No. 23-_____

In The
Supreme Court of the United States

OJIN KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Padilla v. United States*, 559 U.S. 356 (2010), the Court held that that the Sixth Amendment requires defense counsel to advise a noncitizen client of the risk of deportation arising from a guilty plea. Defense counsel's failure to so advise, or defense counsel's misadvice regarding the immigration consequences of the plea, may constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court held specifically that when the risk of removal resulting from a guilty plea is "clear," counsel must advise his or her client that "deportation [is] presumptively mandatory." On the other hand, when that risk is less clear, counsel need only advise the defendant "that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 559 U.S. at 369. The Court acknowledged that a "[l]ack of clarity in the law . . . will affect the scope and nature of counsel's advice." *Id.* at 369 n.10.

Petitioner and defendant Ojin Kim was convicted of a federal felony and faces probable deportation as a result. To address this harm, Kim moved for relief under 28 U.S.C. § 2255, and pursued his claim through the district court and the Fifth Circuit. He now presents the following question to the Court:

> Whether the real threat of deportation as a result of a federal criminal conviction establishes standing and a real case in controversy for federal courts to retain jurisdiction of a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255?

PARTIES AND RELATED PROCEEDINGS

Parties

- Petitioner Ojin Kim was Appellant in the United States Court of Appeals for the Fifth Circuit, and defendant-petitioner in the United States District Court for the Western District of Texas.
- Respondent United States of America was the Appellee in the United States Court of Appeals for the Fifth Circuit and the prosecution-respondent in the United States District Court for the Western District of Texas.

Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Ojin Kim*, No. 7:17-CR-183, United States District Court for the Western District of Texas. Judgment entered November 19, 2018.
- *United States v. Ojin Kim*, No. 18-51024, United States Court of Appeals for the Fifth Circuit. Direct appeal from criminal conviction. Opinion and order vacating in part, dismissing in part, and remanding entered on February 19, 2021.
- *Ojin Kim v. United States*, No. 21-75, Supreme Court of the United States, petition for certiorari denied on October 4, 2021.
- *Ojin Kim v. United States*, No. 7:21-CV-250, United States District Court for the Western District of Texas. Opinion and order denying Motion to

PARTIES AND RELATED PROCEEDINGS
—Continued

Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 entered on September 5, 2022.

- *United States v. Ojin Kim*, No. 22-50827, United States Court of Appeals for the Fifth Circuit. Hon. Jennifer Elrod, U.S. Cir. J., entered an order granting a Certificate of Appealability on March 22, 2023. The Court of Appeals entered its per curiam Order dismissing the appeal on November 27, 2023. A petition for rehearing was denied on January 23, 2024.

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The unpublished per curiam opinion of the Fifth Circuit dismissing the appeal in *United States v. Kim*, No. 22-50827, 2023 WL 8184817 (5th Cir. Nov. 27, 2023), is attached to this petition at App. 1. The unpublished order of the Court of Appeals denying the petition for rehearing (January 23, 2024) is attached to this petition at App. 37.

The unpublished opinion of the United States District Court for the Western District of Texas, denying a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 in *Kim v. United States*, No. 7:21-CV-250 (W.D. Tex. Sep. 5, 2022) is attached to this petition at App. 8. The Order of the Fifth Circuit Court of Appeals in *United States v. Kim*, No. 22-50827 (Mar. 22, 2023) (Elrod, Cir. J.) granting a Certificate of Appealability from the District Court's denial of relief is attached to this petition at App. 4.

The opinion of the Court of Appeals for the Fifth Circuit on direct appeal from conviction is published in *United States v. Kim*, No. 18-51024, 988 F.3d 803 (5th Cir. 2021), vacating in part, dismissing in part, and remanding the judgment and conviction entered in the United States District Court for the Western District of Texas. The Court's order denying a petition for writ of certiorari to the Fifth Circuit, seeking review of the direct appeal from criminal conviction, was published as *Kim v. United States*, 142 S. Ct. 225 (2021).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Fifth Circuit entered its order dismissing the appeal on November 27, 2023, and its order denying rehearing on January 23, 2024.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Article III.

> . . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . —to Controversies to which the United States shall be a Party; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Amendment V.

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

8 U.S.C. § 1227(a)

> Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if

the alien is within one or more of the following classes of deportable aliens:

. . .

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who –

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status . . .) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of

> the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> . . . .
>
> (d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

STATEMENT OF THE CASE

The courts of the United States have an obligation and duty to exercise the jurisdiction granted to them. Appellate jurisdiction of Ojin Kim's claims under 28 U.S.C. § 2255 vested with the Fifth Circuit upon filing of the Notice of Appeal from the district court's denial of his 2255 Motion. The continued threat of real harm to Kim, despite his release from prison pending his appeal, obligated and authorized the court of appeals to retain jurisdiction and decide Kim's case. Instead, the court of appeals erroneously accepted the Government's invitation to dismiss the appeal.

A. Factual Background

On April 23, 2018, Ojin Kim, an alien, pleaded guilty, pursuant to a plea agreement, to one count of criminal copyright infringement under 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1).

The copyright infringement violation stemmed from sales of counterfeit gaming software. *United States v. Kim*, 988 F.3d 803, 805 (5th Cir.), *cert. denied*, 142 S. Ct. 225 (2021). Specifically, the gaming software sold by Kim contained motherboards—computer technology that contained microchips with the counterfeit software. *Id.* The copyright to that software was legitimately owned by a game production company, Scientific Games Corporation. *Id.*

Kim agreed to plead guilty and be held responsible for selling twenty-four counterfeit motherboards. App. 11. In the plea agreement, after receiving advice from trial counsel, Kim stipulated a financial loss of $30,000. App. 11.

The district court instead adopted the Probation Officer's recommendations from the Presentence Investigation Report ("PSR"). App. 17. The district court sentenced Kim to 46 months of imprisonment and ordered him to pay $606,250 in restitution. App. 17.

1. Kim's counsel's calculations of total loss

On the advice of trial counsel, Kim stipulated in his factual basis that Scientific Games had a total financial loss of $30,000. App. 11. This figure was

calculated by multiplying 24, the number of counterfeit boards Kim agreed he sold, by a purported retail value of $1,250 per board for a total of $30,000. App. 14. Even though the motherboards Kim sold were several years old, trial counsel and the PSR both agreed to use $1,250 as the retail value because Scientific Games represented that $1,250 is the price of a brand-new version of a motherboard. App. 17.

2. Presentencing report calculation of total loss

Subsequently, the United States Probation Officer submitted a PSR that stated Kim was accountable for a total financial loss of $606,250. App. 14-15. The Probation Officer reached this number by adding two numbers: $30,000—the number Kim agreed he was responsible for—and $576,250. App. 15-16.

The Probation Officer calculated the additional $576,250 because she incorrectly calculated that Kim was responsible for the sale of an additional 461 counterfeit boards. App. 15. To reach this conclusion, the Probation Officer relied on the statement of a game room owner in an FBI interview that the owner owed Kim $200,000. App. 15. Based on this statement alone, the Probation Officer inferred that the $200,000 worth of alleged debt was totally comprised of additional purchased counterfeit motherboards. App. 15.

The Probation Officer then divided $200,000—the number the owner allegedly owed to Kim—by $434—the value at which the Probation Officer said Kim

"could have" sold them. *Kim*, 988 F.3d at 805. The resulting number is 461. The Fifth Circuit noted in a prior, published opinion that, in this case, the "PSR's methodology was based on speculation regarding the number of counterfeit motherboards that $200,000 could have purchased. *Id.* This conclusion is not supported by the record." *Id.* at 812.

