APPENDIX

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APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

November 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. NANCY MARTIN, Defendant - Appellant.	No. 23-3045 (D.C. No. 6:21-CR-10018-EFM-1) (D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on the government's motion to enforce the appeal waiver in Nancy Martin's plea agreement pursuant to *United States v. Hahn*,

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam). Exercising jurisdiction under 28 U.S.C. § 1291, we grant the motion and dismiss the appeal.

BACKGROUND

Ms. Martin pleaded guilty to bank fraud, in violation of 18 U.S.C. § 1344(2), and aiding or assisting in filing a false tax document, in violation of 26 U.S.C. § 7206(2). As pertinent here, in exchange for her plea, the government agreed to recommend that she receive a two-level reduction in the applicable offense level for acceptance of responsibility, and to move for an additional one-level reduction "if her offense level is 16 or greater, prior to any reduction for acceptance of responsibility, and the Court finds she qualifies for a two-level reduction." Mot. to Enforce, Attach. A at 3. The plea agreement included a broad waiver of Ms. Martin's appellate rights, including the right to appeal "any matter in connection with...her conviction, or the components of [her] sentence..., including restitution," unless either the court departed upwards from the applicable Guidelines range or the government appealed the sentence. *Id*. at 9. Both by signing the written agreement and in her responses to the court's questions at the change of plea hearing, Ms. Martin confirmed that she understood the consequences of her plea, including the appeal waiver, and acknowledged that her plea was knowing and voluntary.

The court determined that Ms. Martin's offense level was 26 and that the applicable Guidelines range was 63 to 78 months. *See id*., Attach. C at 29. At the sentencing hearing, defense counsel noted that Ms. Martin's offense level "reflected [a] three-level

reduction" for acceptance of responsibility—"the two that she [qualified for] plus the additional point that the Government has recommended." *Id.* at 63. Although the government had agreed to move at sentencing for the additional one-point reduction, it did not do so, presumably because the court had already granted the reduction. The district court then sentenced Ms. Martin to concurrent 48-month and 36-month prison terms, well below the bottom of the Guidelines range. The court also imposed a period of supervised release and ordered Ms. Martin to pay restitution totaling almost $4 million.

Despite the appeal waiver Ms. Martin filed a notice of appeal. Her docketing statement indicates that she intends to argue that "[t]here is no factual basis for her conviction on either count," Aplt. Docketing Statement at 6, and to challenge "[t]he amount of loss and restitution figures," *id.* at 7.

DISCUSSION

Ms. Martin claims the appeal waiver is unenforceable because the government breached the plea agreement and because the *Hahn* requirements are not met.

1. Breach of Plea Agreement

Ms. Martin first asserts the government breached the plea agreement by not moving for the additional one-point reduction in her offense level at sentencing. She acknowledges that she did not object in the district court. We thus review her argument for plain error. *See Puckett v. United States*, 556 U.S. 129, 133–34 (2009); *United States v. Bullcoming*, 579 F.3d 1200, 1205 (10th Cir. 2009). The plain-error test requires the defendant to demonstrate (1) error, (2) that is plain,

(3) that affects her substantial rights, and, if those first three prongs are met, (4) that "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732–36 (1993) (brackets and internal quotation marks omitted). To establish the third plain-error prong in a breach-of-plea-agreement case, the defendant must show that the error had a prejudicial effect on the sentence imposed. *See Puckett*, 556 U.S. at 142 n.4.

"[A]n appellate waiver is not enforceable if the Government breaches its obligations under the plea agreement." *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212 (10th Cir. 2008). "General principles of contract law define the content and scope of the government's obligations under a plea agreement." *United States v. VanDam*, 493 F.3d 1194, 1199 (10th Cir. 2007), *overruled on other grounds by Puckett*, 556 U.S. 129. "We thus look to the express language in the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of this promise at the time of the entry of the guilty plea." *Id.* "We evaluate the record as a whole to ascertain whether the government complied with its promise." *Id.*

Ms. Martin has not met these requirements. True, the government agreed to move for an additional offense-level reduction at sentencing and did not do so. But, according to defense counsel's statement at the hearing, the government had already recommended the reduction before the hearing,[1] and the offense level

[1] The district court docket does not suggest that the government filed a motion seeking the reduction. We presume the

determined by the court reflected the additional reduction. Making the motion at the sentencing hearing was thus unnecessary. Ms. Martin has cited no authority, and we are not aware of any, suggesting that the government breaches a plea agreement in these circumstances. Moreover, even if the government's failure to move at the sentencing hearing for a reduction the court had already granted somehow breached the plea agreement, she cannot show that the error affected her sentence—the court sentenced her below the range it had determined based on the reduced offense level.

