

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 3, 2022

Lyle W. Cayce
Clerk

No. 21-10347
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JEFFREY NDUNGI SILA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-448-1

Before SMITH, STEWART, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Jeffrey Ndungi Sila was charged with two counts of theft of public funds in violation of 18 U.S.C. §§ 2 and 641 (Counts I and III) and with aggravated identity theft in violation of 18 U.S.C. §§ 2 and 1028A (Count II). A jury convicted Sila on all counts, and he was sentenced to a total term of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-10347

imprisonment of 97 months. Sila appealed, and this court affirmed his convictions on Counts I and II, but it reversed his conviction on Count III and remanded for resentencing after concluding that there was insufficient evidence to support the conviction. *United States v. Sila*, 978 F.3d 264, 270-71 (5th Cir. 2020).

At resentencing, the only issue before the district court was the calculation of the loss amount following this court's reversal of Sila's conviction on Count III. Ultimately, the district court imposed an 87-month term of imprisonment, and Sila filed a second appeal.

In his second appeal, Sila does not dispute the district court's loss calculation or any other matter related to resentencing. Instead, he raises new substantive challenges to his convictions on Counts I and II, arguing constructive amendment of the indictment and claiming that the evidence at trial varied from the indictment in violation of his due process rights. He has also filed a pro se motion seeking substitute counsel based on his current counsel's alleged failure to communicate with him.

The Government moves for summary affirmance, arguing that because Sila's arguments could have been raised in his first appeal, every issue raised in his second appeal is forfeited by the law of the case doctrine and the related waiver doctrine. *See United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004); *see also United States v. Stanford*, 883 F.3d 500, 514 (5th Cir. 2018). Because the Government's position "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), summary affirmance is proper.

Accordingly, the motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED. The Government's alternative motion for an extension of time is DENIED. Sila's motion for the appointment of substitute counsel is DENIED.

APPENDIX B



To the US Court of Appeals 5th Circuit

Subject: Case number 21-10347

EMERGENCY MOTION FOR MISCELLANEOUS RELIEF

Due to exigent circumstances, defendant submits this document via Federal Bureau of Prisons TRULINCS email to his sister, Joyce Sila with instructions to forward it to the court's email. Defendant has had extreme difficulty communicating with counsel. Defendant is yet to receive any documents filed in this case from counsel. Defendant was only recently made aware by a family member with access to PACER that the government had filed a motion for summary affirmance because the opening brief did not include sentencing arguments and effectively waived/forfeited them. Defendant was surprised because it was his understanding that counsel would include sentencing arguments in the opening brief. Defendant does not wish to waive/forfeit any arguments. Defendant respectfully requests the court to allow him reasonable opportunity to contact counsel and convey his concerns in order to remedy the situation perhaps by moving for leave to file a supplemental brief and file a response opposing the government's motion.

Respectfully Submitted

Jeffrey Sila #74051-112

FCI Victorville Medium 1

P.O Box 3725

Adelanto, CA 92301

APPENDIX C

**General Docket
United States Court of Appeals for the Fifth Circuit**

Court of Appeals Docket #: 21-10347

USA v. Sila

Appeal From: Northern District of Texas, Dallas

Fee Status: Fee Paid

Docketed: 04/08/2021

Termed: 02/03/2022

Case Type Information:

- 1) Criminal (DCRIM)
- 2) Direct Criminal
- 3)

Originating Court Information:

District: 0539-3 : [3:16-CR-448-1](#)

Court Reporter: Shawnie Archuleta, Court Reporter

Originating Judge: Jane J. Boyle, U.S. District Judge

Date Filed: 10/04/2016

Date NOA Filed:

04/06/2021

Date Rec'd COA:

04/06/2021

Prior Cases:

[17-10957](#) **Date Filed:** 08/25/2017 **Date**

Disposed: 09/18/2017 **Disposition:** Affirmed

[17-11212](#) **Date Filed:** 10/12/2017 **Date**

Disposed: 10/20/2020 **Disposition:** Affirmed in Part

Current Cases:

None

Panel Assignment: Not available

United States of America
Plaintiff - Appellee

Stephen S. Gilstrap
Direct: 214-659-8644
Email: stephen.gilstrap@usdoj.gov
[COR LD NTC Government]
U.S. Attorney's Office
Northern District of Texas
Suite 300
1100 Commerce Street
Dallas, TX 75242-1699

Leigha Amy Simonton, Assistant U.S.
Attorney
Email: leigha.simonton@usdoj.gov
[COR NTC Government]

U.S. Attorney's Office
Northern District of Texas
1100 Commerce Street
Dallas, TX 75242-1699

v.

