein is within the guidelines promulgated by the United States Sentencing Commission pursuant to 18 U.S.C. §§ 3351 et seq. and 28 U.S.C. §§ 991 et seq. and the enhanced sentencing provision of 18 U.S.C. § 924(e).

However, in light of that language in the plea agreement, the Fourth Circuit Court of Appeals held, in pertinent part, as follows:

We are of opinion that a fair reading of this waiver preserves Bowden’s right to challenge the district court’s application of the Guidelines and the armed career criminal enhancement of § 924(e). Bowden argues that his sentence is not “within the guidelines.” The suggestion that we dismiss the appeal is denied.

United States v. Bowden, 975 F.2d 1081 n.1

The Fourth Circuit affirmed this approach to recognizing Guidelines–based appeal waiver carve outs in plea agreements in *United States v. Tate*,

supra, where it distinguished the *Bowden* carve out, requiring the sentence to be in accordance with the Guidelines, from the provision in Tate’s plea agreement merely saying the sentence will be calculated using the Guidelines. *Id.* at 577.

In *United States v. McCoy*, *supra*, the defendant, David McCoy, pled guilty in January 2006 to two counts of wire fraud (18 U.S.C. § 1343) and to one count of conspiracy to launder money (18 U.S.C. §§ 1956(h) and 1957). As part of the plea agreement, the government agreed to request a prison sentence within the range appropriate under the Sentencing Guidelines. The agreement also set forth both parties’ positions on some (but not all) of the issues expected to arise in applying the Guidelines to the case. On some of these issues the parties agreed, but others were disputed. The plea bargain also included a (partial) waiver of McCoy’s right to appellate review. The appeal waiver effectively precluded McCoy from challenging any sentence that fell “within the guideline range”. McCoy’s arguments on appeal were that, by both a legal error and a mathematical mistake, the district court mis-measured the loss, and so misapplied the Guidelines. The Court reasoned, if he is correct, then his sentence was *not* “within the Guidelines range”, and his appeal was *not* barred by the waiver. The First Circuit agreed with the Fourth Circuit, citing *Bowden*, that a waiver forgoing “any appeal...if the sentence imposed herein is within the

guidelines” does *not* waive the right to appeal an alleged misapplication of the Guidelines. *Id.* at 78.

Thus, under both *Bowden* and *McCoy*, Arce’s purported appeal waiver in his written plea agreement, at least as to his sentence, was not knowingly and voluntarily made as required by the Due Process Clause of the Fifth Amendment to the United States Constitution, and was, therefore, invalid, and unenforceable. *See, Boykin v. Alabama*, 395 U.S. 238, 242 fn.5 (1969).

While one might argue that the Panel’s decision in the instant case is unpublished, and was grounded on something other than a sweeping departure from the way other Circuits have handled the issue, the Ninth Circuit has taken similar positions in earlier published cases. In *United States v. Bolinger*, 940 F.2d 478 (9th Cir. 1991), the Ninth Circuit held that language in a plea agreement stating the defendant was to be sentenced under the Sentencing Guidelines did *not* constitute an appeal waiver carve out allowing a Guidelines-based sentencing appeal. *Id.* at 480. There, the defendant’s plea agreement expressly waived 18 U.S.C. § 3742 sentencing appeals, but the written plea agreement also included the following provision:

Defendant may be sentenced to a period of incarceration which is not to exceed 36 months. The parties agree that the Court may depart upward or downward *under the sentencing guidelines*. The court may, at its discretion, sentence defendant to a period of incarceration of between zero and thirty-six months, including a sentence of probation.

Id. at 479. (emphasis added)

Bolinger sought to circumvent the appeal waiver by arguing that his sentence did not accord with his plea agreement. He contended that, because the plea agreement specified that he be sentenced “under the Guidelines”⁶, the alleged misapplication of the Guidelines renders the sentence outside the negotiated agreement, thereby providing a basis for appeal under the *Navarro–Botello* exception. The Ninth Circuit rejected that argument, concluding that the plain meaning of the plea agreement was that Bolinger waived his right to appeal the sentence under section 3742 unless he received a term of incarceration in excess of an agreed-upon cap (36 months). Because the sentence did not exceed the 36-month cap, Bolinger waived his right to appeal the application of the Guidelines.

In *United States v. Anglin*, 215 F.3d 1064 (9th Cir. 2000), the Ninth Circuit went further by concluding that the defendant’s appeal waiver in his plea agreement was enforceable, notwithstanding the apparently accidental inclusion of language in the written plea agreement expressly permitting Section 3742 appeals – language the Court disregarded given the contrary language in the larger written plea agreement, and the plea waiver discussion during the in-court change-of-plea colloquy. *Id.* at 1066–67.

Finally, in *United States v. Arias–Espinosa*, 704 F.3d 616 (9th Cir. 2012), the Ninth Circuit held that a district court’s comments regarding a

⁶ As distinguished from merely “using the Guidelines” found in *United States v. Tate, supra*.

defendant's right to appeal nullify an otherwise valid appeal waiver only if they are "unambiguous" and without qualification, *Id.* at 619. However, the Ninth Circuit's application of that rule appears to ignore the maxim that ambiguities in plea proceedings are to be resolved against the government, and in favor of the defendant. Claimed waivers of appellate rights in plea agreements are to be applied "narrowly." *United States v. Ready*, 82 F.3d 551, 556 (2nd Cir. 1996), and construed strictly against the government. *Id.* See, also, *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004) (ambiguous terms are construed against the government); *United States v. Oladimeji*, 463 F.3d 152, 157 (2nd Cir. 2006) (same); *United States v. Sommer*, 127 F.3d 405, 408 (5th Cir. 1997) (same); and *United States v. Acosta-Roman*, 549 F.3d at 3-4 (same).

The reasoning behind the decision in the instant case, and behind decisions in *Bolinger*, *Anglin* and *Arias-Espinosa*, would not have permitted the outcomes in *Bowden* and *McCoy*, and represents a clear departure from decisions in other Circuits that requires Supreme Court intervention.

Moreover, the Ninth Circuit Court of Appeals' conclusion that the district court's unambiguous oral statement during the change-of-plea colloquy regarding Arce's right to appeal his sentence did not create a Guidelines-based appeal waiver carve out so far departed from the usual course of judicial proceedings, or permitted such a departure by the district court, as to call for the Supreme Court's supervisory power.

For all of these reasons, the Panel was remiss in not deciding the appeal on the merits. The judgment of the Ninth Circuit Court of Appeals should be vacated, and the case remanded for resentencing.

CONCLUSION

The Panel's error here conflicts with the manner in which at least two other Circuit Court's of Appeal view such (Guidelines-based) appeal waiver carve outs, requiring Supreme Court intervention. Alternatively, its determination that the appeal waiver carve out asserted by Arce was too ambiguous to permit Arce's appeal, represents such a departure from the accepted and usual course of judicial proceedings, or has permitted such a departure by the district court, as to call for the Supreme Court's supervisory power. The judgment of the Ninth Circuit Court of Appeals should be vacated, and the case remanded for resentencing.

RESPECTFULLY SUBMITTED this 30th day of June, 2026, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
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