The Probation Officer then multiplied 461—the speculative number of additional sold motherboards—by $1,250—the purported market cost of a Scientific Games Corp. motherboard. *Id.* The resulting total figure is $606,250, the number the PSR represents as the total loss to Scientific Games. *Id.*

At the sentencing hearing, Kim's trial counsel presented fourteen objections to the PSR and presented two affidavits from the game room owner and management company to rebut the Government's claim that Kim was responsible for the additional $200,000. App. 16. However, Kim's counsel did not object to the method through which the Probation Officer calculated that Kim was responsible for an additional 461 boards; counsel also did not object to the use of $1,250—the price of a brand-new motherboard—to represent the market value of the counterfeit boards Kim sold. App. 16-17.

The calculation that held Kim responsible for an extra 461 boards inflated Kim's sentence when calculated based on the Sentencing Guidelines. App. 16. The base offense level for Kim's offense according to the Sentencing Guidelines was eight—which would have

placed Kim's range of punishment at 0-6 months. App. 15-16. However, the Sentencing Guidelines recommend a 14-level sentencing enhancement when the total financial loss is over $550,000. App. 16; U.S. Sent'g Guidelines Manual § 2B1.1(b)(1)(H) (U.S. Sent'g Comm'n 2021). Because the calculated total loss to Scientific Games based on the Probation Officer's second calculation exceeded $550,000, the PSR applied the 14-level sentencing enhancement. App. 16. This placed Kim's sentence range at 46-57 months. App. 16.

At sentencing, the district court agreed with the Government and adopted the suggestions in the PSR without change. App. 17. The district court sentenced Kim to 46 months imprisonment and imposed $606,250 in restitution. App. 17-18.

3. Appeal in the Fifth Circuit

On direct appeal to the Fifth Circuit, Kim sought to vacate the order of restitution, contending that it was in excess of the statutory maximum because it exceeded the amount of the victim's actual loss. App. 18. The Fifth Circuit reversed the restitution amount, holding that the district court abused its discretion by ordering restitution based on the speculative loss amount contained in the PSR; however, at that time, the Fifth Circuit found that Kim's challenge to sentence enhancement was procedurally barred by his appeal waiver. App. 18. The court of appeals vacated the restitution order and remanded it to the district court. *Kim*, 988 F.3d at 805.

Kim sought a writ of certiorari from the Court, raising two issues. Kim argued that the district court erred when applying the sentencing guidelines based on the Government's arbitrary assessment of the number of infringing items, resulting in appellant's sentence exceeding the statutory maximum. In October 2021, the Court denied certiorari. *Kim v. United States*, No. 21-75, 142 S. Ct. 225, 211 L. Ed. 2d 99 (Oct. 4, 2021).

B. Proceedings Below

Ojin Kim filed his Petition to Vacate, Set Aside or Correct Sentence in the United States District Court for the Western District of Texas in December 2021. App. 8. Kim asked the District Court to consider his claims that defense trial counsel had been constitutionally ineffective, and his resulting sentence unconstitutional, in five alleged Grounds:

1. Counsel's ineffectiveness invalidated the voluntariness and knowing intelligence of Ojin Kim's plea of guilty, pursuant to a negotiated plea agreement containing an appeal waiver, for counsel's failure to investigate and then explain to Ojin Kim what exactly was the offense to which Ojin Kim was pleading guilty, and the government's evidence if it truly proved Kim's guilt. App. 29;

2. Counsel's ineffectiveness in failing to investigate rather than accept at face value the government's assertion of the values of alleged counterfeit goods, prejudiced Ojin Kim in that Kim agreed unknowingly

to an incorrect valuation as part of the factual basis of his guilty plea. App. 24;

3. Counsel's ineffectiveness in failing to investigate whether the alleged counterfeit items were in fact counterfeit, thereby prejudicing Ojin Kim in his decision to waive his right to a jury trial. App. 21;

4. The sentence imposed on Ojin Kim was unconstitutional in that it was excessive and based upon imaginary and speculative "relevant" conduct not contemplated by the plea agreement and not based on any evidence in the record. App. 31; and

5. Counsel's ineffectiveness at sentencing in failing to investigate and challenge the valuation of the purported counterfeit items sold, permitting the district court to rely improperly on a valuation of approximately $606,250 aggregate full retail value in losses on improper bases and calculations, when a more correct valuation would have been closer to approximately $6,000 based on net loss to the copyright victim for the items to which Ojin Kim actually admitted selling. The result was a one-hundred-fold exaggeration of the relevant amount of losses inflating the guidelines sentencing range, and "but for the trial counsel's errors, the results of the proceeding would have been different." App. 24-25.

The government filed its response in opposition to the Petition in May 2022. App. 8. Ojin Kim filed a reply brief in June 2022. App. 8. The district court held no hearing on the Motion to Vacate and issued its Order

denying the Motion to Vacate on September 5, 2022. App. 8, 34.

Together with its denial of the 2255 Motion, the district court denied a Certificate of Appealability on its ruling. App. 35-36. Accordingly, Ojin Kim filed a Notice of Appeal with the district court on September 15, 2022, and Kim sought a Certificate of Appealability from the Fifth Circuit. App. 4.

C. Appeal to the Fifth Circuit Court of Appeals

Kim appealed the conviction and sentence to the Court of Appeals In support of the appeal, he petitioned the Fifth Circuit for, and received, a Certificate of Appealability, limited to the issue of ineffective assistance of counsel by his trial defense lawyer. App. 4-7.

Among the claims of ineffective assistance by Kim's trial counsel, Kim's opening brief to the Fifth Circuit asserted that Kim faced significant harm from a likely removal or deportation as a consequence of his conviction. App. 3.

The Government's Appellee Brief to the Fifth Circuit noted the fact that while Kim had filed his Motion under § 2255 while he was still in custody, the Bureau of Prisons had later released Kim in March 2022. App. 2. Arguing that Kim was no longer under supervision or restraint, the Government suggested there was no continuing jurisdiction in the court of appeals to

consider Kim's case, and therefore the appeal was moot. App. 2.

In Reply, Kim noted that he faced significant collateral consequences from the conviction which he was challenging under § 2255. App. 3. As a resident alien, Kim faced likely removal or deportation from the United States as a result of his conviction for felony copyright infringement. His claim under 28 U.S.C. § 2255 was accordingly a live case or controversy and merited decision by the Fifth Circuit.

In a per curiam opinion issued on November 27, 2023, the Fifth Circuit dismissed Kim's appeal. App. 1. The Fifth Circuit found that Kim had failed to meet his burden of identifying an ongoing collateral consequence traceable to the challenged portion of his sentence and likely to be redressed by a favorable judicial decision. App. 3. The Fifth Circuit denied petition for rehearing in the matter on January 23, 2024. App. 37.

REASONS FOR GRANTING THE PETITION

Ojin Kim petitions the Court to grant a writ of certiorari to the Court of Appeals for the Fifth Circuit, vacate the order of dismissal, and remand the case for further proceedings in the Court of Appeals.

A. This case presents an important issue of federal constitutional law with nationwide and international impact.

The sufficiency of a stated harm to a litigant to describe a real case or controversy that will support federal jurisdiction under Article III is a constitutional question that looks to the Court for its resolution. The standing requirements and conditions for preserving or retaining federal jurisdiction to hear the postconviction claims of federal prisoners are recurring issues with far reaching impact. The clarification of those boundaries is a significant task of the federal courts and deserving of the Court's time and consideration.

As of April 6, 2024, Bureau of Prison published statistics show that 15.3% of all inmates in federal custody are not United States citizens. U.S. BUREAU OF PRISONS, https://www.bop.gov/about/statistics_inmate_citizenship.jsp. In absolute numbers, as of April 11, 2024, that percentage translates to approximately 23,878 alien inmates out of a total inmate population of 156,063. U.S. BUREAU OF PRISONS, https://www.bop.gov/about/statustics/population_statistics.jsp.

