

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEROME TERRY JR.,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit erred in dismissing the appeal when the district court failed to give notice of its intent to depart upwards 147 months and failed to state in open court the reasons for its sentence in violation of Mr. Terry's right to due process resulting in an illegal sentence which is a jurisdictional defect that is not waivable?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Central District of California, *United States v. Jerome Terry Jr.*, 17cr00577-ODW. The district court entered the judgment on October 25, 2021 and September 23, 2022. *See* Appendix B and C.
2. United States Court of Appeals for the Ninth Circuit, *United States v. Jerome Terry Jr.*, Nos. 21-50245, 22-50214. *See* Appendix A.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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Petitioner, Jerome Terry Jr., respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered September 18, 2023.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered an order dismissing in part and vacating and remanding in part Mr. Terry's appeal. The Ninth Circuit vacated Mr. Terry's ten year term of supervised release as the statute in effect at the time of the offense was a maximum of five years. The Ninth Circuit held that Mr. Terry's appellate waiver in his plea agreement foreclosed any challenge to his sentence because the sentence did not fall within the illegal sentence exception to the appeal waiver. Appendix A.

JURISDICTION

The Court of Appeals issued its order on September 18, 2023. No petition for rehearing was filed. This petition is being filed within the 90-day time limit for certiorari petitions. The Court has jurisdiction under 28 U.S.C. §1254(1).

INVOLVED FEDERAL LAW

The Appendix to the petition includes the relevant provisions of 18 U.S.C. § 3553 (Appendix D), Fed. R. Crim. P. 32 (Appendix E), and the Fifth Amendment (Appendix F).

STATEMENT OF THE CASE

A. Proceedings Before the District Court.

On September 15, 2017, the government charged Mr. Terry in a seven count indictment alleging violations of: 18 U.S.C. § 1594(c), Conspiracy to Engage in Sex Trafficking (count 1); 18 U.S.C. §§ 1591, 2, Sex Trafficking (counts 2 and 3); 18 U.S.C. §§ 2421, 2, Transportation of an Individual in Interstate Commerce with the Intent that Individual Engage in Prostitution (count 4); 18 U.S.C. § 2421, Transportation of an Individual in Interstate Commerce with the Intent that Individual Engage in Prostitution (count 5); 18 U.S.C. §§ 2422, 2, Enticement to Travel in Interstate Commerce to Engage in Prostitution (count 6); and 18 U.S.C. § 2422, Enticement to Travel in Interstate Commerce to Engage in Prostitution (count 7). [2-ER-186.]¹ On July 19, 2021, Mr. Terry entered a plea of guilty to count one, 18 U.S.C. § 1594(c), Conspiracy to Engage in Sex Trafficking, pursuant to a plea agreement. [2-ER-161, 167.] Pursuant to the binding plea agreement, the parties did not reach an agreement regarding the Guidelines calculations, but did agree that a sentence between 84 and 180 months custody was appropriate. [2-ER-167.]

¹“ER” refers to the Excerpts of Record which were filed with the Ninth Circuit Court of Appeals. “CR” refers to the Clerk’s Record.

B. The Sentencing Hearing.

The presentence report (“PSR”) calculated the applicable Guidelines.

Probation calculated an initial offense level of 14 pursuant to U.S.S.G. § 2G1.1(a)(2), a four level increase for fraud and coercion under U.S.S.G. § 2G1.1(b)(1), and a two level increase for multiple counts under U.S.S.G. § 3D1.4. (PSR 4, 15-18.) Probation calculated a total offense level of 20, a three level adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, and a resulting offense level of 17. (PSR 4, 18-19.) Mr. Terry’s resulting Guidelines range based on a criminal history category II was 27 to 33 months. (PSR 4, 15-19.) Probation did not identify any factors for departure and recommended a sentence of 84 months based on an upward variance. [CR-208, 221.]