Ms. Martin attempts to avoid the outcome of this plain-error analysis by arguing that her contention is not that the alleged breach constituted error but that it gives rise to an equitable defense to enforcement of the waiver grounded in "the general contract principle of first to breach." Resp. at 8 (internal quotation marks omitted). Specifically, she maintains that "the Government—as the party who originally breached the plea agreement—cannot now rely on that same agreement." *Id*. But whether she couched her breach-of-contract argument in terms of "error" is beside the point. The point is that to prevail on her unpreserved argument, *Puckett* requires her to show that the alleged breach constituted error that had a prejudicial effect on her sentence. *See* 556 U.S. at 133–34, 142 n.4. She has not made that showing.

In any event, her first-to-breach argument is a non-starter. It was Ms. Martin's responsibility to identify

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government's recommendation for the additional offense-level reduction is reflected in the presentence investigation report, which is not included in the materials before us.

authority to support her argument. *See* Fed. R. App. P. 27(a)(2)(A), (3)(A) (a response to a motion "must state with particularity...the legal argument necessary to support" the grounds for the response). She cited no authority applying this first-to-breach principle in a plea bargaining context, much less to defeat enforcement of an appeal waiver when, as here, the government's alleged breach did not deprive the defendant of the benefit of her bargain. We will not "fill the void" by doing the necessary legal research to support her undeveloped and unsupported argument. *United States v. Moya*, 5 F.4th 1168, 1192 (10th Cir.) (internal quotation marks omitted), *cert. denied*, 142 S. Ct. 385 (2021); *see also Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023) (declining to consider inadequately briefed argument).

2. *Hahn* Factors

Having rejected Ms. Martin's contention that her appeal waiver is unenforceable based on the government's alleged breach, we turn to the government's motion to enforce. In ruling on the motion, we consider whether the appeal falls within the scope of the waiver, whether the waiver was knowing and voluntary, and whether enforcing it would result in a miscarriage of justice. *See Hahn*, 359 F.3d at 1325.

Ms. Martin first asserts that "[h]er waiver was involuntary because there was no factual basis for her plea." Resp. at 8–9. She appears to argue both that her factual-basis issues fall outside the scope of the appeal waiver,[2] and that the insufficient factual basis

[2] Ms. Martin does not contend that her appeal of the restitution order falls outside the scope of the waiver, so we do not address

for her plea renders her waiver involuntary. We are not persuaded by Ms. Martin's first argument and we don't reach the second.

In support of what we construe as a scope-of-waiver argument, Ms. Martin relies on out-of-circuit authority holding that "even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea." *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018) (collecting cases). But that is not the law in this circuit with regard to a scope-of-the-waiver argument. In *United States v. Novosel*, 481 F.3d 1288, 1295 (10th Cir. 2007) (per curiam), we held that a defendant's waiver of his right to appeal "any matter in connection with his prosecution and conviction" encompassed "his claim that the district court failed to ensure there was a sufficient factual basis for his guilty plea," *Id*. at 1295. Under *Novosel*, Ms. Martin's challenges to the factual basis for her plea fall within the scope of her waiver of her right to appeal "any matter in connection with...her conviction," Mot. to Enforce, Attach. A at 9. *Novosel*, 481 F.3d at 1295.

Ms. Martin next challenges the voluntariness of her appeal waiver. In determining whether she knowingly and voluntarily waived her appellate rights, we examine the language of the plea agreement and the adequacy of the plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure. *Hahn*, 359 F.3d at 1325. "[I]f the defendant did not voluntarily enter into the agreement, the appellate waiver subsumed in the agreement also cannot stand." *United States v.*

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that issue. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005) (court need not address uncontested *Hahn* factors).

Rollings, 751 F.3d 1183, 1189 (10th Cir. 2014). "A properly conducted plea colloquy, particularly one containing express findings, will, in most cases, be conclusive on the waiver issue, in spite of a defendant's post hoc assertions to the contrary." *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013) (per curiam). To avoid enforcement of her appeal waiver, Ms. Martin must "present evidence establishing that [she] did not understand the waiver." *United States v. Cudjoe*, 634 F.3d 1163, 1166 (10th Cir. 2011).