Jeffrey Ndungi Sila (Federal Prisoner:
#74051-112)
Defendant - Appellant

Jeffrey Ndungi Sila
[NTC Pro Se]
FCI Victorville Medium I
P.O. Box 3725
Adelanto, CA 92301-0000




United States of America,






Plaintiff - Appellee










v.

Jeffrey Ndungi Sila,

Defendant - Appellant

| | | |
|------------|---|--|
| 04/08/2021 |  | DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Jeffrey Ndungi Sila [21-10347] (CAS) [Entered: 04/08/2021 09:16 AM] |
| | 2 pg, 51.91 KB | |
| 04/12/2021 |  | INITIAL CASE CHECK by Attorney Advisor complete, Action: Case OK to Process. [9548343-2] Initial AA Check Due satisfied.. Transcript order due on 04/27/2021 for Appellant Jeffrey Ndungi Sila [21-10347] (MBC) [Entered: 04/12/2021 01:34 PM] |
| | 4 pg, 129.12 KB | |
| 05/03/2021 |  | ATTORNEY TRANSCRIPT ORDER form filed by Appellant Mr. Jeffrey Ndungi Sila for the Court to process. Date of service: 05/03/2021 via email - Attorney for Appellant: Dube'; Attorney for Appellee: Simonton. [21-10347] (Dimitri Dube') [Entered: 05/03/2021 01:09 PM] |
| | 1 pg, 129.93 KB | |
| 05/04/2021 | | TRANSCRIPT ORDER received from Appellant Mr. Jeffrey Ndungi Sila. DETAILS: Transcript Order: Court Reporter: Shawnie Archuleta, Proceeding Type and Date: Sentencing 03/18/2021. Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 05/14/2021 for Shawnie Archuleta, Court Reporter. Electronic Filing Processed: [9564967-2] [21-10347] (MBC) [Entered: 05/04/2021 10:41 AM] |

| | | |
|------------|--|--|
| 05/22/2021 |  1 pg, 144.45 KB | COURT REPORTER ACKNOWLEDGMENT received from Court Reporter Ms. Shawnie Archuleta. [21-10347] (Shawnie Archuleta) [Entered: 05/22/2021 01:10 PM] |
| 05/24/2021 | | ACKNOWLEDGMENT Transcript Order: Court Reporter: Shawnie Archuleta, Est. Completion Dt: 06/21/2021, Est. No.of Pgs: 40, Dt. Fin Arrangements Made: 05/22/2021, Dt. Trans. to be Filed: 06/21/2021, Proceeding Type and Date: Sentencing 03/18/2021. Ct. Reporter Acknowledgment ddl satisfied. Transcript Due/Court Reporter Discount Date is 06/21/2021 for Shawnie Archuleta, Court Reporter [21-10347] (MVM) [Entered: 05/24/2021 11:30 AM] |
| 06/22/2021 |  1 pg, 146.29 KB | NOTICE RECEIVED that the transcript ordered by Appellant Mr. Jeffrey Ndungi Sila is complete and has been filed in the District Court. [21-10347] (Shawnie Archuleta) [Entered: 06/22/2021 09:25 AM] |
| 06/23/2021 | | TRANSCRIPT FILED IN DISTRICT COURT Transcript Order: Court Reporter: Shawnie Archuleta, Dt. Filed in Dist. Ct: 06/22/2021 Transcript Due/Court Reporter Discount Date canceled [21-10347] (CB) [Entered: 06/23/2021 01:21 PM] |
| 06/23/2021 | | ELECTRONIC RECORD ON APPEAL REQUESTED from District Court for 3:16-CR-448-1. Electronic ROA due on 07/08/2021. [21-10347] (CB) [Entered: 06/23/2021 01:22 PM] |
| 07/02/2021 | | ELECTRONIC RECORD ON APPEAL FILED. Admitted Exhibits on File in District Court? Yes. Video/Audio Exhibits on File in District Court? Yes Electronic ROA deadline satisfied. [21-10347] (DDL) [Entered: 07/02/2021 10:37 AM] |
| 07/02/2021 |  5 pg, 131.81 KB | BRIEFING NOTICE ISSUED A/Pet's Brief Due on 08/11/2021 for Appellant Jeffrey Ndungi Sila. [21-10347] (DDL) [Entered: 07/02/2021 10:43 AM] |
| 08/09/2021 |  1 pg, 29.08 KB | APPEARANCE FORM for the court's review. Lead Counsel? Yes. [21-10347] (Russell Lorfing) [Entered: 08/09/2021 04:36 PM] |
| 08/10/2021 | | APPEARANCE FORM FILED by Attorney(s) Russell Lorfing for party(s) Appellant Jeffrey Ndungi Sila, in case 21-10347 [21-10347] (MBC) [Entered: 08/10/2021 09:22 AM] |
| 08/10/2021 |  2 pg, 136.3 KB | UNOPPOSED MOTION filed by Appellant Mr. Jeffrey Ndungi Sila to substitute counsel Russell Lorfing for Dimitri Dube [9639784-2]. Date of service: 08/10/2021 via email - Attorney for Appellants: Dube', Lorfing; Attorney for Appellee: Simonton [21-10347] (Russell Lorfing) [Entered: 08/10/2021 11:59 PM] |