The government proposed different Guidelines calculations than probation. Specifically, the government contended U.S.S.G. § 2A3.1(a)(2) applied to T.F. with a base offense level of 30 and a four level increase under U.S.S.G. § 2A3.1(b)(1) for a total offense level of 34. [CR-216; 3-ER-224, 248-50.] The government contended a base offense level of 14 pursuant to U.S.S.G. § 2G1.2(a)(2) applied to B.E., with a four level increase under U.S.S.G. § 2G1.1(b)(1). [CR-216; 3-ER-224, 250-51.] Additionally, the government proposed a two level role enhancement pursuant to U.S.S.G. § 3B1.1(c). [CR-216; 3-ER-224, 250-51.] The government proposed a total offense level of 34, with a three level adjustment for acceptance of responsibility

pursuant to U.S.S.G. § 3E1.1. [CR-216; 3-ER-224, 251.] Based on an offense level of 31 and a criminal history category II, the resulting Guidelines range was 121-151 months. [CR-216; 3-ER-224, 251.] The government requested an upward variance to 180 months based on the factors in 18 U.S.C. § 3553(a). [CR-216; 3-ER-224, 251.]

Mr. Terry agreed with probation's Guidelines calculations and requested a sentence of 84 months custody. [CR-224; 2-ER-95, 103.] At the sentencing hearing, the district court adopted probation's calculations:

U.S.S.G. § 2G1.1(a)(2)	BOL 14
U.S.S.G. § 2G1.1(b)(1)	+4
U.S.S.G. § 3D1.4	<u>+2</u>
Total Offense Level	20
U.S.S.G. § 3E1.1	-3
Criminal History Category	II
Resulting Offense Level	17
Resulting Guidelines range	27-33 months

[1-ER-21-23, 75-76.]

Mr. Terry expressed his remorse for committing the offense and accepted responsibility for his actions. [1-ER-57-60, 62.] Mr. Terry explained how he regretted his actions and the emotional hurt, pain, and mistrust inflicted upon T.F.

and B.E. [1-ER-63.] He also apologized for the pain inflicted upon his family as a result of his actions. [1-ER-65.] Mr. Terry discussed his path to redemption. At the time of the offense, Mr. Terry was a single father raising two kids under the age of 3. [1-ER-67.] Mr. Terry articulated his commitment to furthering his education, further developing his relationship with God, and rebuilding trust with his family. [1-ER-67-68.]

The court imposed a sentence of 180 months custody, a \$100 special assessment, and ten years supervised release. [1-ER-75-76.] The court then discussed the mitigating and aggravating factors in support of the sentence. [1-ER-80-86.] In mitigation, the court noted Mr. Terry obtained his college degree and had been self employed with various companies. [1-ER-86.] In aggravation, the court found Mr. Terry used force and threats of force towards one of the victims. [1-ER-86.] The court also noted it had been less than two years since Mr. Terry had been discharged from probation before committing the instant offense. [1-ER-86.] Finally, the court remarked that the two victims recently reached adulthood, that Mr. Terry was a danger to the public, and a lengthy term of incarceration was required. [1-ER-86.]

The district court advised Mr. Terry he had the right to appeal his sentence under certain circumstances, such as if the sentence was contrary to law. [1-ER-

87.] On November 3, 2021 and September 26, 2022, Mr. Terry filed a notice of appeal. [CR-229, 257; 2-ER-194-95.]

C. The Statement of Reasons

On February 1, 2023, pursuant to a court order, Mr. Terry obtained a copy of the Statement of Reasons (“SOR”) filed in his case. [CR-267, 268.] The SOR adopts the PSR and its Guidelines calculations, finding a resulting offense level of 17, a criminal history category of II, and a Guidelines range of 27 to 33 months. [SOR Pt. I, III; 3-ER-220.] Section IV of the SOR indicates the court departed, rather than imposed a variance, from the Guidelines. [SOR Pt. IV; 3-ER-221.] Section V lists the numerous departures applied by the court in imposing Mr. Terry’s sentence:

5H1.3 Mental and Emotional Condition
5K2.0 Aggravating/Mitigating Circumstances
5K2.2 Physical Injury
5K2.3 Extreme Psychological Injury
5K2.4 Abduction or Unlawful Restraint
5K2.12 Coercion and Duress
5K2.13 Diminished Capacity
5K2.22 Sex Offender Characteristics

[SOR Pt. V; 3-ER-221.] The SOR also states “[u]pward departure warranted due to youth of victim. Crime accomplished by means of deception and physical force and repeated threats of application of force to maintain control and compliance.” [SOR Pt. V; 3-ER-221.] Additionally, the basis for the departure states “[v]ictims

related how they were not free to leave, that defendant had taken all their money and passports and they were in a foreign country completely at defendant's mercy." [SOR Pt. V; 3-ER-221.]

Here, none of the district court's grounds for departure (U.S.S.G. §§ 5H1.3, 5K2.0, 5K2.2, 5K2.3, 5K2.4, 5K2.12, 5K2.13, 5K2.22, and "Other Guidelines Reasons for Departure") were identified in the Presentence Report, and only § 5K2.21 was identified in a party's prehearing submission; the plea agreement. The district court failed to give Mr. Terry notice of any of the nine different grounds for departure it relied upon in imposing a sentence 147 months in excess of the high end of the adopted Guidelines range. Moreover, not only was Mr. Terry was denied notice of the district court's intent to depart upwards, he was entirely prohibited from litigating the departures as he had no knowledge of their application until he obtained the SOR after his sentencing hearing had already occurred.

Mr. Terry pursued his appeal before the United States Court of Appeals for the Ninth Circuit. On September 18, 2023, the Ninth Circuit granted the government's motion to dismiss the appeal in part based on the appellate waiver in Mr. Terry's plea agreement.

This petition follows.

REASON TO GRANT THE WRIT

The writ should be granted to allow this Court to correct the erroneous decision by the Ninth Circuit Court of Appeals that dismissed Mr. Terry's appeal. The issues raised in this petition state a valid claim of the denial of a constitutional right, including: (1) Mr. Terry's right to advance notice of departures; (2) his right to be present and litigate those departures; (3) and jurisdictional defects or a miscarriage of justice are not waivable in a plea agreement. As these material points of fact were overlooked by the Ninth Circuit, it is respectfully requested that Mr. Terry's petition for writ of certiorari be granted.

A. Mr. Terry's petition should be granted because jurisdictional defects or a "miscarriage of justice" are not waivable in a plea agreement.

A guilty plea does not bar a federal criminal defendant from challenging the constitutionality of their sentence on direct appeal. *Class v. United States*, 138 S.Ct. 798 (2018). In the Seventh Circuit case of *Oliver v. United States*, 951 F.3d 841, 845-848 (7th Cir. 2020) relied upon by the Ninth Circuit in its decision in *United States v. Goodall*, 21 F.4th 555 (9th Cir. 2021), the following issues were left undecided and should be what compel a decision in Mr. Terry's favor: (1) a guilty plea, standing alone, is not construed as waiving "jurisdictional" claims; (2) an enforcement of the appellate waiver would cause a "miscarriage of justice;" or

(3) the appellate waiver should not be enforced when the conviction rests on a “constitutionally impermissible factor.”

As to the first undecided issue under *Oliver*, because subject matter jurisdiction involves the power of a court to hear a case, then jurisdiction “can never be forfeited or waived.” *United States v. Cotton*, 535 U.S. 625, 630 (2002). Consequently, defects in subject-matter jurisdiction “require correction regardless of whether the error was raised in district court.” *Id.* The Ninth Circuit and other circuits agree that an appeal waiver does not waive a jurisdictional defect. *See, e.g., McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) (“Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a jurisdictional defect cannot be waived or procedurally defaulted . . . a judgment tainted by a jurisdictional defect must be reversed”); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (an appeal waiver will not apply if the sentence violates the law; a sentence is illegal if it violates the Constitution). *Goodall* failed to acknowledge this Court’s precedent, along with the Ninth Circuit’s own precedent and other Circuit precedent, holding jurisdictional claims cannot be waived. 21 F.4th at 557—64. This Court should grant this petition to bring the Ninth Circuit’s errant waiver law in line with this Court’s precedent, and the other Circuits holdings, that jurisdictional claims cannot be waived.