Ms. Martin has failed to meet her burden of showing that her waiver was not knowing and voluntary. She does not claim she did not understand the appeal waiver. Nor does she claim she did not understand any other aspect of the agreement or that her Rule 11 advisement was inadequate. She claims only that the allegedly insufficient factual basis for her plea renders her appeal waiver involuntary. There is law supporting such a claim. *See McCarthy v. United States*, 394 U.S. 459, 466–67 (1969); *see also United States v. Balde*, 943 F.3d 73, 95 (2d Cir. 2019) ("Without being fully informed of the nature of the offense, and without an established factual basis for finding that one of its elements was satisfied, it is hard to imagine how a defendant's plea could be knowing and voluntary."). But our review of the Rule 11 advisement confirms that the district court satisfied the requirement that it determine that there was a factual basis for the plea. *See* Fed. R. Crim. P. 11(b)(3). Ms. Martin did not move to withdraw her plea based on the adequacy of the factual basis, so our review of that issue is limited to plain-error review. *See United States v. Rollings*, 751 F.3d 1183, 1101 (10th Cir. 2014). And because she did not argue plain error in her

response to the motion to enforce, we decline to address the validity of the plea agreement, which she argues was unknowing and involuntary because her plea lacked a sufficient factual basis. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (holding the failure to argue plain error on appeal precludes an argument not presented to the district court).

Finally, Ms. Martin contends that enforcing the waiver would be a miscarriage of justice because she received ineffective assistance of counsel. In *Hahn*, we held that enforcement of an appeal waiver does not result in a miscarriage of justice unless it would result in one of four enumerated situations. 359 F.3d at 1327. One of those four situations is when "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid." *Id*. (internal quotation marks omitted). But we generally "only consider ineffective assistance of counsel claims on collateral review," and *Hahn*'s miscarriage-of-justice holding "does not disturb this longstanding rule," *id*. at 1327 n.13. Consistent with these principles, Ms. Martin's appeal-waiver provision expressly provides that she did not "waive[] any subsequent claims with regards to ineffective assistance of counsel." Mot. To Enforce, Attach. A at 9.

Despite our general rule and her appeal waiver, Ms. Martin urges us to consider her claim on direct appeal because counsel's alleged ineffectiveness affected the voluntariness of her plea. We decline to do so. We have "considered ineffective assistance of counsel claims on direct appeal in limited circumstances, but only where the issue was raised

before and ruled upon by the district court *and* a sufficient factual record exists." *United States v. Flood*, 635 F.3d 1255, 1260 (10th Cir. 2011). "[E]ven if the record appears to need no further development, the claim [for ineffective assistance of counsel] should still be presented first to the district court in collateral proceedings . . . so the reviewing court can have the benefit of the district court's views." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). The circumstances here do not fall within the narrow exception to our general rule because the district court has not had an opportunity to rule on Ms. Martin's claim of ineffective assistance of counsel.[3]

CONCLUSION

Because the *Hahn* factors have been met and the government's failure to seek an additional offense-level reduction at the sentencing hearing does not constitute a breach of the plea agreement that precludes enforcement of the appeal waiver, we grant the government's motion to enforce and we dismiss this appeal.

Entered for the Court
Per Curiam

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[3] We deny Ms. Martin's request that we stay the appeal pending the district court's ruling on her 28 U.S.C. § 2255 motion to vacate her conviction based on ineffective assistance of counsel. *See Galloway*, 56 F.3d at 1241 (declining to remand the case during the direct appeal for the development of a factual record or a ruling by the district court on a claim of ineffective assistance of counsel).

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

November 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. NANCY MARTIN, Defendant - Appellant.	No. 23-3045 (D.C. No. 6:21-CR-10018-EFM-1) (D. Kan.)

ORDER

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Nancy Martin petitions for rehearing en banc. Upon consideration, the panel sua sponte withdraws its previous Order and Judgment and substitutes the attached Order and Judgment. The Clerk shall file the attached Order and Judgment nunc pro tunc to July 31, 2023, the date the original Order and Judgment issued.