| | | |
|------------|---|---|
| 08/11/2021 |  4 pg, 116.61 KB | UNOPPOSED MOTION filed by Appellant Mr. Jeffrey Ndungi Sila to extend time to file brief as appellant until 09/10/2021 [9640046-2]. Date of service: 08/11/2021 via email - Attorney for Appellants: Dube', Lorfing; Attorney for Appellee: Simonton [21-10347] (Russell Lorfing) [Entered: 08/11/2021 09:37 AM] |
| 08/11/2021 |  1 pg, 76.54 KB | CLERK ORDER granting Motion to substitute counsel filed by Appellant Mr. Jeffrey Ndungi Sila [9639784-2] substituted by [21-10347] (MBC) [Entered: 08/11/2021 12:11 PM] |
| 08/11/2021 | | ATTORNEY NOT PARTICIPATING. Dimitri Dube' is designated as inactive in this case. [21-10347] (MBC) [Entered: 08/11/2021 12:17 PM] |
| 08/11/2021 |  1 pg, 76.73 KB | CLERK ORDER granting Motion to extend time to file appellant's brief filed by Appellant Mr. Jeffrey Ndungi Sila [9640046-2] A/Pet's Brief deadline updated to 09/10/2021 for Appellant Jeffrey Ndungi Sila [21-10347] (MBC) [Entered: 08/11/2021 03:23 PM] |
| 09/09/2021 |  4 pg, 184.09 KB | UNOPPOSED MOTION filed by Appellant Mr. Jeffrey Ndungi Sila to extend time to file brief as appellant until 09/23/2021 [9660253-2]. Date of service: 09/09/2021 via email - Attorney for Appellant: Lorfing; Attorney for Appellee: Simonton [21-10347] (Russell Lorfing) [Entered: 09/09/2021 01:19 PM] |
| 09/10/2021 |  1 pg, 76.73 KB | CLERK ORDER granting Motion to extend time to file appellant's brief filed by Appellant Mr. Jeffrey Ndungi Sila [9660253-2] A/Pet's Brief deadline updated to 09/23/2021 for Appellant Jeffrey Ndungi Sila [21-10347] (MBC) [Entered: 09/10/2021 09:47 AM] |
| 09/24/2021 |  113 pg, 3.44 MB | DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken at this time on the Appellant's brief and excerpts received 9/24/21 from Appellant Mr. Jeffrey Ndungi Sila because filed out of time [21-10347] (MBC) [Entered: 09/24/2021 12:32 PM] |
| 09/24/2021 |  117 pg, 3.45 MB | UNOPPOSED MOTION filed by Appellant Mr. Jeffrey Ndungi Sila for leave to file brief out of time [9673362-2] - Brief Tendered? Yes. Date of service: 09/24/2021 via email - Attorney for Appellant: Lorfing; Attorney for Appellee: Simonton [21-10347] (Russell Lorfing) [Entered: 09/24/2021 01:57 PM] |
| 09/27/2021 |  1 pg, 71.14 KB | CLERK ORDER granting Motion to file brief out of time filed by Appellant Mr. Jeffrey Ndungi Sila [9673362-2] [21-10347] (MFY) [Entered: 09/27/2021 08:27 AM] |
| 09/27/2021 |  51 pg, 493.69 KB | APPELLANT'S BRIEF FILED A/Pet's Brief deadline satisfied [21-10347] REVIEWED AND/OR EDITED - The original text prior to review |

