No. _____

In the

Supreme Court of the United States

_____

Demonte Tretion Kelly,

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Petitioner Demonte Kelly pleaded guilty pursuant to a plea agreement that contained an appellate waiver. At sentencing, Mr. Kelly presented extensive, unrebutted evidence that he is intellectually disabled and requested a downward departure under United States Sentencing Guideline § 5H1.3. The district court rejected his argument based on an indisputably erroneous interpretation of the law and stereotypes about intellectual disability that this Court has repeatedly rejected. The Fifth Circuit denied relief, again refusing to adopt a miscarriage of justice exception to appeal waivers.

The question presented is:

Whether appellate waivers in federal criminal cases contain and implied exception for miscarriage of justice.

PARTIES TO THE PROCEEDING

Petitioner is Demonte Tretion Kelly, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Demonte Tretion Kelly*, 3:20-CR-300-B-1, United States District Court for the Northern District of Texas. Judgment and sentence were entered on March 18, 2022.

2. *United States v. Kelly*, No. 22-10300, 2023 WL 314299 (5th Cir. Jan. 19, 2023), Court of Appeals for the Fifth Circuit. The judgment affirming the judgment and sentence was entered on January 19, 2023.

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OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Kelly*, No. 22-10300, 2023 WL 314299 (5th Cir. Jan. 19, 2023), and is reprinted on pages 1a–3a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on January 19, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 922(u) provides:

> It shall be unlawful for a person to steal or unlawfully take or carry away from the person or premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Petitioner Demonte Kelly was charged with one count of Stealing a Firearm from the Business Inventory of a Federally Licensed Dealer, in violation of 18 U.S.C. §§ 922(u), 924(i)(1) and (2), and one count of Possession of a Stolen Firearm, in violation of 18 U.S.C. §§ 922(j), 924(a)(2). (ROA.26–33). Mr. Kelly signed a plea agreement to plead guilty to Count 1, Stealing a Firearm from a Federally Licensed Dealer. (ROA.203). As part of the agreement, Mr. Kelly waived his right to appeal except for a sentence exceeding the statutory maximum, an arithmetic error at sentencing, to challenge the voluntariness of his guilty plea or the appeal waiver, and to bring a claim of ineffective assistance of counsel. (ROA.207).

Mr. Kelly hasn't had an easy life, but the extent of his struggles did not become clear until his assistant federal defender requested a neuropsychological evaluation. The findings from that evaluation were stark—Mr. Kelly has an IQ of 68 and functions at or below the bottom 5th percentile of the population in nearly all neurocognitive abilities, meaning that Mr. Kelly more than qualifies for an intellectual disability diagnosis. (ROA.281–283).

Mr. Kelly requested a downward departure under USSG § 5H1.3, which applies when a mental or emotional conditions, either "individually or in combination with other offender characteristics, are present to an unusual degree and distinguish this case from the typical cases covered by the guidelines." USSG § 5H1.3. But the district court denied Mr. Kelly's request based on erroneous, unscientific beliefs concerning intellectual disability. On appeal, Mr. Kelly argued that the district

court's mistakes constituted a miscarriage of justice. The Fifth Circuit, however, once again declined to recognize an exception to appeal waivers for miscarriage of justice.

I. Mr. Kelly displayed symptoms of intellectual disability long before the crime.

The public school system quickly identified Mr. Kelly as someone who needed additional support and placed him in special education classes. (ROA.228, 277). Mr. Kelly spoke with a stutter as a young child and was medicated for Attention Deficit Hyperactivity Disorder in the second grade. (ROA.278). Even so, Mr. Kelly was held back in the third grade and again in the eighth grade. (ROA.277). Mr. Kelly's medical records show that he struggled with social skills and gullibility and was often taken advantage of by other children. (ROA.279). He tried to complete the tenth grade but dropped out because he was unable to pass the classes and was older than everyone else. (ROA.277). Mr. Kelly also tried to get his GED but could not pass the test. (ROA.277). Mr. Kelly was only ever to obtain one job—a stock clerk at the Family Dollar for two months. (ROA.278).