The petition for rehearing en banc and the modified Order and Judgment were transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the request for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

July 31, 2023

Christopher M. Wolpert
Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. NANCY MARTIN, Defendant - Appellant.	No. 23-3045 (D.C. No. 6:21-CR-10018-EFM-1) (D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on the government's motion to enforce the appeal waiver in Nancy Martin's plea agreement pursuant to *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Exercising jurisdiction under 28 U.S.C. § 1291, we grant the motion and dismiss the appeal.

BACKGROUND

Ms. Martin pleaded guilty to bank fraud, in violation of 18 U.S.C. § 1344(2), and aiding or assisting in filing a false tax document, in violation of 26 U.S.C. § 7206(2). As pertinent here, in exchange for her plea, the government agreed to recommend that she receive a two-level reduction in the applicable offense level for acceptance of responsibility, and to move for an additional one-level reduction "if her offense level is 16 or greater, prior to any reduction for acceptance of responsibility, and the Court finds she qualifies for a two-level reduction." Mot. to Enforce, Attach. A at 3. The plea agreement included a broad waiver of Ms. Martin's appellate rights, including the right to appeal "any matter in connection with . . . her conviction, or the components of [her] sentence . . . , including restitution," unless either the court departed upwards from the applicable Guidelines range or the government appealed the sentence. *Id.* at 9. Both by signing the written agreement and in her responses to the court's questions at the change of plea hearing, Ms. Martin confirmed that she understood the consequences of her plea, including the appeal waiver, and acknowledged that her plea was knowing and voluntary.

The court determined that Ms. Martin's offense level was 26 and that the applicable Guidelines range was 63 to 78 months. *See id.*, Attach. C at 29. At the sentencing hearing, defense counsel noted that Ms. Martin's offense level "reflected [a] three-level reduction" for acceptance of responsibility—"the two

that she [qualified for] plus the additional point that the Government has recommended." *Id.* at 63. Although the government had agreed to move at sentencing for the additional one-point reduction, it did not do so, presumably because the court had already granted the reduction. The district court then sentenced Ms. Martin to concurrent 48-month and 36-month prison terms, well below the bottom of the Guidelines range. The court also imposed a period of supervised release and ordered Ms. Martin to pay restitution totaling almost $4 million.

Despite the appeal waiver Ms. Martin filed a notice of appeal. Her docketing statement indicates that she intends to argue that "[t]here is no factual basis for her conviction on either count," Aplt. Docketing Statement at 6, and to challenge "[t]he amount of loss and restitution figures," *id.* at 7.

DISCUSSION

Ms. Martin claims the appeal waiver is unenforceable because the government breached the plea agreement and because the *Hahn* requirements are not met.

1. **Breach of Plea** Agreement

Ms. Martin first asserts the government breached the plea agreement by not moving for the additional one-point reduction in her offense level at sentencing. She acknowledges that she did not object in the district court. We thus review her argument for plain error. *See Puckett v. United States*, 556 U.S. 129, 133-34 (2009); *United States v. Bullcoming*, 579 F.3d 1200, 1205 (10th Cir. 2009). The plain-error test requires the defendant to demonstrate (1) error, (2) that is plain, (3) that affects her substantial rights, and, if those

first three prongs are met, (4) that "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732–36 (1993) (brackets and internal quotation marks omitted). To establish the third plain-error prong in a breach-of-plea-agreement case, the defendant must show that the error had a prejudicial effect on the sentence imposed. *See Puckett*, 556 U.S. at 142 n.4.

"[A]n appellate waiver is not enforceable if the Government breaches its obligations under the plea agreement." *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212 (10th Cir. 2008). "General principles of contract law define the content and scope of the government's obligations under a plea agreement." *United States v. VanDam*, 493 F.3d 1194, 1199 (10th Cir. 2007), *overruled on other grounds by Puckett*, 556 U.S. 129. "We thus look to the express language in the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of this promise at the time of the entry of the guilty plea." *Id.* "We evaluate the record as a whole to ascertain whether the government complied with its promise." *Id.*

Ms. Martin has not met these requirements. True, the government agreed to move for an additional offense-level reduction at sentencing and did not do so. But, according to defense counsel's statement at the hearing, the government had already recommended the reduction before the hearing,[1] and the offense level

[1] The district court docket does not suggest that the government filed a motion seeking the reduction. We presume the government's recommendation for the additional offense-level

determined by the court reflected the additional reduction. Making the motion at the sentencing hearing was thus unnecessary. Ms. Martin has cited no authority, and we are not aware of any, suggesting that the government breaches a plea agreement in these circumstances. Moreover, even if the government's failure to move at the sentencing hearing for a reduction the court had already granted somehow breached the plea agreement, she cannot show that the error affected her sentence—the court sentenced her below the range it had determined based on the reduced offense level.