appeared as follows: APPELLANT'S BRIEF FILED by Mr. Jeffrey Ndungi Sila. Additionally the Brief requires certificate of compliance must state exact word count. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 Sufficient Brief due on 10/12/2021 for Appellant Jeffrey Ndungi Sila.. Appellee's Brief due on 10/27/2021 for Appellee United States of America [21-10347] (MFY) [Entered: 09/27/2021 08:45 AM]

09/27/2021



81 pg, 7.96 MB

SUFFICIENT RECORD EXCERPTS FILED by Appellant Mr. Jeffrey Ndungi Sila. Record Excerpts NOT Sufficient as they require record citations and tabs. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 Sufficient Record Excerpts due on 10/12/2021 for Appellant Jeffrey Ndungi Sila [21-10347] (MFY) [Entered: 09/27/2021 08:56 AM]

10/04/2021



1 pg, 134.14 KB

APPEARANCE FORM for the court's review. Lead Counsel? Yes. [21-10347] (Stephen S. Gilstrap) [Entered: 10/04/2021 06:12 PM]

10/06/2021

APPEARANCE FORM FILED by Attorney(s) Stephen S. Gilstrap for party(s) Appellee USA, in case 21-10347. [21-10347] (CB) [Entered: 10/06/2021 01:29 PM]

10/12/2021



0 pg, 0 KB







PROPOSED SUFFICIENT BRIEF filed by Appellant Mr. Jeffrey Ndungi Sila in 21-10347 [[9674096-2](#)] Brief has been deemed sufficient. Sufficient Brief deadline satisfied [21-10347] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: PROPOSED SUFFICIENT BRIEF filed by Appellant Mr. Jeffrey Ndungi Sila [[9674096-2](#)] Date of service: 10/12/2021 via email - Attorney for Appellees: Gilstrap, Simonton; Attorney for Appellant: Lorfing [21-10347] (Russell Lorfing) [Entered: 10/12/2021 06:18 PM]








10/12/2021



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PROPOSED SUFFICIENT RECORD EXCERPTS filed by Appellant Mr. Jeffrey Ndungi Sila in 21-10347 [[9674116-2](#)] Record Excerpts have been deemed sufficient. Sufficient Record Excerpts deadline satisfied [21-10347] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: PROPOSED SUFFICIENT RECORD EXCERPTS filed by Appellant Mr. Jeffrey Ndungi Sila [[9674116-2](#)] Date of service: 10/12/2021 via email - Attorney for Appellees: Gilstrap, Simonton; Attorney for Appellant: Lorfing [21-10347] (Russell Lorfing) [Entered: 10/12/2021 06:22 PM]