Moreover, *Goodall* failed to adhere to the constitutional floor below which a defendant’s plea, conviction, and sentencing may not fall. For convictions and sentences to stand, they must not violate the Constitution. Thus, the Ninth Circuit recognizes that “the Constitution imposes a floor below which a defendant’s plea, conviction, and sentencing may not fall,” and that constitutional floor may render appellate waivers unenforceable. *United States v. Torres*, 828 F.3d 1113, 1125—26 (9th Cir. 2016) (emphasis added) (appellate waivers do not preclude challenges to illegal, unconstitutional sentences). *Goodall* thus not only conflicts with this Court’s precedent, but that of its sister Circuits and its own precedent. When a defendant files a § 2255 motion, he asserts “that the sentence was imposed in violation of the Constitution or laws of the United States”—an illegal sentence. 28 U.S.C. § 2255(a) (emphasis added). According to the definitive treatise on the matter, a defendant’s challenge to his sentence necessarily encompasses all “challenges to the legality of holding the petitioner in custody at all,” including “typically the legality of the underlying conviction.” Hertz & Liebman, *Federal Habeas Corpus Prac. & Proced.* § 9.1, n.31 (2020) (collecting cases) (emphasis added). Illegal convictions and illegal sentences are inextricably linked. Thus, circuits have long-recognized the miscarriage of justice exception to appellate waivers. See, e.g., *United States v. Teeter*, 257 F.3d 14, 26 n.9 (1st Cir. 2001) (noting miscarriage of justice exception “is infinitely variable” and providing a six-

factor analysis to determine whether the exception applies). *Goodall* acknowledged that an “illegal sentence is one ‘not authorized by the judgment of conviction, . . . in excess of the permissible statutory penalty for the crime, or [that] is in violation of the Constitution.’” But illogically, the panel concluded an illegal sentence “does not include illegal convictions.” *Id.*

The Ninth Circuit based its errant holding on the Circuit’s interpretation of a former version of Fed. R. Crim. P. 35, which authorized a district court to correct an “illegal sentence at any time.” *Goodall*, 21 F.4th at 563 (citing *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986); *United States v. Johnson*, 988 F.2d 941, 943 (9th Cir. 1993)). In *Fowler*, the Ninth Circuit held under former Rule 35 that an illegal sentence included “a sentence which is not authorized by the judgment of conviction or in excess of the permissible statutory penalty for the crime, or in violation of the constitution.” *Fowler*, 794 F.2d at 1449 (cleaned up). In *Johnson*, the Ninth Circuit held an illegal sentence did not include a defendant’s argument he was improperly convicted of prohibited person in possession of a firearm. *Johnson*, 988 F.2d at 943. Citing *Fowler* and *Johnson*, the *Goodall* panel summarily concluded, post-*Davis*, that a defendant challenging his unconstitutional conviction and resulting mandatory sentence under § 924(c) was not a challenge to an illegal sentence—but rather to an illegal conviction. *Goodall*, 21 F.4th at 563.

The gravity of the erroneous *Goodall* holding is severe. But for the illegal, unconstitutional sentence, Mr. Terry would not have received a 147 month upward departure. Mandating enforcement of appellate waivers to preclude relief from illegal unconstitutional convictions is contrary to this Court's precedent and to justice. This Court should grant review of this important federal question to bring the Ninth Circuit in line with this Court's precedent that general appellate waivers do not preclude challenges to illegal convictions and sentences.

B. The petition should be granted because the appellate waiver does not apply as Mr. Terry's sentence was imposed in violation of the Constitution and the terms of his plea agreement.