When he was 18 years old, Mr. Kelly and two other individuals broke into a gun store and quickly took 46 firearms. (ROA.216–217). The trio went out at night and planned to steal from a sporting goods store; however, when they saw that the lights were on inside the store, they left and went to a gun store. (ROA.301). The door to the gun store was unlocked and the three were able to walk inside. (ROA.300). A few days later, police arrested Mr. Kelly and he admitted to the burglary. (ROA.217). Mr. Kelly's co-defendants were also arrested and admitted to their participation. (ROA.218).

II. The district court denied Mr. Kelly's motion for a downward departure under USSG § 5H1.3 based on erroneous beliefs about the law and intellectual disability.

Prior to sentencing, Mr. Kelly's counsel obtained the services of Dr. Daniel Martell, a forensic neuropsychologist, to evaluate Mr. Kelly's cognitive functioning. (ROA.274–275). Dr. Martell reviewed Mr. Kelly's medical records and administered numerous intellectual and neuropsychological tests. (ROA.276–277). Using the Wechsler Adult Intelligence Scale – IV, "the current gold-standard for IQ testing in the United States," Dr. Martell determined that Mr. Kelly has a full-scale IQ of 68, which is "significantly subaverage" and qualifies him as intellectually disabled. (ROA.281). Mr. Kelly tested at a fourth grade level for most academic skills and was at or below the bottom first percentile in memory abilities. (ROA.282). Mr. Kelly exhibited significant executive functioning impairments, at the bottom 5th percentile, and was below the bottom .1 percentile in language skills. (ROA.283). "Less than one in 1,000 people are this badly impaired in their language ability[.]" (ROA.283).

Dr. Martell also evaluated Mr. Kelly's adaptive functioning, or ability to navigate in the world. Like many others with intellectual disability, Mr. Kelly struggles socially. Individuals with intellectual disability are often more gullible and overly trusting, and Mr. Kelly has been the victim of his gullibility since childhood. (ROA.279). His childhood therapy notes describe him as having difficulty talking to others, having trouble communicating, and having limited cognitive abilities. (ROA.279).

Based on Dr. Martell's findings, Mr. Kelly filed a motion for downward departure under USSG § 5H1.3, which permits district courts to grant downward

departures when the defendant has a mental or emotional condition "present to an unusual degree" that "distinguishes the case from the typical cases covered by the guidelines." (ROA.259–260). Mr. Kelly pointed out that the Sentencing Commission had lightened the burden required to obtain a § 5H1.3 departure *and* that § 5H1.3, unlike § 5K2.13 (diminished capacity), does not require the defendant to show that his mental or emotional condition contributed to the offense. (ROA.259–260).

Mr. Kelly urged the court to grant the departure because this Court has recognized that intellectual disability lessens a person's "personal culpability," *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), and because "such defendants are more likely less-deserving of punishment for punishment's sake than are those without such limitations." (ROA.261) (quoting *United States v. Ferguson*, 942 F. Supp. 2d 1186, 1194 (M.D. Ala. 2013)). He also pointed out that intellectual disability has an overall general population prevalence of approximately 1%, meaning that it meets the § 5H1.3 criteria of "present to an unusual degree and distinguish[es] the case from the typical case covered by the guidelines." (ROA.261). The government opposed the motion, stating "Mr. Kelly does not argue that this mental condition even contributed to him committing the offense." (ROA.295).

Dr. Martell testified at Mr. Kelly's sentencing. He noted that 1–2% of the general population and 4–10% of the prison population has intellectual disability. (ROA.130–131). Dr. Martell emphasized that a person with intellectual disability is more likely to be a follower than a leader and is often gullible—an important point considering Mr. Kelly had two co-defendants. (ROA.136). But Dr. Martell also

emphasized that, although intellectual disability cannot be cured, Mr. Kelly can become a functioning member of society with therapy and support. (ROA.140−141).

The government attempted to impeach Dr. Martell's credibility, even though various U.S. Attorney's offices throughout the country are currently retaining him as an expert. (ROA.167). The government also suggested that Mr. Kelly might be malingering despite the fact that Dr. Martell administered four separate tests for malingering and found no indication that Mr. Kelly was faking. (ROA.132, 160−162). Notably, the government failed to hire its own expert to rebut Dr. Martell's testimony or present any evidence that Mr. Kelly is not intellectually disabled. (ROA.172).