| | | |
|------------|--|--|
| 10/26/2021 |  10 pg, 105.68 KB | MOTION for summary affirmance [9698299-2] Foreclosed Issues Case: NO, to extend time to file brief of appellee [9698299-3]. [21-10347] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: MOTION filed by Appellee USA for summary affirmance [9698299-2] Foreclosed Issues Case: NO, to extend time to file brief of appellee [9698299-3]. Date of service: 10/26/2021 via email - Attorney for Appellees: Gilstrap, Simonton; Attorney for Appellant: Lorfing [21-10347] (Stephen S. Gilstrap) [Entered: 10/26/2021 03:34 PM] |
| 10/27/2021 | | BRIEFING COMPLETE.E/Res's Brief deadline canceled [21-10347] (MBC) [Entered: 10/27/2021 08:55 AM] |
| 11/12/2021 |  2 pg, 249.86 KB | DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken at this time on the Emergency motion for miscellaneous relief received from Appellant Mr. Jeffrey Ndungi Sila. Counsel is advised to handle as necessary. (MBC) [Entered: 11/11/2021 12:41 PM] |
| 11/18/2021 |  11 pg, 710.84 KB | MOTION filed by Appellant Mr. Jeffrey Ndungi Sila to appoint counsel [9716285-2] Affidavit due on 12/09/2021 for Appellant Jeffrey Ndungi Sila. [21-10347] (MBC) [Entered: 11/19/2021 08:38 AM] |
| 12/06/2021 | | AFFIDAVIT OF FINANCIAL STATUS filed by Appellant Mr. Jeffrey Ndungi Sila in support of the Motion to appoint counsel filed by Appellant Mr. Jeffrey Ndungi Sila in 21-10347 [9716285-2]. Affidavit deadline satisfied. [21-10347] (MBC) [Entered: 12/07/2021 11:11 AM] |
| 02/03/2022 |  4 pg, 199.8 KB | UNPUBLISHED OPINION FILED. [21-10347 Affirmed] Judge: JES, Judge: CES, Judge: JEG. Mandate issue date is 02/25/2022 for Appellant Jeffrey Ndungi Sila; granting Motion for summary affirmance filed by Appellee USA [9698299-2]; denying Motion to extend time to file appellee's brief filed by Appellee USA [9698299-3]; denying Motion to appoint counsel filed by Appellant Mr. Jeffrey Ndungi Sila [9716285-2] [21-10347] (CBW) [Entered: 02/03/2022 08:11 AM] |
| 02/03/2022 |  1 pg, 63.95 KB | JUDGMENT ENTERED AND FILED. [21-10347] (CBW) [Entered: 02/03/2022 08:13 AM] |
| 02/25/2022 |  4 pg, 288.39 KB | MANDATE ISSUED. Mandate issue date satisfied. [21-10347] (RSM) [Entered: 02/25/2022 08:02 AM] |

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|------------|--|---|
| 02/28/2022 |  4 pg, 138.43 KB | MOTION filed by Appellant Mr. Jeffrey Ndungi Sila for leave to file rehearing out of time (with incorporated rehearing) [9791173-2]. [21-10347] (MBC) [Entered: 03/07/2022 02:34 PM] |
| 03/07/2022 |  1 pg, 216.72 KB | LETTER filed by attorney Russel Lorfing advising he is no longer retained. [21-10347] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: LETTER filed by Appellant Mr. Jeffrey Ndungi Sila Date of Service: 03/07/2022 via email - Attorney for Appellees: Gilstrap, Simonton; Attorney for Appellant: Lorfing [21-10347] (Russell Lorfing) [Entered: 03/07/2022 04:31 PM] |
| 03/08/2022 | | ATTORNEY NOT PARTICIPATING. Russell Lorfing is designated as inactive in this case. Reason:letter filed 3/7/22. [21-10347] (MBC) [Entered: 03/08/2022 08:15 AM] |
| 03/08/2022 | | CASE CAPTION updated. Party information modified for Jeffrey Ndungi Sila in 21-10347. Update: Attorney no longer retained. [21-10347] (MBC) [Entered: 03/08/2022 08:19 AM] |
| 03/17/2022 |  2 pg, 115.72 KB | COURT ORDER denying Motion to file rehearing out of time filed by Appellant Mr. Jeffrey Ndungi Sila [9791173-2] [21-10347] (CBW) [Entered: 03/17/2022 09:24 AM] |
| 03/25/2022 |  3 pg, 110.96 KB | DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken at this time on the Motion for appointment of counsel received from Appellant Mr. Jeffrey Ndungi Sila because the case is closed [21-10347] (MBC) [Entered: 03/25/2022 02:34 PM] |
| 04/07/2022 |  3 pg, 402.22 KB | DISTRICT COURT ORDER of 04/06/2022 Transferring request for appointment of counsel [21-10347] (MBC) [Entered: 04/07/2022 10:06 AM] |
| 04/07/2022 |  2 pg, 84.2 KB | MOTION filed by Appellant Mr. Jeffrey Ndungi Sila to appoint counsel to assist with preparation of a petition for writ of certiorari [9817991-2]. [21-10347] (MBC) [Entered: 04/07/2022 10:10 AM] |
| 04/13/2022 |  2 pg, 129.09 KB | COURT ORDER denying Motion to appoint counsel to assist with preparation of petition for writ of certiorari filed by Appellant Mr. Jeffrey Ndungi Sila [9817991-2] [21-10347] (MBC) [Entered: 04/13/2022 01:37 PM] |

APPENDIX D

FIFTH CIRCUIT

To: Pro_se@ca5.uscourts.gov

Subject: Case 21-10347

Defendant submits this motion via BOP Trulincs email to his sister Joyce, with instructions to forward to the court's email. In reference to defendant's last motion to the court, defendant still has extreme difficulty communicating with counsel despite several attempts directly and indirectly through family members. Defendant has no resources to hire counsel. In the interests of justice, defendant respectfully requests that he be appointed counsel to represent him. While defendant understands he has no right to counsel of choice, he respectfully requests the court consider appointing him the office of the Federal Public Defender.

