

APPENDIX 1

UNITED STATES DISTRICT COURT

Southern District of Mississippi



UNITED STATES OF AMERICA

v.

JOHN WAYNE SPELL

Date of Original Judgment 11/17/2021

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:19cr114KHJ-FKB-001

USM Number: 21520-043

Michael L. Scott

Defendant's Attorney

THE DEFENDANT: pleaded guilty to count(s) single-count Indictment pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty. Modification of Restitution Order (18 U.S.C. 3664)

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2252(a)(4)(B)	Possession of Materials Involving the Sexual Exploitation of Minors	04/19/2019	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 20, 2022*

Date of Imposition of Judgment

Signature of Judge

The Honorable Kristi H. Johnson
Name and Title of Judge

U.S. District Judge

January 25, 2022
Date

DEFENDANT: JOHN WAYNE SPELL
CASE NUMBER: 3:19cr114KHJ-FKB-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

120 months

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be designated to Yazoo City, MS, FCC, should he so qualify.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN WAYNE SPELL

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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

30 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. * You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JOHN WAYNE SPELL

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

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SPECIAL CONDITIONS OF SUPERVISION

- 1) You shall not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless you are in compliance with the installment payment schedule.
- 2) You shall provide the probation office with access to any requested financial information.
- 3) You must not have direct contact with any child you know or reasonably should know to be under the age of 18, without the permission of the Court with the exception of your own biological children. If you do have any direct conduct with any child you know or reasonably should know to be under the age of 18, without the permission of the Court, you must report this contact to the probation office within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary dailyactivities in public places.
- 4) You must not go to, or remain at, any place where you know children under the age of 18 are likely to be, including parks, schools, playgrounds, and childcare facilities.
- 5) At the direction of the supervising U.S. Probation Officer, you shall submit to polygraph examination(s), by a licensed polygraph examiner, as approved by the U.S. Probation Officer, and shall pay the cost of the examination. Upon release from imprisonment, you must participate in a sex offense-specific assessment, to be arranged by the probation officer with a mental health provider, and you shall follow the recommendations of that provider.
- 6) You are prohibited contact with the victim(s) in this case.
- 7) You must participate in a sex-offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program. You shall contribute to the cost of treatment in accordance with the probation office co-payment policy.
- 8) You must allow the probation officer to install computer monitoring software on any computer (as defined in 18 U.S.C. § 1030(e)(1)) you use. To ensure compliance with the computer monitoring condition, you must allow the probation officer to conduct initial and periodic unannounced searches of any computers (as defined in 18 U.S.C. § 1030(e)(1)) subject to computer monitoring. These searches shall be conducted to determine whether the computer contains any prohibited data prior to installation of the monitoring software, whether the monitoring software is functioning effectively after its installation, and whether there have been attempts to circumvent the monitoring software after its installation. You must warn any other people who use these computers that the computers may be subject to searches pursuant to this condition. You shall contribute to the cost of monitoring in accordance with the probation office co-payment policy.
- 9) You shall submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of your person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media and effects, upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by you, or by any probation officer in the lawful discharge of the officer's supervision functions.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$ 100.00	\$ 52,000.00	\$	\$ 10,000.00	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
At School series			
Carol Hepburn in trust for Violet P.O. Box 17718 Seattle, WA 98127		\$10,000.00	
Cindy series			
Cusack & Gilfillan, LLC for "Cindy" 411 Hamilton Boulevard, Suite 1510 Peoria, IL 61602		\$8,000.00	
TOTALS	\$ 0.00	\$ 52,000.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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ADDITIONAL RESTITUTION PAYEES

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Cinderblock Blue series		\$3,000.00	
Marsh Law Firm PLLC in trust for Jane			
Attn: Jane			
P.O. Box 4668 #65135			
New York, NY 10163-4668			
Jenny series		\$3,000.00	
Marsh Law Firm PLLC in trust for Jenny			
Attn: Jenny			
P.O. Box 4668 #65135			
New York, NY 10163-4668			
Lighthouse1 series		\$10,000.00	
Deborah A. Bianco, in trust for Maureen			
P.O. Box 6503			
Bellevue, WA 98008			
Sweet White Sugar series		\$5,000.00	
Deborah A. Bianco, in trust for Pia			
P.O. Box 6503			
Bellevue, WA 98008			
Tara series		\$3,000.00	
(The victim information will be provided under separate cover)			
Vicky series		\$10,000.00	
Carol L. Hepburn, in trust for Lily of the Vicky series			
P.O. Box 17718			
Seattle, WA 98127			