Ms. Martin attempts to avoid the outcome of this plain-error analysis by arguing that her contention is not that the alleged breach constituted error but that it gives rise to an equitable defense to enforcement of the waiver grounded in "the general contract principle of first to breach." Resp. at 8 (internal quotation marks omitted). Specifically, she maintains that "the Government—as the party who originally breached the plea agreement—cannot now rely on that same agreement." *Id.* But whether she couched her breach-of-contract argument in terms of "error" is beside the point. The point is that to prevail on her unpreserved argument, *Puckett* requires her to show that the alleged breach constituted error that had a prejudicial effect on her sentence. *See* 556 U.S. at 133–34, 142 n.4. She has not made that showing.

In any event, her first-to-breach argument is a non-starter. It was Ms. Martin's responsibility to identify authority to support her argument. *See* Fed. R. App.

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reduction is reflected in the presentence investigation report, which is not included in the materials before us.

P. 27(a)(2)(A), (3)(A) (a response to a motion "must state with particularity . . . the legal argument necessary to support" the grounds for the response). She cited no authority applying this first-to-breach principle in a plea bargaining context, much less to defeat enforcement of an appeal waiver when, as here, the government's alleged breach did not deprive the defendant of the benefit of her bargain. We will not "fill the void" by doing the necessary legal research to support her undeveloped and unsupported argument. *United States v. Moya*, 5 F.4th 1168, 1192 (10th Cir.) (internal quotation marks omitted), *cert. denied*, 142 S. Ct. 385 (2021); *see also Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023) (declining to consider inadequately briefed argument).

2. *Hahn* Factors

Having rejected Ms. Martin's contention that her appeal waiver is unenforceable based on the government's alleged breach, we turn to the government's motion to enforce. In ruling on the motion, we consider whether the appeal falls within the scope of the waiver, whether the waiver was knowing and voluntary, and whether enforcing it would result in a miscarriage of justice. *See Hahn*, 359 F.3d at 1325.

Ms. Martin first asserts that "[h]er waiver was involuntary because there was no factual basis for her plea." Resp. at 8–9. She appears to argue both that her factual-basis issues fall outside the scope of the appeal waiver,[2] and that the insufficient factual basis

[2] Ms. Martin does not contend that her appeal of the restitution order falls outside the scope of the waiver, so we do not address

for her plea renders her waiver involuntary. We are not persuaded by either argument.

In support of what we construe as a scope-of-waiver argument, Ms. Martin relies on out-of-circuit authority holding that "even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea." *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018) (collecting cases). But that is not the law in this circuit. In *United States v. Novosel*, 481 F.3d 1288, 1295 (10th Cir. 2007) (per curiam), we held that a defendant's waiver of his right to appeal "any matter in connection with his prosecution and conviction" encompassed "his claim that the district court failed to ensure there was a sufficient factual basis for his guilty plea," *Id.* at 1295. Under *Novosel*, Ms. Martin's challenges to the factual basis for her plea fall within the scope of her waiver of her right to appeal "any matter in connection with . . . her conviction," Mot. to Enforce, Attach. A at 9. *Novosel*, 481 F.3d at 1295. Ms. Martin next challenges the voluntariness of her appeal waiver. In determining whether she knowingly and voluntarily waived her appellate rights, we examine the language of the plea agreement and the adequacy of the plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure. *Hahn*, 359 F.3d at 1325. "[I]f the defendant did not voluntarily enter into the agreement, the appellate waiver subsumed in the agreement also cannot stand." *United States v. Rollings*, 751 F.3d 1183, 1189 (10th Cir. 2014). "A properly conducted plea colloquy, particularly one containing express

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that issue. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005) (court need not address uncontested *Hahn* factors).

findings, will, in most cases, be conclusive on the waiver issue, in spite of a defendant's post hoc assertions to the contrary." *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013) (per curiam). To avoid enforcement of her appeal waiver, Ms. Martin must "present evidence establishing that [she] did not understand the waiver." *United States v. Cudjoe*, 634 F.3d 1163, 1166 (10th Cir. 2011).