Respectfully Submitted,

/s/

Jeffrey Sila #74051-112

Victorville Medium 1

P.O Box 3725

Adelanto, CA 92301

APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 19, 2021

Mr. Jeffrey Ndungi Sila
#74051-112
Victorville Medium 1
P.O Box 3725
Adelanto, CA 92301

No. 21-10347 USA v. Sila
USDC No. 3:16-CR-448-1

Dear Mr. Sila,

The motion for appointment of counsel is filed. You must complete and return the attached financial affidavit within 21 days from the date of this letter. Your motion and the affidavit will be submitted to the court for consideration upon receipt of the completed financial affidavit.

Sincerely,

LYLE W. CAYCE, Clerk

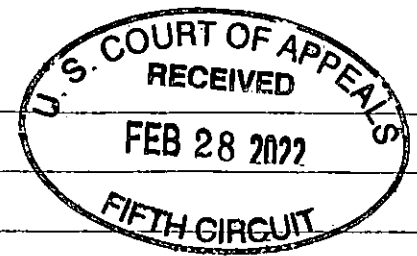


By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

cc:

Mr. Stephen S. Gilstrap
Mr. Russell Lorfing
Ms. Leigha Amy Simonton

APPENDIX F

MOTION FOR REHEARINGCASE 21-10347Introduction

On 22nd February, 2022, the day Mr. Sila emerged from a two-month lockdown, he learnt of the Court's adverse decision via email from his mother who had serendipitously phoned the Clerk of the Court on the same day. As per Sila's previous correspondence to the court, he believes counsel has abandoned him and requests the Court to consider this pro se request for rehearing as well as appoint him new counsel to perfect his motion to ensure conformity with Circuit rules; and to represent him going forward including in any requests for rehearing en banc and if necessary petitioning for Certiorari with the Supreme Court.

1. Issues could not have been presented in prior appeal.

At trial, the government advanced two acts as forming the basis for conviction on count one:

- (1) that Sila stole the check by submitting a false tax return (charged act); and
- (2) that Sila sold the stolen check (uncharged act):

(Please see government's opening and closing arguments, and opening brief in the first appeal) (Sila has no access to the law library nor case documents and relies on memory to the best of his ability).

In fact, the district Court at some point ordered the government to "clarify the allegations" in response to the jury's question - to which it said that there was a "slight inaccuracy" in the "year" of the indictment. That it was "actually 2015" and not "2016" as charged/alleged. (Jury Trial Volume 3 Page 87). The only act that occurred in 2015 was the filing of the return.

After conviction, the government issued an official press release that said Sila was convicted of "illegally obtaining" the check (consistent with "stealing" the check as charged).

Given these divergent circumstances, it was unclear which act formed the basis of the jury's guilty verdict.

On appeal, the government clarified that the only act that formed the basis of the verdict was the act of "selling" the check. Only after the Court agreed with the government and affirmed the conviction on this uncharged basis, did the issue of constructive amendment become newly relevant and ripe for review.

This court ordinarily addresses issues that "arise out of" or become "newly relevant" because of the appeal. *United States v. Lee* 358 F.3d 315, 325 (5th Cir 2004).

2. Miscarriage of justice exception to the Law of the case doctrine.

The government's brief stated that there was no evidence to show Sila stole the check (as actually charged in the indictment). This in effect, means Sila is actually innocent of the crimes alleged in the indictment. To allow Sila's conviction to stand based on an uncharged act would be a miscarriage of justice and fundamentally unfair. This court has long established precedent that a conviction cannot stand based on acts not alleged in the indictment. See e.g. *United States v. Sanders* 966 F.3d 397, 407, (5th Cir 2020) (an indictment is amended when it permits the defendant to be convicted upon a factual basis that effectively modifies an essential element of the offense charged or permits the government to convict the defendant on a materially different theory than that which he was charged).