Accordingly, the Court should decide an issue of importance to a significant portion of the inmate population and to future defendants in the federal criminal justice system. In addition, issues of deportation and removal of aliens to their home countries necessarily affects the foreign policy and diplomatic relations of the United States.

B. The Court of Appeals has a duty and obligation to review on the merits a colorable claim of ineffective assistance of counsel.

Congress created a statutory right to appellate review of final decisions in 28 U.S.C. § 1291. "[A] federal court always has jurisdiction to determine its own jurisdiction" of the matters presented to it. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("In order to make that determination, it was necessary for the [ ] Circuit [Court of Appeals] to address the merits. We therefore hold that appellate jurisdiction was proper."); *see United States v. Mine Workers*, 330 U.S. 258, 291 (1947); *see also Brownback v. King*, 592 U.S. __, 141 S. Ct. 740, 750 (2021) ("a federal court can decide an element of [a] claim on the merits if that element is also jurisdictional."). At a minimum, the Court of Appeals had an obligation to do that—allow briefing and argument of the threshold jurisdiction question, to render a decision on the merits of appealability.

The Court has long emphasized the "virtually unflagging obligation" of federal courts to exercise the jurisdiction given them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). "In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) ("federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant.").

"Federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." *Wilcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) (quoted in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989)). *See also Deakins v. Monaghan*, 484 U.S. 193, 202-03 (1988) (enforcing "the duty of federal courts to assume jurisdiction where jurisdiction properly exists"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not."). "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

C. Circuits are split as to the sufficiency of harm from deportation to support continued jurisdiction of a habeas 2255 claim.

On the merits, the Fifth Circuit's order of dismissal creates a circuit split as to the pleaded harm that will sustain continued jurisdiction in federal court of a 2255 claim brought by an inmate who was released during the pendency of his litigation. The Court has established that "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to the completion of proceedings on such application." *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). *See also Heflin v. United States*, 358 U.S. 415, 418 (1959) (whether or not the petitioner

remains in custody, relief remains available to attack a sentence illegal on its face).

To sustain jurisdiction of a postconviction claim in those circumstances, a petitioner must demonstrate that he has "suffered, or [is] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Sibron v. New York*, 392 U.S. 40, 57 (1968) ("a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction"); *compare Lane v. Williams*, 455 U.S. 624, 632 (1982) (mere parole violation as opposed to felony conviction results in no "civil disabilities such as those present in *Carafas*."); *see also Pollard v. United States*, 352 U.S. 354, 58 (1957) (holding that petitions for certiorari are "allowed only where [the Court's] judgment will have some material effect.").

The Sixth Circuit has held that "among the myriad collateral consequences that criminal defendants face is removal or deportation." *Pola v. United States*, 778 F.3d 525, 530 (6th Cir. 2015). Deportation may impose "great hardship" on people deported. *Fiswick v. United States*, 329 U.S. 211, 221-22 & n.8 (1946); *accord Pola*, 778 F.3d at 530. *See also Abreu v. Superintendent Smithfield SCI*, 971 F.3d 403, 407 (3d Cir. 2020) (acknowledging *Pola* decision, while distinguishing facts of that case).

Any alien convicted of a crime of moral turpitude is deportable when the potential term of imprisonment is one year or longer. 8 U.S.C. § 1227(a)(2)(A)(i). Ojin Kim was sentenced to 46 months for a crime

punishable up to five years. In *Lang v. Ashcroft*, 81 F. App'x 268 (9th Cir. 2003), the Ninth Circuit upheld the determination by the Board of Immigration Appeals that "criminal copyright infringement in violation of 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b)(1)" is a crime of moral turpitude requiring deportation. 81 F. App'x 268, No. 01-71483, 2003 WL 22718205 (9th Cir. Nov. 18, 2003). *See also Alwan v. Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004) ("we are obliged to accord the BIA *Chevron* deference as it gives the term" meaning).

Any alien who is convicted of an aggravated felony at any time after his admission to the United States is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). In *Park v. Att'y Gen.*, 472 F.3d 66 (3d Cir. 2006), the Third Circuit ruled that a crime of conviction may qualify for deportation purposes "both as a crime involving moral turpitude and as an aggravated felony." 472 F.3d at 73. In the *Park* case, the Third Circuit determined that trafficking in counterfeit goods or services qualified under both provisions of Title 8 as sufficient alternate reason to deport a convicted defendant. *Id*. *See also Leitao v. Reno*, 311 F.3d 453, 455-56 (1st Cir. 2002) (defendant alien convicted of aggravated felony suffered sufficient collateral consequence that his "case is not moot even though he is no longer in custody.").

The decision of the Fifth Circuit in this case places it at odds with the First, Third, Sixth and Ninth Circuits. The Court should grant certiorari to resolve the circuit split and restore consistency to federal law. SUP. CT. R. 10(a).

D. This case is suitable for summary disposition—The Court should grant certiorari, vacate the judgment of dismissal, and remand to the Court of Appeals for review on the merits.

Although this Court's plenary review may ultimately be warranted, the appropriate course at this point would be to grant certiorari, vacate the Court of Appeals's judgment, and remand for full consideration of the appeal on the merits.

The Court of Appeals has evaded its responsibility to exercise its appellate jurisdiction to hear and determine an appeal as of right, presenting a colorable claim of a Sixth Amendment violation of ineffective assistance of counsel. It is most common practice for the Court to review reasoned and argued issues first heard by the lower appeals courts. *Knickerbocker Ins. Co. of Chicago v. Comstock*, 83 U.S. 258, 270 (1872) ("as those questions have not been re-examined in the Circuit Court, and this court is not inclined to re-examine any such questions coming up from the District Court until they have first been passed upon by the Circuit Court."); *cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues were neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984) ("Though, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, we are generally reluctant to do so.") (citations omitted).

With no colorable basis to evade such review, the Court of Appeals must exercise its appellate jurisdiction. This Court need only recognize these conclusions, to justify a grant of certiorari, vacating the judgment of dismissal by the Court of Appeals, and remanding the issue to the Fifth Circuit for appropriate briefing, consideration and review. *Cf. United States v. Jose*, 519 U.S. 54, 58 (1996) (granting certiorari, vacating judgment, and remanding case).

CONCLUSION

The Court should grant the petition, vacate the Fifth Circuit's order of dismissal, and remand the case for further proceedings in the Fifth Circuit.

Respectfully submitted,

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April 2024

APPENDIX

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United States Court of Appeals
for the Fifth Circuit

No. 22-50827
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

OJIN KIM,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:21-CV-250
USDC No. 7:17-CR-183-1

(Filed Nov. 27, 2023)

Before BARKSDALE, GRAVES, and OLDHAM,
Circuit Judges.

PER CURIAM:*

Ojin Kim, former federal prisoner # 30806-479, challenges the district court's denial of his 28 U.S.C. § 2255 motion (person in federal custody may move to vacate, set aside, or correct sentence). Our court

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

granted a certificate of appealability (COA) for "his claim that his trial counsel was ineffective at sentencing" and denied a COA for his other claims.

The Government contends this appeal is moot because Kim's sentence has fully expired. "Whether an appeal is moot is a jurisdictional matter, [because] it implicates the Article III requirement that there be a live case or controversy." *Bailey v. Southerland*, 821 F.2d 277, 278 (5th Cir. 1987). "Under Article III's case-or-controversy requirement, to invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Heredia-Holguin*, 823 F.3d 337, 340 (5th Cir. 2016) (en banc) (citation omitted).

