

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JOHN WAYNE SPELL
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60878

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510
Email: omodare_jupiter@fd.org

Michael L. Scott (MS Bar #101320)
Senior Litigator
Office of the Federal Public Defender
Email: mike_scott@fd.org

Attorneys for Defendant/Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by dismissing Mr. Spell's appeal based on the waiver of appeal provisions in his Plea Agreement.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT	3
III. CONSTITUTIONAL PROVISIONS INVOLVED.....	4
IV. STATEMENT OF THE CASE.....	5
A. Basis for federal jurisdiction in the court of first instance	5
B. Statement of material facts	5
1. Facts about Mr. Spell’s background.....	5
2. The subject charges	6
3. Facts about the sentence and restitution hearing.....	7
4. Facts about the waiver of appeal provision in the Plea Agreement.....	7
V. ARGUMENT: Review on certiorari should be granted in this case.....	9
VI. CONCLUSION	14
CERTIFICATE OF SERVICE.....	15
(Appendices 1 and 2)	

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	12
<i>Schweiker v. Wilson</i> , 450 U.S. 221, 101 S. Ct. 1074 (1981)	4
<i>United States v. Melancon</i> , 972 F.2d 566 (5th Cir. 1992)	9, 10, 11, 12, 14
<i>United States v. Sierra</i> , No. 91-4342 (5th Cir. Dec. 6, 1991)	10, 12

Statutes:

18 U.S.C. § 2252	1, 5
18 U.S.C. § 3231	5
18 U.S.C. § 3742	7
28 U.S.C. § 1254	3
28 U.S.C. § 2255	8

Rules:

Rule 10, Supreme Court Rules	9
Rule 13.1, Supreme Court Rules	3
Rule 29.5, Supreme Court Rules	x

United States Constitution:

U.S. Const. amend. V, Due Process Clause..... 4, 9, 12, 14

U.S. Const. amend. XIV, Equal Protection Clause..... 4, 9, 12, 14

Other:

Kathleen M. Sullivan, *Unconstitutional Conditions*,
102 Harv.L.R. 1415 (1989) 12

I. OPINIONS BELOW

A Federal Grand Jury for the Southern District of Mississippi indicted Mr. Spell for possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The Grand Jury returned the Indictment on June 25, 2019.

Mr. Spell accepted full responsibility for his actions by pleading guilty to the charge on July 7, 2021. The sentencing hearing followed on October 26, 2021. The court sentenced Mr. Spell to the statutory maximum penalty – 120 months in prison – followed by 30 years of supervised release. *Id.* at ROA.156; Judgment, ROA.94, 95. The Court entered a Judgment reflecting this sentence on November 17, 2021. Judgment, ROA.78-84. The district court's Judgment is attached hereto as Appendix 1.

Mr. Spell filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on November 17, 2021. On May 16, 2020, Mr. Spell filed Appellant's Brief with the Fifth Circuit, through which he argued that both the sentence ordered and the restitution awarded to the victims were unreasonably high. On May 17, 2022, the prosecution file a Motion to Dismiss Appeal based on the waiver of appeal provision of the Plea Agreement entered by the parties. The Fifth Circuit granted the Motion to Dismiss without considering the merits of Mr. Spell's substantive arguments. It filed both an Opinion and a Judgment on

February 23, 2023. The Opinion and Judgment are attached hereto as composite Exhibit 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgments in this case on February 23, 2023. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

“No person shall be ... deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V, Due Process Clause.

“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, Equal Protection Clause.¹

¹ “This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” *Schweiker v. Wilson*, 450 U.S. 221, 227 n.6, 101 S. Ct. 1074, 1079 n.6 (1981) (citations omitted).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Spell for violation of 18 U.S.C. § 2252, which makes it illegal to possess child pornography. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Spell arose from the laws of the United States of America.

B. Statement of material facts.

1. Facts about Mr. Spell's background.

Mr. Spell never knew his biological father. He had “a troubled life as a youth, with his mother having a drug/alcohol abuse problem.”² “[T]here was not always food in the home” during Mr. Spell’s early childhood. He was sexually abused “by the son of his mother’s girlfriend, who was in his twenties at the time, from the time defendant was age 8 until age 11.” The abuser touched Mr. Spell’s “private areas[.]”