Ms. Martin has failed to meet her burden of showing that her waiver was not knowing and voluntary. She does not claim she did not understand the appeal waiver. Nor does she claim she did not understand any other aspect of the agreement or that her Rule 11 advisement was inadequate. She claims only that the allegedly insufficient factual basis for her plea renders her appeal waiver involuntary. But our review of the Rule 11 advisement confirms that the district court satisfied the requirement that it determine that there was a factual basis for the plea. *See* Fed. R. Crim. P. 11(b)(3). Ms. Martin did not move to withdraw her plea based on the adequacy of the factual basis, so our review of that issue is limited to plain-error review. *See United States v. Rollings*, 751 F.3d 1183, 1101 (10th Cir. 2014). And because she did not argue plain error in her response to the motion to enforce, we decline to address the validity of the plea agreement, which she argues was unknowing and involuntary because her plea lacked a sufficient factual basis. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (holding the failure to argue plain error on appeal precludes an argument not presented to the district court).

Finally, Ms. Martin contends that enforcing the waiver would be a miscarriage of justice because she

received ineffective assistance of counsel. In *Hahn*, we held that enforcement of an appeal waiver does not result in a miscarriage of justice unless it would result in one of four enumerated situations. 359 F.3d at 1327. One of those four situations is when "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid." *Id.* (internal quotation marks omitted). But we generally "only consider ineffective assistance of counsel claims on collateral review," and *Hahn*'s miscarriage-of-justice holding "does not disturb this longstanding rule," *id.* at 1327 n.13. Consistent with these principles, Ms. Martin's appeal-waiver provision expressly provides that she did not "waive[] any subsequent claims with regards to ineffective assistance of counsel." Mot. to Enforce, Attach. A at 9.

Despite our general rule and her appeal waiver, Ms. Martin urges us to consider her claim on direct appeal because counsel's alleged ineffectiveness affected the voluntariness of her plea. We decline to do so. We have "considered ineffective assistance of counsel claims on direct appeal in limited circumstances, but only where the issue was raised before and ruled upon by the district court *and* a sufficient factual record exists." *United States v. Flood*, 635 F.3d 1255, 1260 (10th Cir. 2011). "[E]ven if the record appears to need no further development, the claim [for ineffective assistance of counsel] should still be presented first to the district court in collateral proceedings . . . so the reviewing court can have the benefit of the district court's views." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). The circumstances here do not fall within the narrow exception to our general rule because the

district court has not had an opportunity to rule on Ms. Martin's claim of ineffective assistance of counsel.[3]

CONCLUSION

Because the *Hahn* factors have been met and the government's failure to seek an additional offense-level reduction at the sentencing hearing does not constitute a breach of the plea agreement that precludes enforcement of the appeal waiver, we grant the government's motion to enforce and we dismiss this appeal.

Entered for the Court
Per Curiam

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[3] We deny Ms. Martin's request that we stay the appeal pending the district court's ruling on her 28 U.S.C. § 2255 motion to vacate her conviction based on ineffective assistance of counsel. *See Galloway*, 56 F.3d at 1241 (declining to remand the case during the direct appeal for the development of a factual record or a ruling by the district court on a claim of ineffective assistance of counsel).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff*, vs. NANCY MARTIN, *Defendant*.	Case No. 21-CR-10018-EFM

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Nancy Martin's Unopposed Motion for Release Pending Appeal (Doc. 62). She seeks to continue her release pending the resolution of her appeal because she is neither a danger to the community nor a flight risk, and her appeal involves substantial questions that—if resolved favorably to her on appeal—would result in her convictions being reversed. The United States does not oppose Ms. Martin's release pending appeal. For the reasons stated in more detail below, the Court grants Defendant's motion.

I. Factual and Procedural Background

On May 24, 2022, Ms. Martin pleaded guilty to one count of Bank Fraud, a violation of 18 U.S.C. § 1344(2), and Aiding in the Filing of False Tax Information, a violation of 26 U.S.C. § 7206(2). On March 2, 2023, the

Court sentenced Ms. Martin to a 48-month term of imprisonment, followed by a two-year term of supervised release. As part of the sentence, the Court ordered Ms. Martin to pay restitution to the victims of the offense, as well as a $100 special assessment for each count of conviction. On March 15, 2023, Ms. Martin filed a timely notice of appeal. On March 31, 2023, Ms. Martin filed her Motion for Release Pending Appeal. The United States does not oppose the request. On April 4, 2023, the Court held a hearing on Ms. Martin's Motion for Release, and heard arguments from both parties.