While in custody, Kim filed his § 2255 motion. But, the case-or- controversy requirement is distinct from the earlier-referenced § 2255 "in custody" requirement. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (evaluating case-or-controversy requirement after establishing defendant met § 2255 "in custody" requirement). The former "subsists through all stages of federal judicial proceedings, trial and appellate". *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). "The parties must continue to have a personal stake in the outcome of the lawsuit." *Id.* at 78 (citation omitted).

"In criminal cases, [the case-or-controversy] requirement means [, *inter alia*,] that a defendant wishing to continue his appeals after the expiration of his

sentence must suffer some 'continuing injury' or 'collateral consequence' sufficient to satisfy Article III." *United States v. Juv. Male*, 564 U.S. 932, 936 (2011). Accordingly, a defendant challenges only an expired sentence, he has the burden of identifying an ongoing collateral consequence that is traceable to the challenged portion of the sentence and would likely be redressed by a favorable judicial decision. *E.g.*, *id.*

Kim fails to meet his burden. In his opening brief, he mentions his continued pursuit of the appeal is linked to his immigrant status and the possibility future immigration proceedings may be predicated on the outcome of this action. Kim provides, however, no briefing on whether: he has been placed in immigration proceedings; any immigration provision would apply to him; or the immigration consequence would likely be redressed by a favorable decision. *See Juv. Male*, 564 U.S. at 936 (outlining burden for defendant challenging only expired sentence). "[T]he mere possibility of future consequences is too speculative to give rise to a case or controversy." *Bailey*, 821 F.2d at 279. Therefore, Kim has waived his contention by failing to brief it adequately. *E.g.*, Fed. R. App. P. 28(a)(8)(A) (requiring appellant's brief to include contentions and reasons for them); *United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002) (explaining unbriefed issues are waived on appeal). His assertions raising other collateral consequences are bare and speculative.

DISMISSED.

App. 4

United States Court of Appeals
for the Fifth Circuit

No. 22-50827

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

OJIN KIM,

Defendant–Appellant.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC Nos. 7:21-CV-250, 7:17-CR-183-1

(Filed Mar. 22, 2023)

ORDER:

Ojin Kim, former federal prisoner # 30806-479, requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion in which he challenged his guilty-plea conviction for copyright infringement.

In the factual basis of his plea agreement, Kim agreed that he caused a financial loss of $30,000, which was calculated by multiplying 24, the number of counterfeit boards, by a retail value of $1250 per board.

However, Kim's presentence report stated that Kim was accountable for the sale of 485 boards, for a total loss of $606,250. The probation officer arrived at this figure after relying on a statement from a game room owner who claimed that she owed Kim $200,000, and then inferring that this $200,000 in debt was entirely due to the purchase of counterfeit boards.

Kim's recommended sentence was impacted by this new calculation – his presentence report applied a 14-level sentencing enhancement because the loss was greater than $550,000. Kim agreed to be held accountable for the 24 counterfeit boards and the resulting $30,000 in loss, but objected to the additional 461 boards and $576,250 in loss. In support of his objection, Kim submitted an affidavit from the game room owner who stated that she did not purchase counterfeit boards form [sic] him, and that she did not owe him any money, as she always paid cash upon delivery. On cross-examination, the FBI agent who first interviewed this game room owner admitted that he had no documentation to indicate that the game room owner owed Kim money, and that the game room owner never specified how many counterfeit boards she purchased from Kim, or what portion of the alleged debt was for other materials and equipment.

The district court denied Kim's objections to the total loss and restitution amounts without explanation, and sentenced Kim to 46 months imprisonment. On appeal, Kim challenged both the sentence and the restitution amount. This court agreed with Kim that the district court erred in ordering restitution based on

the speculative loss amount contained in the presentence report. However, Kim's sentence, which was impacted by those same speculative loss calculations, was left untouched because Kim's appeal waiver barred such a challenge.

In his motion, Kim argued that his trial counsel was ineffective. More specifically, Kim alleges that trial counsel: (1) failed to investigate the retail value of the counterfeit boards; (2) failed to challenge the presentence report's relevant conduct determination holding Kim accountable for an additional 461 boards; and (3) failed to challenge the Government's allegedly inflated retail price. Further, Kim argues that his plea agreement was unknowing and involuntary, as he believed he was being held accountable for the conduct contained in the factual basis of his plea agreement – not for the sale of an additional 461 boards.

To obtain a COA, Kim must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA may issue only if the movant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a movant's constitutional clams on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2022). When the district court's denial of relief is based on procedural grounds, a COA may not issue unless the movant shows that "jurists of reason would find it debatable

whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 at 484.

Kim has made a substantial showing of the denial of a constitutional right with regard to his claim that his trial counsel was ineffective at sentencing. Although Kim waived his right to challenge his sentence in any postconviction proceeding, he specifically reserved the right to challenge his sentence based on a claim of ineffective assistance of counsel. Accordingly, COA is GRANTED only as to this issue. The COA is DENIED with respect to the other claims raised.

/s/ Jennifer W. Elrod
JENNIFER WALKER ELROD
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

OJIN KIM,	§	**NO: MO:17-CR-**
Reg. No. 30806-479,	§	**00183(1)-DC**
***Movant*,**	§	**MO:21-CV-00250**
	§	(Filed Sep. 5, 2022)
v.	§	
UNITED STATES OF AMERICA,	§	
***Respondent*.**	§	

ORDER

BEFORE THE COURT is Movant Ojin Kim's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 119).[1] Also before the Court are Respondent United States of America's (the Government's) Response in Opposition to the Motion (Doc. 122) and Movant's Reply (Doc. 124). After due consideration, the Motion is **DENIED**.

I. BACKGROUND

Movant is a 55-year-old former federal prisoner who served a 46-month sentence for copyright infringement. (Doc. 84 at 1, 2). He was released by the

[1] "Doc." refers to the Electronic Case Filing number for documents docketed in MO:17-CR-00183(1)-DC. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

Bureau of Prisons on March 29, 2022. *See* Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/ (search for Reg. No. 30806-479) (last visited July 11, 2022).

Federal Bureau of Investigation (FBI) special agents discovered Movant sold counterfeit software during a joint investigation into game rooms in Odessa, Texas. *United States v. Kim*, 988 F.3d 803, 805 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 225 (2021). During the investigation, agents assisted local law enforcement officers with the execution of a search warrant at the OK Marketing Game Room in Odessa. *Id*. They opened the video-slot machines and discovered "Life of Luxury" (LOL) motherboards with Scientific Games, LLC labels on the memory chips. *Id*. Authorities determined Scientific Games was a legitimate business that owned the copyright to the LOL software. *Id*. They concluded—with the assistance of an expert from Scientific Games—that the labels on the memory chips were fake and the motherboards were illegally loaded with gaming software in violation of federal copyright law. *Id*.

> The Scientific Games representative visually inspected the computer motherboards of various gaming devices. The motherboards for the "Life of Luxury" games included a memory chip which contained the gaming software for the game. Memory chips for the "Life of Luxury" games produced by Scientific Games or their subsidiaries displayed the following information on the surface of the chip:

> • the name of the game;
>
> • Scientific Games' copyright symbol; and
>
> • the year the software was programmed onto the chip.
>
> After inspecting the "Life of Luxury" games located in the game room the Scientific Games representative advised officers the computer motherboards contained memory chips bearing counterfeit Scientific Games labels. Based on the representative's training and experience, the presence of such labels found in a video gaming device would indicate an infringing copy of the gaming software in violation of federal copyright laws.

(Doc. 76 at ¶¶ 8, 9).