Mr. Kelly's counsel argued to the court that the guidelines do not require a nexus between the offense and the defendant's mental condition because Congress specifically amended the guidelines to remove that requirement in 2009. (ROA.174). Counsel also argued that—especially considering his intellectual disability—Mr. Kelly should not receive a guideline sentence that would be roughly double the sentences of his co-defendants. (ROA.178−179).

The government's argument for a guideline sentence stemmed from misconceptions about the nature of intellectual disability, arguing Mr. Kelly's offense was "strategic"—he (or at least a co-defendant) was smart enough to choose the store with the lights off instead of one with the lights on. (ROA.184). The government also submitted that a departure is only warranted when "there was some connection—explicit connection, not something we were meant to guess at—explicit connection between the intellectual disability and the offense itself." (ROA.185).

The district court denied the motion for departure, stating it agreed with the government that Mr. Kelly's "was a strategic offense" and the issue was "whether the offense, itself, was covered by the mental illness, was affected by the mental illness. And there's no indication of that here." (ROA.187). The court did not "discount that [Mr. Kelly's] got a few problems" but "it was a strategic offense . . . [and] there's no connection between his mental state and that offense." (ROA.187−188). The court concluded that Mr. Kelly was "not going to be a big scholar right now, because he hasn't been socialized that way" but there was not enough to grant a departure considering it was a "strategic" offense. (ROA.188−189). The court imposed a guideline sentence of 100 months of imprisonment and three years of supervised release. (ROA.190−191).

On appeal, Mr. Kelly argued that the Fifth Circuit should finally adopt a miscarriage of justice exception to appellate waivers and that his case exemplified a miscarriage of justice. The Fifth Circuit declined to adopt such an exception, stating with no explanation that Mr. Kelly's case does not warrant such an exception. Appx. at 2a–3a.

REASON TO GRANT THIS PETITION

This Court should grant the petition because the courts of appeal are divided on the question of whether a defendant may avoid a waiver of appeal because its enforcement would result in a miscarriage of justice.

A. There is an entrenched circuit split over whether a miscarriage of justice should nullify an appeal waiver.

Federal courts of appeals will enforce a knowing and intelligent waiver of appeal to the extent of its scope. *See United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994); *United States v. Melancon*, 972 F.2d 566, 567–568 (5th Cir. 1992); *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States v. Rutan*, 956 F.2d 827, 829-830 (8th Cir. 1992); *United States v. DeSantiago-Martinez*, 980 F.2d 582, 583 (9th Cir. 1992), *amended*, 38 F.3d 394 (1994); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). But this Court has recognized that "no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019).

Thus, at least six federal courts of appeal have recognized an exception to appellate waivers for cases involving a miscarriage of justice. *See United States v. Teeter,* 257 F.3d 14, 21–27 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 559–63 (3d Cir. 2001); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Shockey*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009). These courts have reasoned that "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that

may be thrust upon him by either an ineffective attorney or an errant sentencing court." *Guillen*, 561 F.3d at 530. And they have reasoned that because courts "construe the agreement against a general background understanding of legality … [it] presume(s) that both parties to the plea agreements contemplated that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement." *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

The Ninth Circuit, however, has declined to adopt this exception, criticizing it as "nebulous." *United States v. Ligon*, 461 F. App'x 582, 583 (9th Cir. 2011) ("Ligon asks the court to recognize a 'miscarriage of justice' exception to otherwise valid waivers of appellate rights. The court declines the invitation. This court does recognize certain exceptions to valid appellate waivers, but a nebulous 'miscarriage of justice' exception is not among them.") (internal citation omitted) (citing *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996)). The court below has likewise "decline(d) to adopt the miscarriage of justice exception to appellate waivers." *United States v. Fairley*, 735 F. App'x 153, 154 (5th Cir. 2018); *see also United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020) ("Finally, Barnes spends two paragraphs suggesting that we can refuse to enforce his waiver by applying a 'miscarriage of justice' exception. Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it.") (citing *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017)).