The appeal waiver does not apply here as Mr. Terry's sentence violates the Constitution. Here, the district court's imposition of a 147 month upward departure, which was never stated on the record and not discovered until a subsequent review of the Statement of Reasons, denied Mr. Terry his Constitutional right to be present at sentencing. *Diaz v. United States*, 223 U.S. 442 (1912). Furthermore, Mr. Terry was deprived of the right to participate in his own sentencing hearing. A defendant has a constitutional right to be present² and represented by counsel when the district court pronounces his sentence. The right

²Fed. R. Crim. P. 43 also requires the defendant's presence at sentencing.

to be present at sentencing derives from both the Fifth and Sixth Amendment.

United States v. Gagnon, 470 U.S. 522, 526 (1985); *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (citing *Lewis v. United States*, 146 U.S. 370 (1892) (one of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.)

The purpose of the defendant's presence at sentencing: is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes.

Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation of his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.

However, there is an additional and perhaps more fundamental justification for the right to be personally present. Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of liberty. It shows a lack of fundamental respect for the dignity of a man to sentence him in absentia. The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.

Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81

Harv.L.Rev. 821, 831 (1968). All of these policy considerations militate against a rule allowing a defendant's presence at sentencing to be waived.

To satisfy due process, the district court must pronounce the sentence, "giving the defendant notice of the sentence and an opportunity to object." *United States v. Diggles*, 957 F.3d 551, 560 (5th Cir. 2020) (en banc); cf. *United States v. Jackson*, 923 F.2d 1494, 1496–97 (11th Cir. 1991) (noting the right to be present at sentencing ensures that "the defendant has an opportunity to challenge the accuracy of information the sentencing judge may rely on, to argue about its reliability and the weight the information should be given, and to present any evidence in mitigation he may have"). Consequently, due process concerns arise when a district court's in-court pronouncement of a sentence differs from the judgment that the court later enters. As the court in *Diggles* explained, "[i]ncluding a sentence in the written judgment that the judge never mentioned when the defendant was in the courtroom is tantamount to sentencing the defendant in absentia" and thus offends due process. *Diggles*, 957 F.3d at 557; *United States v. Rodriguez*, 75 F.4th 1231, 1249 (11th Cir. 2023) (including in written judgment of conviction and sentence discretionary conditions of supervised release that were omitted from oral pronouncement of sentence did not comport with rule requiring that defendant be present at sentencing.)

A defendant who has been sentenced in absentia without his consent is deprived of almost all of his rights at that crucial hearing. “A defendant who is absent from his sentencing cannot testify in his own behalf, communicate with his counsel during the proceeding, affect the participants (witnesses, the judge, the government, or his attorney) by his presence, or in any way contribute to the determination of how much of his life or liberty will be taken from him by the state.” *Hays v. Arave*, 977 F.2d 475, 479–80 (9th Cir. 1992), overruled by *Rice v. Wood*, 77 F.3d 1138 (9th Cir. 1996) (applying harmless error, rather than structural error to in absentia sentencing). Consequently, a sentence imposed at such a proceeding is abhorrent to democratic conceptions of justice. See, e.g., *Lewis v. United States*, 146 U.S. 370, 372 (1892) (“A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.”) Here, Mr. Terry was denied his constitutional right to be present at sentencing, to receive notice of the nine different proposed upward departures, and to present evidence contesting the court’s 147 month upward departure.

Finally, Mr. Terry’s constitutional challenge is not based on any underlying right that was waived by the appeal waiver as part of the plea agreement. Mr. Terry did not waive his constitutional right to be present at sentencing. In fact, Mr. Terry’s plea agreement required he appear for all court appearances. (CR

201, ¶ 3(d).) Under the “Waiver of Constitutional Rights” section of the plea agreement, Mr. Terry did not agree to waive his constitutional right to be present at his sentencing hearing. (CR 201, ¶ 19.) Because Mr. Terry’s plea agreement required his presence at all court appearances and he did not waive his constitutional right to be present, the appeal waiver is unenforceable.

CONCLUSION

For the foregoing reasons, Mr. Terry respectfully requests this Court grant his petition for writ of certiorari.

Dated: December 17, 2023

Respectfully submitted,
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