Agents also located an empty box with a return address from a company called Ozz Microsystem, Inc., in Houston, Texas. *Kim*, 988 F.3d at 805. They connected Ozz Microsystem to Movant through state government records.[2] *Id*. at 806. They also arranged for a confidential source to purchase 24 counterfeit LOL motherboards from Movant and his business associate, Hans Kim. *Id*.

Several months later, local law enforcement officers executed a search warrant at another game room in Odessa, the Best/Blue. *Id*. Law enforcement seized the motherboards from the machines they discovered

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[2] According to Kim, he was part owner of Ozz Microsystem. (Doc. 95 at 10:18–10:19).

there. *Id*. They found some of the motherboards were marked with fake Scientific Games labels. *Id*. They learned from owner of Best/Blue that she purchased the motherboards—which she understood were manufactured illegally in China—from Movant. *Id*. They also learned from the owner that she owed Movant more than $200,000 for the gaming equipment, including the motherboards. *Id*.

FBI agents subsequently seized ten counterfeit LOL motherboards from the Ozz offices in Houston. *Id*. They interviewed Movant and obtained his admission that he knowingly sold counterfeit copies of Scientific Games software. *Id.*

Movant was indicted on two counts of copyright infringement. (Doc. 1). His counsel negotiated a Plea Agreement. (Doc. 44). Under its terms, Movant agreed to plead guilty to count one of the Indictment. *Id*. at 1. In the agreement he acknowledged he was aware that the maximum punishment for the offense was "a term of imprisonment of not more than five (5) years, a term of not more than 3 years supervised release, a fine that may not exceed $250,000.00, and a mandatory special assessment of $100." *Id*. at 8. He agreed the detailed factual basis in the Plea Agreement was "true and correct." *Id*. at 2. He admitted that he caused a financial loss to Scientific Games of $30,000, which was calculated by multiplying 24, the number of counterfeit LOL motherboards that the confidential source purchased from him, by the retail value of $1,250 per motherboard. *Id*. at 7. He waived "the right to appeal any aspect of the conviction and sentence, and [he] waiv[ed]

the right to seek collateral relief in post-conviction proceedings." *Id*. at 10. In exchange, he obtained the Government's promise to move to dismiss count two of the Indictment at his sentencing. *Id*. at 11.

At his re-arraignment before the United States Magistrate Judge, Movant testified under oath that he understood the charge against him and the maximum punishment he faced:

> THE COURT: The grand jury charges:
>
> That beginning on or about May the 1st, 2016, and continuing through, and including, on or about November the 21st, 2016, in the Western District of Texas and elsewhere, that you and Hans Kim did willfully for purposes of commercial advantage and private financial gain, infringe a copyright by reproducing and distributing, during a 180-day period, 10 or more copies of one or more copyrighted works, to-wit: gaming software, which had a total retail value of more than $2,500, in violation of Title 17, United States Code, Section 506(a)(1)(A), and Title 18, United States Code, Section 2319(b)(1).
>
> Mr. Kim, do you understand what you're being charged with in Count 1 of this indictment?
>
> THE DEFENDANT: Yes, I understand.
>
> THE COURT: Your full range of punishment is up to five years imprisonment, up to $250,000 fine, three years of supervised release, and $100 special assessment.

> Do you understand your full range of punishment?
>
> THE DEFENDANT: Yes, I understand.

(Doc. 98 at 7:2–7:22). He also testified that the factual basis in the Plea Agreement was correct, and he voluntarily entered his guilty plea:

> THE COURT: All right. So, again, the factual basis that's contained in your plea agreement is accurate, true and correct? Is that correct?
>
> THE DEFENDANT: That's correct.
>
> THE COURT: And the allegations that are made in that factual basis, is that what you did?
>
> THE DEFENDANT: That's correct.
>
> THE COURT: Are you pleading guilty freely and voluntarily?
>
> THE DEFENDANT: Yes. I'm doing voluntarily.
>
> THE COURT: How about freely?
>
> THE DEFENDANT: Yes. Yes, I'm doing it freely.
>
> THE COURT: Do you believe you're guilty of these charges?
>
> THE DEFENDANT: Yes.

> THE COURT: Has anyone threatened you or forced you in any way that's made you plead guilty?
>
> THE DEFENDANT: No.
>
> THE COURT: Has anyone made any promises to you other than your plea agreement that's causing you to plead guilty?
>
> THE DEFENDANT: No.
>
> THE COURT: Has anyone made any prediction or promise to you as exactly what your sentence will be?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you have any questions concerning the charges or the facts that you just pled guilty to?
>
> THE DEFENDANT: No.

Id. at 16:17–17:19.

The probation officer who prepared the Presentence Investigation (PSR) held Movant "accountable for 485 motherboards for a total loss of $606,250."[3] (Doc. 76 at ¶ 24).

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[3] *See United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009) ("In calculating a defendant's base offense level, the district court may consider other offenses in addition to the acts underlying the offense of conviction, as long as those offenses constitute "relevant conduct" as defined in the Guidelines. . . . The defendant need not have been convicted of, or even charged with, the other offenses for them to be considered relevant conduct for sentencing purposes."); U.S. SENT'G GUIDELINES MANUAL § 2B5.3 n.2 (U.S. SENT'G

> The probation office arrived at this figure through two separate calculations. First, mirroring the plea agreement, the PSR stated that [Movant] was accountable for a loss of $30,000 based on the counterfeit motherboards he sold to the [confidential source]. This calculation multiplied the approximate retail value of a LOL motherboard, $1,250, by 24, the number of motherboards purchased by the [confidential source] from [Movant] and his co-defendant. Second, the PSR stated that [Movant] was responsible for the sale of an additional 461 counterfeit motherboards for a loss of $576,250.[4] To arrive at this number, the probation officer relied on the statement by [the] owner of the Best/Blue game room, that she owed [Movant] $200,000. The PSR stated that this $200,000 "could have bought 461 motherboards at an average cost of $434 each."[5] The PSR then multiplied the approximate retail value of a LOL motherboard, $1,250, by 461 to arrive at the alleged loss to Scientific Games of $576,250.

COMM'N 2018) ("[The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving . . . a digital or electronic reproduction of the infringed item.").

[4] *See* U.S. SENT'G GUIDELINES MANUAL § 2B5.3 n.2(E) (U.S. SENT'G COMM'N 2018) ("In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.").

[5] *See* Doc. 75 at ¶ 23 (suggesting the average cost of a counterfeit motherboard sold by Movant was $434).

Kim, 988 F.3d at 806. The probation officer added 14 levels to Movant's base offense level after she concluded the infringement amount exceeded $550,000. (Doc. 76 at ¶ 31) (citing U.S. SENT'G GUIDELINES MANUAL §§ 2B1.1 and 2B5.3 (U.S. SENT'G COMM'N 2018)). She concluded, "[b]ased upon a total offense level of 23 and a criminal history category of I, [Movant's] guideline imprisonment range [was] 46 months to 57 months." *Id*. at ¶ 65.

Movant's attorney filed a motion for a variance from the recommended guideline range. (Doc. 79). He also filed objections to the PSR. (Doc. 76-2). He then submitted an affidavit from the owner of the Best/Blue game room which explained she did not owe Movant $200,000:

> At the time I opened the business, there were already gaming machines located within the business and I did not have to purchase the games. I have been told that it has been alleged that I purchased 103 "motherboards" from [Movant] that were located in the Best/Blue Game Room. In fact, as I stated previously, those games and their motherboards were already located in the Best/ Blue Game Room at the time I purchased the business. Through my technician, Ju Kim, I did purchase other game room parts from [Movant], parts like monitors, wires, bill accepters, etc. All of these purchases were cash on delivery. I do not owe [Movant] $200,000 for prior purchases of "motherboards" or any other game room parts.