This conflict between the courts of appeals pertains to an issue of great significance, meriting this Court intervention. The miscarriage of justice exception to appeal waivers is trained precisely on those cases that carry the greatest potential for grave injustice, such as:

> (1) a sentence based on "constitutionally impermissible criteria, such as race"; (2) a sentence that exceeds the statutory maximum for the defendant's particular crime; (3) deprivation of "some minimum of civilized procedure" (such as if the parties stipulated to trial by twelve orangutans); and (4) ineffective assistance of counsel in negotiating the plea agreement.

Adkins, 743 F.3d at 192–93. These issues lie at the core of procedural due process in the criminal realm. The absence of a failsafe protection against errors of this consequence is no small matter.

Uncertainty in this area, moreover, has tangible impact on the administration of justice. Defendants who forego the right of appellate review should enjoy certainty about the scope of that waiver. And as appellate waivers are frequently appended to plea agreements, such uncertainty may result in the surrender of the precious right to trial by jury based on a misconception as to the real terms of the agreement.

Finally, the uncertainty surrounding the scope of appellate waivers has caused the Department of Justice to advise its lawyers to avoid relying on them. It said that because a "reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice … in a case involving an egregiously incorrect sentence, the prosecutor should consider electing to disregard the waiver and to argue the merits of the appeal. That would avoid confronting the court of appeals with the difficult decision of enforcing a sentencing appeal waiver that might

result in a miscarriage of justice." DOJ Criminal Resource Manual, *Plea Agreements and Sentencing Appeal Waivers -- Discussion of the Law*, §626(2) (Updated January 22, 2020), *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law, *last visited Apr. 16, 2023*. Certainty would benefit all parties; recognition of an exception for miscarriages of justice would protect against the most serious errors in the criminal process.

B. This case presents an ideal vehicle to resolve the split because the issue is preserved and resulted from a clear miscarriage of justice—the district court's blatantly erroneous interpretation of the law and science.

The district court in this case was wrong on two fronts—interpretation of the law and interpretation of the facts. Mr. Kelly requested a downward departure, arguing that his diagnosis of intellectual disability is inherently mitigating and merits a departure under USSG § 5H1.3. (ROA.258–264). The Sentencing Guidelines instruct courts to consider a defendant's mental and emotional conditions and grant a departure when such conditions, either "individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." USSG § 5H1.3.

Importantly, USSG § 5H1.3 does *not* include the same criteria for a downward departure under § 5K2.13, which permits departures based on diminished capacity. That is, a defendant need not show that his mental or emotional condition contributed to the offense or that his offense lacked actual violence. *Compare* USSG § 5H1.3 *with* USSG § 5K2.13. Undoubtedly, this is because Congress recognizes that certain

conditions, like impaired intellectual functioning, are mitigating regardless of any connection to the offense. This Court likewise declined to require a defendant to prove that his intellectual disability contributed to his offense in order for courts to consider whether intellectual disability is mitigating. *Tennard v. Dretke*, 124 S. Ct. 2562, 2571 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence—and thus that the *Penry* question need not even be asked—unless the defendant also establishes a nexus to the crime."). Multiple courts have granted downward departures under § 5H1.3, either alone or in conjunction with other guideline provisions, based on intellectual disability and other mental and emotional conditions.[1]

Although Mr. Kelly pointed out that USSG § 5H1.3 does not require a nexus, the government repeatedly argued otherwise. *See* (ROA.295) ("Further, Mr. Kelly

[1] *See*, e.g., *United States v. Rothwell*, 847 F. Supp. 2d 1048 (E.D. Tenn., Oct. 19, 2011) (District Court granted four level downward departure pursuant to § 5H1.3 to child pornography defendant who has an IQ of 77, very limited degree of social awareness and competence, spells at a third-grade level, comprehends sentences at the seventh-grade level, reads at an eighth-grade level, and can perform math at a fourth-grade level); **Error! Main Document Only.***Unites States v. Velazco-Berranza*, 2013 U.S. Dist. LEXIS 10678, 2013 WL 311843, (D.N.M., Oct. 12, 2011) (District Court granted four level downward departure pursuant to §§ 5H1.3 and 5K2.13 to defendant whose criminal history included a conviction for arson, but who had been diagnosed with alcohol dependence by history, cannabis dependence by history, psychotic disorder not otherwise specified, mild mental retardation, self-reported headaches . . . disoriented thoughts, impulsive behavior and significant neurocognitive deficits); *United States v. Ferguson*, 942 F. Supp. 2d 1186 (M.D. Ala., Feb. 20, 2013) (Defendant faced guidelines of 10–16 months but sentenced to probation with home confinement upon the District Court adopting the evaluating physician's opinion that "while Ferguson knew that what she was doing was wrong, her borderline-impaired intellectual capacity made it nearly impossible for her to orchestrate the elaborate wire-fraud scheme or even to understand the scheme in any detail.").