Ultimately, Mr. Spell escaped his abusive environment. He lived with Rose Bailey beginning at age 11, and she adopted him at age 15.

² This Petition contains several direct quotes from evidence contained in the record on appeal. Citations to the record on appeal are not presented in this Petition because the record is not available to the Court at this point in the litigation.

Notwithstanding his difficult childhood, Mr. Spell graduated from high school in 2011. Also to his credit, he does not abuse alcohol or prescription medications. And other than the subject conviction, Mr. Spell has no prior arrests or convictions whatsoever.

Mr. Spell has a solid work history. From February 2017 through the day of his arrest, he worked 40 to 60 hours per week at Koch Foods. Prior to that, he worked part time at Koch Foods. In 2013 and 2014, he worked as a farm hand in Lena, Mississippi.

We do not bring up Mr. Spell's background to make excuses for his actions. Rather, this background information puts his admitted wrongdoing in proper context.

2. Facts about the subject charge.

This case involves a conviction for possessing child pornography. Mr. Spell accepted full responsibility for his actions by pleading guilty to the charge. In fact, Mr. Spell admitted that he has a problem with child pornography, and affirmatively stated he wants help dealing with the issue. Notwithstanding his admitted problem, Mr. Spell has never physically touched a child in an inappropriate manner, and he has never exposed himself to a child.

Apparently the district court did not believe that Mr. Spell presently presents a danger to society. This is true because the court allowed Mr. Spell to be free on bond until he was sentenced. He complied with all conditions of bond.

3. Facts about the sentencing and restitution hearing.

The district court ordered the statutory maximum prison term – 120 months in prison. It also ordered 30 years of supervised release following the prison term, and an assessment of \$10,000. The total restitution award was \$52,000.

Mr. Spell objected to both the 120-month prison term and the \$52,000 restitution award. However, because the Fifth Circuit dismissed his appeal based on the waiver of appeal provision in the Plea Agreement, the court never reached the merits of these arguments.

4. Facts about the waiver of appeal provision in the Plea Agreement.

Mr. Spell signed a Plea Agreements in the subject case. The Plea Agreement contains a waiver of appeal provision that states in relevant part:

Defendant, knowing and understanding all of the matters aforesaid, including the maximum possible penalty that could be imposed, and being advised of Defendant's rights ... [including his right] to appeal the conviction and sentence ... hereby expressly waives ... the right to appeal the conviction and sentence imposed in this case, or the manner in which that sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever....

The Plea Agreement contains a further waiver of “the right to contest the conviction and sentence or the manner in which the sentence was imposed in any

post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255[.]” Mr. Spell reserved the right to assert ineffective assistance of counsel on appeal.

V. ARGUMENT:
Review on certiorari should be granted in this case.

As described above, the Fifth Circuit never reached the merits of Mr. Spell's appeal claims because it ruled that they are barred from consideration by the waiver of appeal provision in the Plea Agreement. Because the Fifth Circuit never addressed the merits of Mr. Spell's arguments, the only issue presented in this Petition is whether the Fifth Circuit erred in its analyses and conclusions regarding the waiver of appeal issue. We ask this Court to grant certiorari and reverse the Fifth Circuit's ruling. If this Court grants certiorari and rules that the waiver of appeal provision is unenforceable, then the case must be remanded to the Fifth Circuit for consideration of Mr. Spell's arguments on the merits.

Certiorari is warranted under Rule 10 of the Supreme Court Rules, which states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." The Court should exercise its "judicial discretion" and grant certiorari because the subject issue involves important constitutional issues under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The concurrence opinion in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992) articulates these constitutional concerns in the waiver of appeal context.