(Doc. 83-1). Movant's attorney asserted at the sentencing hearing that "these old, old Life of Luxury games are no longer sold by Scientific Games, they don't really have a retail value other than what someone will pay on the open market for the old game, and it appears that China then duplicates these old games." (Doc. 95 at 21:12–21:16). He explained he agreed to the $1,250 valuation of the motherboards only "because that's what the affidavit of Scientific Games" said. *Id.* at 29:20–29:21. He objected to extrapolating the number of mother boards from the $200,000 the Movant allegedly owed the owner of the Best/Blue game room. *Id*. at 16:2–16:14. He maintained "[a]ll of those purchases [for game cabinets, monitors, wires, all of those things that my client sold in addition to the boards] were cash on delivery . . . so there [was] not $200,000 owed to the owner of the Best/Blue game room." *Id*. at 16:4–16:11. He argued "the appropriate consideration [was] 24 motherboards," the number of boards sold to the confidential source, "not an extrapolation" based on the $200,000 in purported sales to the owner of Best/Blue *Id.* at 29:22–29:23.

The Court denied Movant's objections to the total loss and restitution amounts without explanation. *Kim*, 988 F.3d at 807. It also denied Movant's variance motion and stated that, based on the 18 U.S.C. § 3553(a) factors, the guidelines range was reasonable. *Id*. The Court then adopted the PSR without change. (Doc. 85). The Court sentenced Movant to forty-six (46) months' imprisonment, three years' supervised

release, a $20,000 fine, a $100 special assessment, and $606,250 in restitution. ECF No. 81.

On appeal, Movant argued the Court "erred in imposing a 14-level sentencing enhancement . . . based on its conclusion that the loss calculation exceeded $550,000." *Kim*, 988 F.3d at 808. Movant also sought to vacate the restitution order. *Id.* at 805. He maintained the order exceeded the statutory maximum because it was greater than the amount of the "victim's actual loss." *Id*.

The Fifth Circuit noted that Movant's "plea agreement contained a broad waiver-of-appeal provision, expressly excepting only ineffective assistance of counsel claims and certain prosecutorial misconduct claims." *Id*. at 808. It observed that Movant did "not contend that his appeal waiver was not knowing and voluntary." *Id*. It concluded that Movant's challenge to the application of the Guidelines was therefore barred by the waiver provision. *Id*.

The Fifth Circuit then explained a restitution order required a different calculation based on lost net profit—not the retail value of the infringed items. *Id*. at 809. It added "that a defendant may bring a challenge to a restitution order in excess of that which is authorized by statute [even] where his appeal waiver expressly reserves the right to appeal a sentence in excess of the statutory maximum." *Id*. at 809. It found that the Court "erred because the Government failed to carry its burden of properly establishing the number of infringing items placed into commerce that

[Movant] was responsible for and the resulting harm to Scientific Games in terms of lost net profit." *Id*. at 812. It accordingly remanded the case to the Court "for redetermination of restitution." *Id*. at 813.

The Court amended the Judgment to order restitution in the amount of $9,500 based on the lost net profit to Scientific Games. (Doc. 117 at 6).

In his motion, Movant claims his counsel provided ineffective assistance when he failed to investigate and determine (1) whether the software on the LOL motherboards was, in fact, counterfeit, and (2) the actual retail value of the LOL motherboards. (Doc. 119 at 4, 5, 10). He then claims he did not make a voluntary and intelligent plea because his counsel "did not explain that the proper way to determine if [he] infringed on a copyright regarding software was to boot up the chip instead of merely look[ing] at photographs of a label." *Id*. at 7. He also claims his sentence was not supported by adequate evidence because the Court enhanced his "sentence by adding 461 motherboards . . . based on erroneous speculation." *Id*. at 8.

II. LEGAL STANDARD

Title 28 U.S.C. § 2255 "'provides the primary means of collateral attack on a federal sentence.'" *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (quoting *Cox v. Warden*, 911 F.2d 1111, 1113 (5th Cir. 1990)). But "it does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). It identifies only four grounds on

which a movant may obtain relief: (1) the "sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack." *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted). Consequently, it does not permit relief on a claim of error that is neither constitutional nor jurisdictional unless the error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). It also requires the prisoner to bear the burden of establishing a claim of error by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) (citing *United States v. Kastenbaum*, 613 F.2d 86, 89 (5th Cir. 1980)). It permits a court to "vacate and set the judgment aside" if a prisoner's claims are meritorious and to "discharge the prisoner or resentence him or grant [him] a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

III. Discussion

A. Ineffective Assistance of Counsel

Movant first claims his counsel provided constitutionally ineffective assistance. (Doc. 119 at 4, 5). He asserts his counsel erred when he failed to investigate and determine whether the software on the LOL motherboards was counterfeit. *Id*. at 4. He also maintains

his counsel erred when he failed to determine the actual retail value of the LOL motherboards. *Id*. at 5.

A prisoner may bring "an ineffective-assistance-of-counsel claim . . . in a collateral proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 504 (2003). If he does, his claim is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). To prevail, he has the burden of showing (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689–94. To establish deficient performance, he must prove that his counsel's assistance fell " 'below an objective standard of reasonableness.' " *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003) (quoting *Strickland*, 466 U.S. at 688). "[T]o establish prejudice, [he] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (quoting *Strickland*, 466 U.S. at 694).

(1) Failure to Investigate

Movant claims his counsel provided constitutionally ineffective assistance when he failed to investigate whether the software on the LOL motherboards he sold was, in fact, counterfeit. (Doc. 119 at 4). He avers a team of forensic analysts at Computer Analysis of

Texas concluded it was "impossible to validate motherboards based on photo[s]" of the boards. *Id*.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Counsel's "determination of whether an investigation is reasonably adequate properly and necessarily 'depend[s] upon a variety of factors, including the number of issues in the case, the relative complexity of those issues, the strength of the Government's case, and the overall strategy of trial counsel.'" *Baldwin v. Maggio*, 704 F.2d 1325, 1333 (5th Cir. 1983) (quoting *Washington v. Strickland*, 693 F.2d 1243, 1251 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984). Counsel's "decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Still, a movant must allege more than a bare failure to investigate on the part of his counsel to obtain relief from a sentence. *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993). He "'must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993) (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). He must prove an alleged breach of his attorney's duty to investigate resulted in an actual and substantial disadvantage to the course of his defense. *See Baldwin*, 704 F.2d at 1333.

Movant's counsel explains his client admitted to an FBI agent that the motherboards were counterfeit *before* he was retained:

> Prior to my representation, a search warrant was executed at [Movant's] business by Agent Drebenstead. At that time, he interviewed the [Movant] who admitted that the Life of Luxury boards sold to the agents on two prior occasions were counterfeit and that "he knew better than to sell and distribute the copied Life of Luxury software as the programs were not original." [Movant] also offered to help the agents identify others that were making and distributing other counterfeit gaming software.

(Doc. 122-1 at 1); *see also Kim*, 988 F.3d at 806 ("On November 21, 2016, the FBI seized ten LOL motherboards from the Ozz offices in Houston. On the same day, the FBI interviewed [Movant], who admitted that he knowingly sold counterfeit copies of LOL software."). He adds he reviewed "the declaration of Eric Schmalz, Counsel for Scientific Games in Licensing and Intellectual Property. Schmaltz confirmed that the Life of Luxury boards sold to the agents were counterfeit." (Doc. 122-1 at 1).