II. Legal Standard

A district court has authority to release a defendant pending appeal, provided certain conditions are met.[1] First, a defendant must demonstrate by clear and convincing evidence that she is neither a flight risk nor a danger to the community.[2] The United States agrees that Ms. Martin has made this showing. Second, a defendant must show, by a preponderance of the evidence, that the appeal raises a substantial question of law that, if resolved in the defendant's favor, would result in a reversal of the defendant's convictions.[3] A district court retains the authority to grant a motion for release pending appeal even after a defendant has filed a notice of appeal.[4]

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[1] *See* 18 U.S.C. § 3143(b)(1).

[2] 18 U.S.C. § 3143(b)(1)(A).

[3] 18 U.S.C. § 3143(b)(1)(B)(i); *see also United States v. Meyers*, 95 F.3d 1475, 1489 (10th Cir. 1996).

[4] *Meyers*, 95 F.3d at 1489 n.6.

III. Analysis

The United States agrees that Ms. Martin has shown by clear and convincing evidence that she is neither a danger to the community nor a flight risk.[5] The Court agrees and so finds.

A. The Bank Fraud Conviction

As to the statute's second requirement, Ms. Martin argues that her appeal raises substantial questions about whether there are sufficient factual bases for her convictions. A conviction under 18 U.S.C. § 1344(2), she contends, requires evidence that a defendant used a false statement as the mechanism to obtain bank property.[6] But according to Ms. Martin, that evidence does not exist in the record here. Rather, the evidence in the record shows that Ms. Martin used false statements to disguise thefts from her employers—not as the means by which she obtained the bank's property.

The United States does not concede that Ms. Martin's argument is correct on the merits—that is, it does not agree that Ms. Martin's bank-fraud conviction is legally infirm. Yet it does agree that the issue raises a substantial question that satisfies the requirement of 18 U.S.C. § 3143(b)(1)(B)(i). In other words, the United States concurs with Ms. Martin that the question of whether there's a sufficient factual basis for her bank-fraud conviction is substantial. And that if the appellate court were to

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[5] *See* 18 U.S.C. § 3143(b)(1).

[6] *See Loughrin v. United States*, 573 U.S. 351, 363 (2014)("[T]he defendant's false statement" must be "the mechanism naturally inducing the bank…to part with money in its control.").

decide the question in Ms. Martin's favor, the result would be a reversal of her conviction on those counts.

The Court agrees. As the Court noted during the hearing, the standard is whether Ms. Martin's appeal raises a substantial question.[7] The standard does not require this Court to evaluate the odds of the argument's eventual success or failure. Rather, the Court must only determine whether there is "a close question or one that very well could be decided the other way."[8] Whether there is sufficient evidence in the record to show Ms. Martin's admitted conduct rose to a violation of Section 1344(2) could go either way. That equilibrium makes the question substantial. And if Ms. Martin were to prevail, then the appellate court would likely reverse her conviction for lack of a sufficient factual basis.[9] Thus, the Court holds that Ms. Martin has satisfied the requirements for release pending appeal as to her bank-fraud conviction.

B. The Tax Fraud Conviction

Ms. Martin claims a similar question affects her conviction on the tax count. To convict a defendant under 26 U.S.C. § 7206(2), there must be evidence that the defendant acted willfully. A person acts willfully by "voluntarily and intentionally" violating "a known duty."[10] Ms. Martin argues this standard requires

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[7] *Meyers*, 95 F.3d at 1489.

[8] *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985)(quotations and citations omitted).

[9] *See* Fed. R. Crim. P. 11(b)(3).

[10] *United States v. Guidry*, 199 F.3d 1150, 1156 (10th Cir. 1999); *see also Cheek v. United States*, 498 U.S. 192, 201 (1991)(defining

evidence that she knew that the law required her to report the sums she took from her employers as income on her taxes,[11] but there is no evidence of that in the record. Thus, like her challenge to the bank-fraud conviction, Ms. Martin contends that her conviction lacks a sufficient factual basis. The United States views this as a weaker argument than the one concerning the bank-fraud conviction, but ultimately agrees that it raises a substantial question under Section 3142.