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 62,100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ 100.00 over a period of xxxx (e.g., months or years), to commence 60 days (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
The defendant is ordered to enter into a written agreement with the Financial Litigation Program of the U.S. Attorney's Office for payment of the remaining balance. Additionally, the value of future discovered assets may be applied to offset the balance of criminal monetary penalties and the defendant may be included in the Treasury Offset Program. Should interest be required on the AVAA assessment, the Court instructs the interest requirement be waived as to the AVAA assessment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
Property listed in the Agreed Preliminary Order of Forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX 2-A

United States Court of Appeals
for the Fifth Circuit

No. 21-60878

United States Court of Appeals
Fifth Circuit

FILED

February 23, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHN WAYNE SPELL,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CR-114

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

PER CURIAM:*

John Wayne Spell pleaded guilty to possession of material involving the sexual exploitation of minors. The district court sentenced Spell and ordered restitution. Despite the appellate waiver included in his plea agreement, Spell now challenges his sentence and the award of restitution. After due consideration, we DISMISS the appeal.

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

No. 21-60878

FACTS AND PROCEDURAL HISTORY

Spell pleaded guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). As part of his written plea agreement, Spell waived the right to appeal his conviction and sentence, or the manner in which it was imposed, on any ground. The district court sentenced Spell to 120 months of imprisonment, 30 years of supervised release, and imposed a \$10,000 assessment pursuant to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018. The judgment of conviction was entered on November 17, 2021. Spell filed a notice of appeal on November 17, 2021. Following a restitution hearing, the judgment was amended on January 25, 2022, to include restitution in the amount of \$52,000. Spell filed an amended notice of appeal to include the restitution issue on February 9, 2022.

On May 16, 2022, the government filed a motion to dismiss or, alternatively, for summary affirmance on the basis of the appeal waiver. Spell filed opposition. The motion was carried with the case.

STANDARD OF REVIEW

A defendant may waive his statutory right to appeal pursuant to a valid plea agreement so long as his waiver is knowing and voluntary. *United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005). This court reviews de novo the issue of whether an appeal waiver bars an appeal. *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). “To determine the validity of an appeal waiver, this court conducts a two-step inquiry. Specifically, this court considers whether the waiver was knowing and voluntary and whether, under the plain language of the plea agreement, the waiver applies to the circumstances at issue.” *Id.* “In determining whether a waiver applies, this court employs ordinary principles of contract interpretation, construing waivers narrowly and against the Government.” *Id.*

No. 21-60878

DISCUSSION

Spell asserts that the district court ordered an unreasonably high sentence and an unreasonable restitution award. Spell concedes that the relief sought is against Fifth Circuit precedent. However, he asserts that his arguments raise “important public policy and constitutional concerns that may warrant en banc consideration by this court and/or consideration by the United States Supreme Court.” Spell also asserts that the appeal waiver should not be enforced because he did not know what his sentence would be when he pleaded guilty. We disagree.

This court recently considered a similar matter in *United States v. Meredith*, 52 F.4th 984 (5th Cir. 2022). In that case, Christopher Meredith attempted to appeal a sentencing enhancement and restitution award after waiving his right to appeal. This court concluded that Meredith’s waiver foreclosed his arguments on appeal and dismissed his appeal. *Id.* at 988. Meredith waived his right to appeal “on any ground,” including as to any “monetary penalty or obligation.” *Id.* at 986. This court also concluded that the waiver was knowing and voluntary.

Spell agreed to waive his right to appeal the conviction and sentence in this matter on any ground under 18 U.S.C. § 3742 or “on any ground whatsoever.” Pursuant to the plea agreement and supplement, Spell also agreed to make full restitution to all victims. Spell’s agreement did not include specific language waiving his right to appeal as to any “monetary penalty or obligation.” *See Meredith*, 52 F.4th at 986. However, in *Keele*, this court concluded that restitution was encompassed by a general waiver such as the one here. *Id.*, 755 F.3d at 756.

Additionally, this court has already disagreed with Spell’s argument regarding his uncertainty of sentence at the time he pleaded guilty. *See*

No. 21-60878

United States v. Melancon, 972 F.2d 566, 567-68 (5th Cir. 1992) (“uncertainty of Appellant’s sentence does not render his waiver uninformed.”).

Moreover, the record in this matter supports a conclusion that Spell knowingly and voluntarily waived his appellate rights. Spell signed a written provision on the plea agreement and supplement affirming that he had read the agreement, his attorney had explained it, he understood it, and he had entered into it voluntarily and knowingly. Before Spell’s plea was accepted, he testified that he had read the plea agreement and supplement, discussed it with counsel, and understood it. The district court also went over specific provisions, including the waiver, and Spell reiterated his voluntary agreement.

For these reasons, Spell’s appeal is DISMISSED. The government’s motion to dismiss or, alternatively, for summary affirmance is DISMISSED as moot.

APPENDIX 2-B

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 23, 2023

No. 21-60878

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHN WAYNE SPELL,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CR-114-1

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

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the appeal is DISMISSED.