Movant maintains "trial counsel's complete failure to investigate calls into question whether a copyright infringement even occurred." (Doc. 124 at 10). He provides a copy of a forensic analysis which reports a team of engineers could not validate the illegitimacy of a motherboard based on photographs. (Doc. 119-9 at 12).

His forensic analysis also suggests a used LOL gameboard sells for between $100 and $200 dollars. *Id*. at 11. Notably, Movant does not claim or provide evidence that the LOL motherboards he sold were genuine. He also does not dispute the retail value of a single infringed item—a new LOL motherboard—was $1,250.

The Court observes "the standard for constitutionally effective assistance of counsel is 'not errorless counsel, and not counsel judged ineffective by hindsight, but [whether] counsel [rendered] reasonably effective assistance.'" *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981) (quoting *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974)). The Court finds that, based on the strength of the Government's case, the declaration of Eric Schmalz, and the admissions of Movant, Counsel's decision not to investigate further was reasonable. It further finds that Movant merely speculates that the motherboards were not counterfeit and therefore fails to allege with sufficient specificity what further investigation would have revealed and how it would have altered the outcome of the case. The Court also finds that, after applying a heavy measure of deference to counsel's judgment, his decision not to investigate further was reasonable under the circumstances.

(2) Valuation of Motherboards

Movant asserts his counsel erred when he failed to obtain the actual retail value of an LOL motherboard. (Doc. 119 at 5). He argues his counsel's "blind

acceptance of Scientific Games' valuation significantly prejudiced" him. *Id*. He adds his counsel "should have presented evidence regarding the retail value of the motherboards and lost net profit to show that the infringement amount was not $606,250, as the PSR alleged." *Id*. at 10. He maintains his counsel's errors resulted in "at least 40 additional months of imprisonment." *Id*.

The probation officer held Movant "accountable for 485 motherboards for a total loss of $606,250" based on the sales to the confidential source—and the purported sales to the Best/Blue game room owner. *Id*. at ¶ 24. Because the loss was more than $550,000 but less than $1,500,000, she added 14 levels to Movant's base offense level under Sentencing Guideline 2B1.1(b)(1). *Id*. at ¶ 31.

Consequently, Movant's counsel was put on notice by the PSR that the value of an LOL motherboard was critical to determining Movant's sentence. (Doc. 76 at ¶¶ 23, 24, 31); *see Cox v. Cockrell*, 62 F. App'x 557 (5th Cir. 2003). But he presumably believed that Eric Schmatz [sic], Counsel for Scientific Games, was available and would testify that the current value of a new LOL motherboard was $1,250. (Doc. 122-1 at 1). And he knew that Movant had already agreed that the value of an LOL motherboard "was approximately $1,250" in the Plea Agreement. (Doc. 44 at 7).

So, in response to the probation officer's calculations, Movant's counsel filed a motion for a variance from the recommended guideline range, claiming there

was "no evidence that Scientific Games lost money from the distribution of the motherboards" because they were not involved in the sale of obsolete motherboards. (Doc. 79). He also filed multiple objections to the PSR. (Doc. 76-2). He asserted, among other things, that Movant "never sold . . . motherboards to the Best/Blue game room." *Id*. at 4. In support of this declaration, he submitted an affidavit from the owner of the Best/Blue game room which explained she did not owe Movant $200,000. (Doc. 83-1). He then argued at Movant's sentencing hearing that "these old, old Life of Luxury games are no longer sold by Scientific Games, they don't really have a retail value other than what someone will pay on the open market for the old game, and it appears that China then duplicates these old games." (Doc. 95 at 21:12–21:16). He explained that he agreed to the $1,250 valuation of the motherboards only "because that's what the affidavit of Scientific Games" said. *Id*. at 29:20–29:21. He objected to extrapolating the number of mother boards from the $200,000 the Movant allegedly owed the owner of the Best/Blue game room. *Id*. at 16:2–16:14. He maintained that all the Best/Blue game room purchases for game cabinets, monitors, wires, and boards "were cash on delivery . . . so there [was] not $200,000 owed to the owner of the Best/Blue game room." *Id*. at 16:4–16:11. He argued that "the appropriate consideration [was] 24 motherboards," the number of boards sold to the confidential source, "not an extrapolation" based on the $200,000 in purported sales to the owner of Best/Blue. *Id*. at 29:22–29:23.

Had the Court accepted the arguments of Movant's counsel, it would have resulted in a sentencing range of 12 to 18 months. According to the commentary to the Sentencing Guidelines, "[t]he infringement amount [was] the *retail value* of the infringed item, multiplied by the number of infringing items, in a case [where] . . . [t]he infringing item is a digital or electronic reproduction of the infringed item." U.S. SENT'G GUIDELINES MANUAL § 2B5.3 n.2 (U.S. SENT'G COMM'N 2018) (emphasis added). Scientific Games claimed the retail value of the infringed item—the LOL motherboard—was $1,250 per board. (Doc. 76 at ¶ 23). The probation officer determined Movant was "accountable for 485 motherboards for a total loss of $606,250." *Id*. at ¶ 24. So, the Court denied Movant's objection to the 14-level upward adjudgment to Movant's base offense level because it concluded the infringement amount for the purposes of calculating a sentence exceeded $550,000. *Kim*, 988 F.3d at 807. It also denied Movant's variance motion and stated that, based on the 18 U.S.C. § 3553(a) factors, the guideline range was reasonable. *Id*. It then adopted the PSR without change. (Doc. 85).

The Fifth Circuit concluded that the waiver provision in Movant's Plea Agreement barred his challenge to the application of the Guidelines. *Kim*, 988 at 808. It further concluded, however, that the waiver did not preclude him from challenging the amount of restitution. *Id*. at 809. It noted that Movant did "not dispute that he owe[d] $30,000 in restitution based on the 24 counterfeit LOL motherboards that he sold to the"

confidential source. *Kim*, 988 at 811. It observed that Movant only challenged "the remainder of the restitution amount, $576,250, arguing that it is based on the probation officer's speculation that" the owner of the Best/Blue game room owed Movant "an outstanding debt of $200,000 that represented 461 counterfeit motherboards." *Id*. It concluded, after reviewing the record, that the Court "erred because the Government failed to carry its burden of properly establishing the number of infringing items placed into commerce that [Movant] was responsible for and the resulting harm to Scientific Games." *Id*. at 812. In other words, it accepted the argument of Movant's counsel—preserved during his sentencing hearing—that the Court should not extrapolate the number of motherboards from the $200,000 in purported sales by Movant to the Best/Blue owner. (*See* Doc. 95 at 29:22–29:23).

The Fifth Circuit further explained that "a restitution amount in a case involving infringing or counterfeit goods should be calculated using the 'lost net profit' suffered by the victim of the infringement, rather than the retail value of the goods." *Kim*, 988 F.3d at 813 (citing *United States v. Beydoun*, 469 F.3d 102, 107 (5th Cir. 2006)). It reasoned that "[b]asing restitution on the retail value of the goods disregards the costs incurred in manufacturing and selling legitimate goods and could therefore result in the victim receiving a windfall amount that exceeds the actual loss caused by the infringement." *Id*. It concluded in this case, "[b]ecause it is unclear how much, if any, of the alleged outstanding $200,000 was spent specifically on

counterfeit LOL motherboards, and also unclear what the resulting loss in net profit was to Scientific Games, . . . that the district court erred in ordering restitution based on the speculative loss amount contained in the PSR." *Id*.

The Court finds Movant's counsel made reasonable arguments regarding the value of the motherboards to show that the infringement amount was not $606,250, as the PSR alleged. It accordingly finds that Movant has not met his burden of showing that his counsel's performance was either deficient or prejudiced his cause.