The Court agrees with the United States. Though not as clear-cut as the substantial question raised as to the bank-fraud conviction, it is "a close question" whether there is sufficient evidence in the record to show Ms. Martin acted willfully.[12] And if the court of appeals were to agree with Ms. Martin that the record lacks that evidence, it would reverse her conviction.[13] Thus, the Court holds that Ms. Martin has satisfied the requirements for release pending appeal as to her tax-fraud conviction.

IT IS THEREFORE ORDERED that Defendant's Unopposed Motion for Release Pending Appeal (Doc. 62) is **GRANTED.**

"willfully," in the context of the Revenue Code, as the "voluntary, intentional violation of a known duty.").

[11] *See Cheek v. United States*, 498 U.S. 192, 200 (1991) (affirming the interpretation of "willfully" as used in statutes governing federal criminal tax offenses as "carving out an exception to the traditional rule" that ignorance of the law is not a defense).

[12] *See Affleck*, 765 F.2d at 952.

[13] *See* Fed. R. Crim. P. 11(b)(3).

IT IS SO ORDERED.
Dated this 12th day of April, 2023.

ERIC F. MELGREN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

United States District Court
District of Kansas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	
Nancy Martin	Case Number: 6:21CR10018 - 001
	USM Number: 39801-509
	Defendant's Attorney: Sylvia B. Penner

THE DEFENDANT:

☒ pleaded guilty to count(s): *1 and 4 of the 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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1344(2)	BANK FRAUD, a Class B Felony	05/31/2017	1
26 U.S.C. § 7206(2)	AID OR ASSIST FILING A FALSE TAX DOCUMENT, a Class E Felony	10/12/2016	4

The defendant is sentenced as provided in pages 1 through 7 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) *2, 3, and 5 of the Indictment* are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and United States attorney of material changes in economic circumstances.

03/02/2023
Date of Imposition of Judgment

s/ Eric F. Melgren
Signature of Judge

Honorable Eric F. Melgren,
Chief U.S. District Judge
Name and Title of Judge

3/6/2023
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of *48 months*.

Count 1: 48 months, Count 4: 36 months, concurrent to count 1

☒ The Court makes the following recommendations to the Bureau of Prisons: Court recommends designation to a medical facility that will allow the Defendant to receive ongoing treatment and rehabilitation. Secondary to the medical facility, the Court recommends placement as close to Atlanta, Georgia as possible to facilitate family support.

☐ 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 ___ 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 ___ on ___.

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

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 U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of *2 years*.

Count 1: 2 years, Count 4: 1 year, concurrent to count 1.

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, not to exceed eight (8) drug tests per month.
   - ☐ 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.

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, after obtaining court approval, require you to notify the person about the risk and you must comply with that instruction.
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. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date: _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must not incur new credit charges or open, or attempt to open, additional lines of credit, without the prior approval of the U.S. Probation Officer. You must also execute any release of information forms necessary for the probation officer to monitor your compliance with the credit restrictions.
2. You must immediately provide the U.S. Probation Officer with access to any and all requested financial information, to include executing any release of information forms necessary for the probation office to obtain and/or verify said financial information.

ACKNOWLEDGMENT OF CONDITIONS:
I have read or have had read to me the conditions of supervision set forth in this judgment; and I fully understand them. I have been provided a copy of them. I understand upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

Defendant's Signature _____ Date: _____

USPO Signature _____ Date: _____

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$200	$3,898,088.61	Waived	Not applicable	Not applicable

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

☒ The defendant shall make restitution (including community restitution) to the following payees in the amounts 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.

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*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.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
Emergency Services, P.A.	$5,472,967.41	$3,227,921.61	1
IRS	$670,167	$670,167	2
TOTALS	**$6,143,134.41**	**$3,898,088.61**	

☐ Restitution amount ordered pursuant to plea agreement $.

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution 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 set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☒ the interest requirement for the ☐ fine and/or ☒ restitution is modified as follows:

***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.

The defendant shall pay interest as the law allows in count one. The interest is waived in count four.

SCHEDULE OF PAYMENTS

Criminal monetary penalties are due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows, but this schedule in no way abrogates or modifies the government's ability to use any lawful means at any time to satisfy any remaining criminal monetary penalty balance, even if the defendant is in full compliance with the payment schedule:

A ☐ Lump sum payment of $___ 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 monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☒ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of *2* years, to commence *30* 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:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 204, 401 N. Market, Wichita, Kansas 67202, or may be paid electronically via Pay.Gov.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

Case Number Defendant and Co-Defendant Names (including defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ 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. Payments against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

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.