Melancon involved the same issue before the Court in Mr. Spell's case – whether a waiver of appeal provision in a plea agreement is enforceable. 972 F.2d

at 567. On the prosecution's motion to dismiss the appeal, the *Melancon* Court held "that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *Id.* at 568. Accordingly, the Court granted the prosecution's motion to dismiss Melancon's appeal. *Id.*

Judge Robert M. Parker authored a lengthy and well-reasoned concurring opinion in *Melancon*. 972 F.2d at 570-80. He began by stating, "I concur specially because I cannot dissent. This panel is bound by the unpublished, *per curiam* opinion, *United States v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)]." *Id.* at 570. He went on to state "I write separately to express why I think the rule embraced by this Circuit in *Sierra* is illogical and mischievous – and to urge the full Court to examine the '*Sierra* rule,' and to reject it." *Id.*

Judge Parker reasoned that "[t]he rule articulated in *Sierra* is clearly unacceptable, even unconstitutional policy: the '*Sierra* rule' manipulates the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law." *Melancon*, 972 F.2d at 571. "I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent." *Id.*

Judge Parker acknowledged that waivers can be valid in a number of scenarios in criminal cases. However,

[i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (citations omitted). But “[t]he situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence.” *Id.* at 572. **“This right cannot come into existence until after the judge pronounces sentence;** it is only then that the defendant knows what errors the district court has made – i.e., what errors exist to be appealed, or waived.” *Id.* (emphasis added; citation omitted).

For the reasons thoughtfully articulated by Judge Parker, this Court should grant certiorari and find that Mr. Spell's waiver of the right to appeal was made unknowingly. But the analysis does not end here. Judge Parker's attack on the majority's opinion also extends to constitutional concerns.

He opines that the rule adopted by the majority “reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty.” *Melancon*, 972 F.2d at 577.

Unconstitutional conditions occur “when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from governmental interference. The ‘exchange’ thus has two components: the conditioned government **benefit** on the one hand and the affected constitutional **right** on the other.”

Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.R. 1415, 1421-1422 (1989) (emphasis in original)). “With a ‘*Sierra Waiver*,’ the government grants to the criminal defendant the **benefit** of a plea agreement only on the **condition** that the defendant accept the boot-strapped abdication of his or her right to appeal.” *Melancon*, 972 F.2d at 578 (emphasis in original). This is at least unacceptable, even if the government may withhold the benefit (i.e., the plea agreement) altogether.” *Id.* (citation omitted).

Judge Parker recognized that to create the constitutional issue described in the previous paragraph of this Brief, there must be a constitutional right. “The right to appeal is a statutory right, not a constitutional right.” *Melancon*, 972 F.2d at 577 (citation omitted). However,

[e]ven if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.

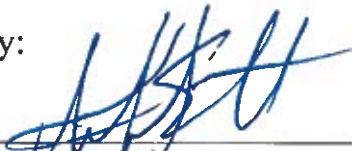
Id. (citing *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is

established, due process and equal protection bar the government from infringing on the right in an improper manner. The Court should grant certiorari to clarify this issue for the lower courts.

VI. CONCLUSION

For the reasons stated in *Melancon*'s concurring opinion, this Court should grant certiorari. Specifically, we ask the Court grant certiorari and ultimately rule: either (1), the waiver of appeal provision was agreed upon unknowingly; or (2), under the Due Process and Equal Protection Clauses of the United States Constitution, the subject waiver of appeal provision unconstitutionally infringes on Mr. Spell's statutory right to appeal his sentence.

Submitted May 15, 2023, by:



Michael L. Scott (MS Bar #101320)
Senior Litigator
Office of the Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510
Email: mike_scott@fd.org

Attorney for Defendant-Petitioner

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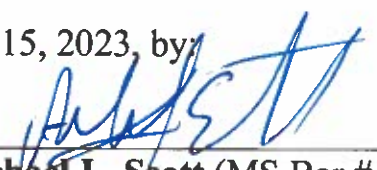
CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, May 15, 2023, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 772144621807, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.

Respectfully submitted, May 15, 2023, by



Michael L. Scott (MS Bar #101320)
Senior Litigator
Office of the Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510
Email: mike_scott@fd.org

Attorney for Defendant-Petitioner