B. Voluntary and Intelligent Plea

Movant claims he did not make a voluntary and intelligent plea because his counsel "did not explain that the proper way to determine if [he] infringed on a copyright regarding software was to boot up the chip instead of merely look[ing] at photographs of a label." (Doc. 119 at 7).

A court will uphold a guilty plea if it "was knowing, voluntary and intelligent." *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). A guilty plea is knowing, voluntary and intelligent so long as a defendant is aware of "the maximum prison term and fine for the offense charged." *Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996) (citing *United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990)). A plea becomes involuntary if the defendant is "induced by threats (or promises to discontinue improper harassment), misrepresentation

(including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper[.]" *Brady v. United States*, 397 U.S. 742, 755 (1970).

Movant confirmed in the Plea Agreement that he was aware the maximum punishment for the offense was "a term of imprisonment of not more than five (5) years, a term of not more than 3 years supervised release, a fine that may not exceed $250,000.00, and a mandatory special assessment of $100." (Doc. 44 at 8). He also agreed that the detailed factual basis in the Plea Agreement was "true and correct." *Id*. at 2.

Movant testified at his re-arraignment before the Magistrate Judge that he understood the charge against him and the maximum punishment he faced. (Doc. 98 at 7:2–7:22). He also testified that the factual basis in the Plea Agreement was correct, and he was voluntarily entering his guilty plea. *Id.* at 16:17–17:6. He maintained that he had not been threatened, coerced, or forced to enter a guilty plea. *Id*. at 17:7–17:9. He declared that he had not received promises of any kind in exchange for his guilty plea. *Id*. at 17:10–17:16.

The Magistrate Judge found after completing the plea colloquy that Movant was "fully competent and capable of entering an informed plea. I find that you're aware of the nature of the charges and the consequences of the plea. And I find that your plea of guilty is a knowing and voluntary plea, supported by an independent basis in fact." *Id*. at 18:12–18:16.

Any document signed by a defendant in connection with a guilty plea is entitled to "great evidentiary

weight." *United States v. Abreo*, 30 F.3d 29, 32 (1994). "Solemn declarations in open court carry a strong presumption of verity," forming a "formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977). "[A] defendant ordinarily will not be heard to refute [his] testimony given at a plea hearing while under oath." *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998) (citing *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985)).

This Court will not permit Movant to disavow his prior statements made under oath in open court concerning the voluntariness of his plea. It will not ignore the evidence in the record. It finds Movant's plea was not induced by threats, misrepresentations, or improper promises. It reaffirms Movant's plea was knowingly, intelligently, and voluntarily entered. It also finds that Movant has not met his burden of showing his counsel's omission in not explaining how to determine if software was counterfeit was either deficient or prejudiced his cause.

C. Adequacy of the Evidence

Movant claims his sentence was not supported by adequate evidence. (Doc. 119 at 8). He asserts his sentence was unconstitutional because the Court enhanced his "sentence by adding 461 motherboards . . . based on erroneous speculation." *Id*. Moreover, he contends the Government breached the plea agreement

when it affirmatively advocated for an enhancement that was not part of the Plea Agreement. *Id*.

Section 2255 relief is available only in limited circumstances. *Addonizio*, 442 U.S. at 185. It is not meant to substitute for an appeal. *United States v. Shaid*, 937 F.2d 228, 231–32 (5th Cir. 1991). And "issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in section 2255 Motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986).

Furthermore, when raising issues of jurisdictional or constitutional magnitude for the first time in a motion seeking collateral relief, a movant must either (1) demonstrate "cause" for not raising the issue on direct appeal and "actual prejudice" resulting from the error; or (2) show that he is "actually innocent" of the crime for which he was convicted. *United States v. Torres*, 163 F.3d 909, 911 (5th Cir. 1999).

The "cause" standard requires the movant to show that "some objective factor external to the defense" prevented him from timely raising the claims he now advances. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Objective factors that constitute cause include (1) interference by officials that make compliance with the procedural rule impracticable, (2) a showing that the factual or legal basis for the claim was not reasonably available to counsel at the prior occasion, and (3) ineffective assistance of counsel in the constitutional sense. *Id*. The actual prejudice standard requires the movant to show more than a "mere possibility of

prejudice," and a movant must instead "'shoulder the burden of showing . . . that the errors at his trial . . . worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Shaid*, 937 F.2d at 231 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). If the movant does not meet either burden, then he is procedurally barred from attacking his conviction or sentence. *United States v. Drobny*, 955 F.2d 990, 994–95 (5th Cir. 1992).

"'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To establish actual innocence, a movant must demonstrate, considering all the evidence, that it is more likely than not that no reasonable juror would have convicted him. *Id*. (citing *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)).

In his direct appeal, Movant claimed "the district court erred in imposing a 14-level sentencing enhancement under [Sentencing Guideline] § 2B1.1(b)(1)(H) based on its conclusion that the loss calculation exceeded $550,000." *Kim*, 988 F.3d at 808. But his appeal waiver in the Plea agreement barred this challenge. *Id*. As a result, the Fifth Circuit denied his claim. *Id*.

Movant now claims the Government breached the Plea Agreement when it argued that "even though the plea agreement only included $30,000 for 24 motherboards, the appropriate financial loss was $606,250 for 484 motherboards." (Doc. 119 at 8). But he was told he would be held "accountable for 485 motherboards for a

total loss of $606,250" in the Presentence Investigation Report. (Doc. 76 at ¶ 24). He was advised at his sentencing hearing that "Probation can still look at all relevant conduct and extrapolate and make a determination on loss." (ECF No. 95 at 33:15–33:16). Thus, Movant knew by the time of his sentencing hearing that he would be held accountable for 485 boards. Still, Movant has not alleged some objective factor prevented him from timely raising his claim that the Government breached the plea agreement during his direct appeal. He has also never alleged his factual innocence.

The Court accordingly finds that Movant is procedurally barred from pursing these claims in a § 2255 motion.

IV. Evidentiary Hearing

A motion brought under § 2255 may be denied without a hearing if "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). The record in this case is adequate to dispose fully and fairly of Movant's claims. The Court need inquire no further on collateral review and an evidentiary hearing is not necessary.

V. Certificate of Appealability

A movant may not appeal a final order in a habeas corpus proceeding "[u]nless a circuit justice or judge

issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id*. § 2253(c)(2). In cases where a district court rejects a movant's constitutional claims on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (applying *Slack* to a certificate of appealability determination in the context of § 2255 proceedings). To warrant a certificate as to claims that a district court rejects solely on procedural grounds, the movant must show both that "jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Reasonable jurists could not debate the Court's reasoning for denying Movant's claims on substantive or procedural grounds—or find that his issues deserve encouragement to proceed. *Miller El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). The Court will not issue a certificate of appealability.

VI. CONCLUSION AND ORDER

The Court concludes that Movant has failed to meet his burden of establishing (1) his "sentence was

imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack." *Seyfert*, 67 F.3d at 546. It further concludes, therefore, that Movant is not entitled § 2255 relief. The Court also concludes that Movant is not entitled to a certificate of appealability.

Accordingly, the Court enters the following orders:

It is **ORDERED** that Movant's *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 119) is **DENIED,** and his civil cause is **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that Movant is **DENIED** a **CERTIFICATE OF APPEALABILITY**.

It is further **ORDERED** that all pending motions are **DENIED AS MOOT**.

It is finally **ORDERED** that the Clerk shall **CLOSE** this case.

It is so **ORDERED.**

SIGNED this 5th day of September, 2022.

/s/ David Counts
DAVID COUNTS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 22-50827

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

OJIN KIM,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:21-CV-250

(Filed Jan. 23, 2024)

Before BARKSDALE, GRAVES, and OLDHAM,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.
