

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 17 2022

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 21-10070

Plaintiff-Appellee,

D.C. No. 1:19-cr-00107-HG-1

v.

MEMORANDUM\*

JERRE NISHIDA,

Defendant-Appellant.

Appeal from the United States District Court  
for the District of Hawaii  
Helen W. Gillmor, District Judge, Presiding

Argued and Submitted February 16, 2022  
Honolulu, Hawaii

Before: HAWKINS, R. NELSON, and FORREST, Circuit Judges.

Defendant-Appellant Jerre Nishida appeals the district court's order sentencing her to 120 months' incarceration followed by 5 years of supervised release. We have jurisdiction under 28 U.S.C. § 1291, and we dismiss.<sup>1</sup>

**1. *Appeal Waiver.*** As explained in our concurrently filed opinion, Nishida

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

<sup>1</sup>We vacate and remand in part two of Nishida's special conditions of supervised release in a separate opinion filed herewith.

knowingly and voluntarily waived her right to appeal “any and all legally waivable claims” and the district court’s statements about her right to appeal did not vitiate her waiver. *United States v. Nishida*, \_\_\_ F.4th \_\_\_ (9th Cir. 2022). Thus, we cannot consider her arguments on appeal unless they fall outside the bounds of her waiver or her sentence violates her plea agreement or is unlawful. *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). Where a defendant argues her sentence is unlawful, whether her waiver applies “rises and falls with her claim on the merits.” *United States v. Dailey*, 941 F.3d 1183, 1188 (9th Cir. 2019).

**2. Sentence Calculation.** Nishida argues the district court erred by failing to apply 18 U.S.C § 3553(f)’s safety-valve in calculating her sentence. Nishida’s appeal waiver forecloses a challenge to “any sentence within the Guidelines range as determined by the [district c]ourt” and “the manner in which the sentence . . . was determined.” However, Nishida retained the right to appeal any portion of her sentence that was “greater than specified in the guideline range determined by the [district c]ourt.”

The district court’s calculation of the guideline range without the safety value, even if erroneous, was part of “the manner in which the sentence . . . was determined.” See *United States v. Medina-Carrasco*, 815 F.3d 457, 462 (9th Cir. 2016) (A “sentence in accordance with the plea agreement need not rest on a correct guidelines determination” where a defendant expressly waives the right to appeal

the guideline determination. (internal quotation marks omitted)). Because no portion of Nishida’s sentence was greater than the specified guidelines range determined by the court, the plea agreement’s express waiver exception does not apply because Nishida cannot show that her sentence violates “the terms of [her] plea agreement.” *Bibler*, 495 F.3d at 624. Nor does the claimed safety-valve error render Nishida’s sentence illegal “because § 3553(f) does not lower the permissible statutory penalty for the crime. All that the safety valve requires is that the district court sentence defendants without regard for the statutory minimum.” *Id.* Since Nishida was sentenced “beneath the maximum allowed by statute”—life imprisonment—the waiver exception for an illegal sentence does not apply. *Id.*; *see* 21 U.S.C. § 960(b)(1).<sup>2</sup>

**3. *Right to Counsel of Choice.*** Nishida argues her sentence was unlawful because her Sixth Amendment right to counsel was violated. We disagree. The district court did not deprive Nishida of her counsel of choice when it appointed counsel under the Criminal Justice Act (CJA) to answer her questions about the disciplinary problems her privately retained counsel was facing. The district court

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<sup>2</sup>In her reply brief, Nishida argues that her appeal waiver does not preclude review because her counsel’s failure to object to the 120-month mandatory minimum was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Where Nishida did not raise this argument in her opening brief, we do not consider it and make no judgment on whether Nishida’s appeal waiver would apply to an ineffective assistance of counsel claim brought as a collateral attack. *See United States v. Briones*, 35 F.4th 1150, 1158–59 (9th Cir. 2021).

repeatedly informed Nishida that she could proceed with her private counsel, continue the sentencing to ask further questions of her private and CJA counsel, or choose new counsel.

**4. *Financial-Disclosure Condition.*** Finally, Nishida’s appeal waiver bars us from considering her argument that the financial-disclosure condition included in the terms of her supervised release exceeds the permissible statutory penalty under 18 U.S.C. § 3553(a) by imposing, without explanation, requirements not “reasonably necessary” for the enumerated purposes of supervised release. Conditions of supervised release must serve the sentencing goals, “involve no greater deprivation of liberty than necessary to achieve those goals,” and be adequately supported by reasons “apparent from the record.” *United States v. Collins*, 684 F.3d 873, 889–90 (9th Cir. 2012) (citations omitted).

Here, the record makes clear that Nishida’s financial-disclosure condition meets these requirements. Where Nishida has a long history of drug abuse and multiple convictions for both possession and intent to distribute, financial disclosures allow the probation office to monitor whether Nishida “is receiving or spending significant funds in suspicious ways” that would indicate that she “has reengaged with drug trafficking or use.” *United States v. Garcia*, 522 F.3d 855, 862 (9th Cir. 2008).

**DISMISSED.**