does not argue that this mental condition even contributed to him committing this offense."); (ROA.296) (pointing to case where "[t]he court specifically found these conditions contributed to his instant and previous offenses, and it therefore departed downward from an enhancement related *solely* to that previous offense. Here, by contrast, the defendant does not suggest his intellectual impairments led to his previous or instant offenses."); (ROA.296) ("Here, there is nothing to suggest either a connection between Mr. Kelly's mental condition and the offense, nor is there evidence showing Mr. Kelly failed to understand his conduct."); (ROA.296) ("And, as noted above, Mr. Kelly does not argue this mental condition even contributed to his charged offense."); (ROA.184) ("This was a strategic and specific behavior to get to guns."); (ROA.184−185) ("In the cases that I found . . . there was some connection—explicit connection, not something we were meant to guess at—explicit connection between the intellectual disability and the offense itself. That simply isn't the case here.").

The district court parroted the government, stating it could not grant the departure because Mr. Kelly failed to link his intellectual disability to the offense: "And I agree with [the prosecutor], that it was a strategic offense. And most of the cases that I have seen will look to whether the offense, itself, was covered by the mental illness. And there's no indication of that here." (ROA.187); *see also* (ROA.188) ("So I think it was a strategic offense, as the presentence report states and the addendum states, that there's no connection between his mental state and that offense."). When Mr. Kelly objected that he need not demonstrate a nexus to be

eligible for a departure under § 5H1.3, the court overruled the objection but did not indicate in any way that it understood the nexus was not required under the guidelines. (ROA.193−194).

Beyond a misinterpretation of the law, the district court's reasoning stems from unscientific misconceptions about the nature of intellectual disability, a notion about which this Court has repeatedly disabused the lower courts. This Court has long recognized that intellectual disability diminishes a person's "personal culpability" in the criminal context. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Those suffering from intellectual disability often act on impulse and tend to be "followers rather than leaders." *Id.* For that reason, the Court has refused to impose a nexus requirement between intellectual disability and the crime to qualify as mitigating evidence against imposition of the death penalty. *Tennard*, 124 S. Ct. at 2571 (2004).

And in evaluating intellectual ability, courts are required to follow current clinical standards. *See Moore v. Texas*, 581 U.S. 1, 20 (2017). Those standards do not permit a court to write off the potential of intellectual disability simply because the defendant committed a "strategic" offense. *See Moore v. Texas*, 139 S. Ct. 666, 671 (2019) ("Finally, despite the court of appeals' statement that it would abandon reliance on the *Briseno* evidentiary factors, it seems to have used many of those factors in reaching its conclusion. Thus, *Briseno* asked whether the offense required forethought, planning, and complex execution or purpose. The court of appeals wrote that Moore's crime required a level of planning and forethought.") (internal

quotations omitted). Here, the district court flat out ignored the extensive evidence supporting Mr. Kelly's intellectual disability and decided that although Mr. Kelly was "not going to be a big scholar right now, because he hasn't been socialized that way," the offense was simply too strategic because he and his co-defendants did not steal from a store with a light on. (ROA.188–189).

Despite these obvious errors, the Fifth Circuit yet again declined to adopt a miscarriage of justice exception. The result means that Mr. Kelly is stuck with a sentence based on an erroneous interpretation of the facts and the law. Were he sentenced in another circuit, that would not be the case. The case would thus be an appropriate one to help define the contours of the miscarriage exception, should the Court adopt one.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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