

MAY 26 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>BRIAN MCLUCAS,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 07-50316

D.C. No. CR-99-01168-RSWL

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Ronald S.W. Lew, District Judge, Presiding

Submitted May 12, 2009\*\*

Before: PREGERSON, CANBY, and BERZON, Circuit Judges.

Brian McLucas appeals from the district court’s order determining that it would not have imposed a materially different sentence following a limited remand pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005)(en banc).

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

We have jurisdiction under 28 U.S.C. § 1291, and we remand.

The government asserts that this appeal is barred by McLucas's appeal waiver. We conclude that the government has waived the waiver by requesting the *Ameline* remand. *See United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002).

McLucas contends that the district court failed to comply with our mandate under *Ameline* because it did not obtain the written views of counsel regarding resentencing under the advisory Sentencing Guidelines before it issued its order responding to our remand. We remand because it is not apparent from this record that counsel had a meaningful opportunity to submit their written views on this issue. *See United States v. Montgomery*, 462 F.3d 1067, 1072 (9th Cir. 2006) (“The court must implement both the letter and the spirit of the mandate”).

We do not reach McLucas's remaining contention.

**REMANDED.**