"If we find a constructive amendment, we must reverse the conviction", *United States v. Lockhart* 844 F.3d 501, 514 (5th Cir 2016)

3. Court's discretion to consider waived issues.

Lastly, this court retains a broad discretion to consider any issue to include waived, forfeited or unbriefed issues.

"We ordinarily have the discretion to decide legal issues that are not timely raised." *United States v. Myers* 772 F.3d 213 (5th Cir 2014). Please see also *United States v. Whitfield* (5th Cir 2010).

Mr. Sila respectfully implores the court to exercise its broad discretion in his favor and to allow the case to proceed on its merits. This is especially important here where failure to address the issues has great potential to affect the fairness and integrity of the proceedings and potentially result in manifest miscarriage of justice. His conviction has far-reaching consequences including immigration proceedings.

CONCLUSION

Sila respectfully prays that the Court find that his motion presents substantial issues and grant his request for reconsideration and appointment of counsel.

Respectfully Submitted,



Jeffrey Sila #74051-112

Federal Correctional Institution

P.O. Box 3725

Adelanto, CA 92301.

February 23, 2022.

Jeffrey Sile # 74251-112
Federal Correctional Institution
P.O. Box 3725
Atlanta, GA 92301

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 S. Maestri Place Suite 115
New Orleans, LA 70130



1-800-344-0340

701-500-3440

701-500-3440

APPENDIX G



March 7, 2022

U.S. Court of Appeals
For the Fifth Circuit
600 S. Maestri Place
Suite 115
New Orleans, LA 70130

RE: United States of America v. Jeffrey Sila 21-10347

To Whom It May Concern:

Mr. Sila employed my firm to file an appeal in the above-referenced case. Consistent with the scope of my representation, my firm filed an appellate brief on behalf of Mr. Sila. Our representation ceased upon the Fifth Circuit's summary judgment of the appeal. As such, I am no longer retained by Jeffrey Sila in Cause No. 21-10347.

Thank you for your time and attention to this matter.

Sincerely,
/s/ Russell H. Lorfing
Russell H. Lorfing

APPENDIX H

United States Court of Appeals
for the Fifth Circuit

No. 21-10347

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JEFFREY NDUNGI SILA,

Defendant—Appellant.

Appeal from the United States District Court
Northern District of Texas
USDC No. 3:16-CR-448-1

ORDER:

IT IS ORDERED that Appellant's motion for leave to file petition for rehearing out of time is DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge

APPENDIX I

REQUEST FOR COUNSEL CASE NO. 21-10347

Defendant hereby submits this request for appointment of counsel to represent him in further appellate proceedings in this matter to include in this court and the Supreme Court. Defendant understands he has no right to counsel of choice and respectfully requests the Court to consider appointing him the Office of the Public Defender.

Respectfully submitted,

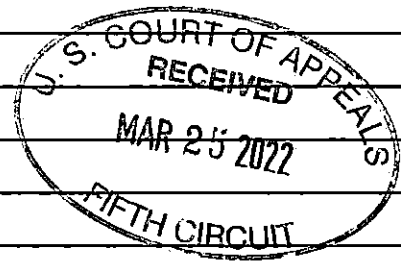


JEFFREY SILA #74051-112

Federal Correctional Institution

PO Box 3725

Adelanto, CA 92301



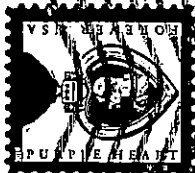
March 20, 2022.

Jeffrey Sila# 74051-112
Federal Correctional Institution
PO Box 3725
Atlanta, GA 92301

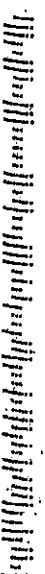
United States Court of Appeals
Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

SN BERNARDINO CA 923

22 MAR 2022 PM 7 L



70130-344040



15 MAR 2022

APPENDIX J

United States Court of Appeals
for the Fifth Circuit

No. 21-10347

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JEFFREY NDUNGI SILA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-448-1

ORDER:

IT IS ORDERED that Appellant's motion for appointment of counsel to assist with preparation of a petition for writ of certiorari is DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge