No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

MICHAEL SAMUEL DEKELBAUM,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*

The Petitioner, Michael Samuel Dekelbaum, requests leave, pursuant to Rule 39.1 of the Supreme Court Rules, to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Petitioner has previously sought and been granted leave to proceed *in forma pauperis* in the following court: The United States District Court for the Northern District of Texas.

Undersigned counsel was admitted to practice before the U.S. Supreme Court June 23rd, 2014. Additionally, undersigned counsel has

been appointed under the Criminal Justice Act of 1964, 18 USC § 3006A.

Respectfully submitted,

/s/ John A. Kuchera
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Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

MICHAEL SAMUEL DEKELBAUM,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1. Should the U.S. Supreme Court recognize a "miscarriage of justice" exception to a waiver of appeal provision in a plea bargain for due process sentencing procedural violations (Rule 32 of the Rules of Criminal Procedure, and Government's violation of a proffer agreement) that took place after execution of the waiver and that could not have been anticipated by the defendant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Samuel Dekelbaum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Dekelbaum's conviction and sentence is styled: *United States v. Dekelbaum*, No. 24-10537, 2025 U.S. App. LEXIS 7434 (5th Cir. March 31, 2025).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Dekelbaum's conviction and sentence was announced on March 31, 2025 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.3, this Petition has been filed within 90 days of the date of the entry of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision

U.S. Const. amend. V:

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law;

Federal Rule

Fed. R. Crim. P. 32(i)(1)(C)

> At sentencing, the court:
>
> . . .
>
> Must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence;

Statement of the Case

Dekelbaum entered a guilty plea to the offense of conspiracy to possess with intent to distribute methamphetamine pursuant to a plea agreement. The plea agreement included a waiver-of-appeal provision.

Dekelbaum filed written objections to the drug quantity for which the presentence investigation report (PSR) held him accountable. The drug quantity in the PSR was based on information from confidential informants. Dekelbaum also provided competent rebuttal evidence in the form of affidavits, and by pointing out inconsistencies in the statements purportedly made by the confidential sources that the formed the basis of the drug quantity calculations.

Dekelbaum also argued that he was deserving of a 2-level reduction in his offense level under the safety valve provision set forth in U.S.S.G. § 2D1.1(b)(18). The Government's written response to this objection included eight pages of typed notes taken from the proffer sessions between Dekelbaum and law enforcement officers. This violated the proffer agreement. Dekelbaum objected at sentencing.

At the beginning of the sentencing proceedings, the district court advised Dekelbaum's attorneys that the court was too busy to allow arguments on objections:

> AUSA: Good afternoon, Your Honor. Shawn Smith for the United States, the Government's ready.
>
> Defense Counsel: Mark Lassiter for Mr. Dekelbaum, Your Honor. And with your permission, I will address the sentencing objections; and Mr. Linder, my cocounsel, will be doing 3553.
>
> Court: Well, you're not used to appearing in front of me; *but I don't give argument on objections anymore. We're too busy over here.* I'm going to give you my rulings on those objections. As far as I'm concerned, they're preserved for appeal and you can take it up with the Fifth Circuit.
>
> . . .
>
> We are very, very busy over here. Our criminal docket, in particular, always runs three times the number of filings and the number of cases as the average active judge in Dallas. Now, because of that, we have to process these as quickly as possible, while keeping in mind giving opportunity for defense and the United States to make their presentations.

The only dispute over whether Dekelbaum qualified for the safety valve provision was whether he had "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The Government put on no evidence. The Government's position, based on nothing more than the unsworn

statement of the AUSA, was that Dekelbaum had provided some information, but not all.

On appeal, Dekelbaum gave five reasons (including the two above-referenced) for why the waiver-of-appeal provision should not bar his arguments on the merits. The Fifth Circuit's opinion summarizes those reasons and the Court's response thereto:

> Recognizing the existence of the waiver of appeal provision, Dekelbaum argues five reasons why the waiver should not apply: (1) the waiver does not cover a challenge to the manner in which the sentence was determined; (2) the waiver does not cover constitutional claims, such as his due process claim; (3) the waiver does not apply where there has been a miscarriage of justice; (4) the waiver does not apply because the district court indicated he could appeal the denial of his objections to the PSR; and (5) the waiver should not apply because the Government breached a proffer agreement. We conclude none of these arguments are persuasive, and therefore, the waiver of appeal applies.

United States v. Dekelbaum, No. 24-10537, 2025 U.S. App. LEXIS 7434, at *3-4 (5th Cir. 2025).

First Reason for Granting the Writ: *The concept of "waiver" has limitations.*

> Regarding what constitutes waiver, the Supreme Court has noted:
>
> > [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances[.] (Emphasis in original.)

United States v. Ruiz, 536 U.S. 622, 629 (2002); *see also United States v. Ready,* 82 F.3d 551, 556 (2d Cir. 1996) (Allowing a defendant to waive appeal of any and every sentence "imposed in violation of law" would invite disrespect for the integrity of the courts and discredit the legitimacy of the sentencing process).

Second Reason for Granting the Writ: *The Supreme Court has in the past equated "miscarriage of justice" with plain error.*

> Black's Law Dictionary defines "miscarriage of justice" thusly:
>
> > Decision or outcome of legal proceeding that is prejudicial or inconsistent with substantial rights of party.

> As used in constitutional standard of reversible error, "miscarriage of justice" means a reasonable probability of more favorable outcome for the defendant.

Black's Law Dictionary 999 (6th ed. 1990).

The U.S. Supreme Court has similarly equated "miscarriage of justice" with plain error:

> [T]he plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result. (Internal quotation marks omitted).

United States v. Young, 470 U.S. 1, 15 (1985).

> Rule 52(b) was intended to afford a means for the prompt redress of *miscarriages of justice*. By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so "plain" the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. The Rule thus reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed. (Emphasis added.)

United States v. Frady, 456 U.S. 152, 163 (1982).

> We previously have explained that the discretion conferred by Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result. (Cleaned up.)

United States v. Olano, 507 U.S. 725, 736 (1993).

Third Reason for Granting the Writ: *Not all federal circuits allow for a miscarriage of justice exception to a waiver of appeal, and those that do have generally articulated exceptions on an ad-hoc basis.*

The Eleventh Circuit does not have a miscarriage of justice exception:

> Our Circuit has long held that knowing and voluntary waivers of the right to appeal are enforceable, and we have never adopted a general miscarriage of justice exception to the rule that valid appeal waivers must be enforced according to their terms. (Cleaned up.)

Rudolph v. United States, 92 F.4th 1038, 1048 (11th Cir. 2024). Nor does the Seventh Circuit. *United States v. Nulf,* 978 F.3d 504, 505 (7th Cir. 2020).

The First Circuit has set forth the following factors to be considered in whether to apply the exception:

> [T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result. . . . For example, we have found a miscarriage of justice when an error of significant or constitutional dimension is clear[.] (Cleaned up.)

United States v. Thompson, 62 F.4th 37, 42-43 (1st Cir. 2023).

The Second Circuit does not recognize a miscarriage of justice exception but has found exceptions that can invalidate a waiver of appeal. *See United States v. Johnson,* 347 F.3d 412, 416-16, 418-19 (2d Cir. 2003) (indigent status); *United States v. Jacobson,* 15 F.3d 19, 23 (2d Cir. 1994) (naturalization).

In the Third Circuit, the miscarriage of justice exception applies as follows:

> To determine whether enforcing a waiver in a plea agreement works a miscarriage of justice, we consider the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result. . . . [T]he miscarriage of justice exception to appellate waivers applies only in "unusual circumstances . . . with the aim of avoiding manifest injustice. (Cleaned up.)

United States v. Rivera, 62 F.4th 778, 785 (3d Cir. 2023).

In the Fourth Circuit, miscarriage of justice claims include:

> sentences imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race, . . .sentences imposed while a defendant was deprived of counsel during his sentencing proceedings, . . . [and] sentences imposed beyond the authority of the district court[.] (Cleaned up.)

United States v. Smith, No. 22-4338, __F.4th__, 2025 U.S. App. LEXIS 8764, at *26 (4th Cir. 2025).

The Fifth Circuit has neither explicitly rejected nor adopted a miscarriage of justice exception to enforcement of an appeal waiver. *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020). However, the Court has on at least one occasion equated the exception to plain error:

> We have held that plain error is an error so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice. (Internal quotation marks omitted).

United States v. Fortenberry, 914 F.2d 671, 673 (5th Cir. 1990).

The Sixth Circuit has never expressly recognized a miscarriage-of-justice exception to the enforcement of appellate waivers in a published decision. *United States v. Mathews*, 534 F. App'x 418, 424-25 (6th Cir. 2013). The Sixth Circuit has however refused to enforce an appellate waiver where the statutory maximum sentence was exceeded. *United States v. Caruthers*, 458 F.3d 459, 472 (6th Cir. 2006).

In the Eighth Circuit, the miscarriage of justice exception includes illegal sentences, a sentence in violation of the terms of an agreement,

and a claim of ineffective assistance of counsel. *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003).

In the Ninth Circuit, an appeal waiver does not apply if:

> (1) the defendant raises a challenge that the sentence violates the Constitution; (2) the constitutional claim directly challenges the sentence itself; and (3) the constitutional challenge is not based on any underlying constitutional right that was expressly and specifically waived by the appeal waiver as part of a valid plea agreement.

United States v. Atherton, 106 F.4th 888, 893-94 (9th Cir. 2024). This exception also applies to a procedural constitutional challenge. *Id.* at 894.

In the Tenth Circuit, the miscarriage of justice exceptions applies to four situations:

> [1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful.

United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004).

In the D.C. Circuit, a defendant who waives his right to appeal his sentence waives his right to contest "only a sentence within the statutory

range and imposed under fair procedures[.]" *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009).

Fourth Reason for Granting the Writ: *A waiver of appeal should not bar complaints having to do with a court's failure to afford a defendant his due process right to full adversarial testing at sentencing.*

The sentencing process must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* A criminal defendant has a due process right to be sentenced based on accurate information. *United States v. Tucker,* 404 U.S. 443, 447 (1972). Reliability is a central ingredient in a due process analysis, including where a district court sentences a defendant based on the drug-quantity guidelines. *United States v. Helding,* 948 F.3d 864, 870 (7th Cir. 2020). Due process requires that a defendant be afforded opportunity to refute information brought against him at sentencing. *United States v. Giltner,* 889 F.2d 1004, 1008 (11th Cir. 1992). "Our belief that debate between

adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner v. Florida*, 430 U.S. at 360.

"The court is required to resolve specifically disputed issues of fact if it intends to use those facts as a basis for its sentence. *United States v. Rodriguez,* 897 F.2d 1324, 1327 (5th Cir. 1990). Rule 32 of the Federal Rules of Criminal Procedure creates a process for parties to present and challenge sentencing information, and for the adjudication of disputes. *United States v. Lovelace*, 565 F.3d 1080, 1090 (8th Cir. 2009). Rule 32 does not obligate a court to make a finding or determination absent a complaint from the defendant that a mistake has been made. *Rodriguez,* 897 F.2d at 1327-28. Nonetheless, Rule 32 "contemplates full adversary testing of the issues relevant to a Guideline sentence." *Burns v. United States,* 501 U.S. 129, 135 (1991). The Supreme Court has also noted:

> Rule 32(i)(1)(C) requires the district court to allow the parties to comment on matters relating to an appropriate sentence, and given the scope of the issues that may be considered at a sentencing hearing, a judge will normally be well-advised to withhold her final judgment until after the parties have had a full opportunity to *present their evidence* and their arguments. Sentencing is a fluid and dynamic process and the court itself may not know until the end whether a variance will be

> adopted, let alone on what grounds. (Cleaned up.) (Emphasis added.)

Irizarry v. United States, 553 U.S. 708, 715 (2008).

Rule 32 has two central policies: (1) to maximize the amount of information available to the sentencing court, and (2) to protect a defendant's right to due process. *United States v. Christman,* 509 F.3d 299, 309 (6th Cir. 2007). The Rule is intended to provide efficient and "focused, adversarial resolution of the legal and factual issues . . . to ensure that a defendant is not sentenced on the basis of materially untrue statements or misinformation." *United States v. Sisti,* 91 F.3d 305, 310 (2d Cir. 1996). Defense counsel's filing of a sentencing memorandum is not a substitute. *United States v. Herder,* 594 F.3d 352, 363 n.3 (4th Cir. 2010).

Fifth Reason for Granting the Writ: *A waiver of appeal should not bar complaints regarding a sentencing court's improper consideration of information protected by a proffer agreement.*

The First Circuit has held that "the government's adherence to the terms of the proffer agreement is insured by the Due Process Clause, its

failure to adhere is perforce of constitutional dimension." *United States v. Melvin*, 730 F.3d 29, 39 (1st Cir. 2013). Likewise, the Seventh Circuit: Proffer agreements are unique and "ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's rights to fundamental fairness under the Due Process Clause." *United States v. $ 87,118.00 in United States Currency*, 95 F.3d 511, 516-17 (7th Cir. 1996). Likewise the Eleventh Circuit. *United States v. Blanco*, 102 F.4th 1153, 1163 (11th Cir. 2024).

At the time Dekelbaum entered into a plea agreement with the Government and waived appeal, he had no reason to contemplate that he was also giving up his right to complain in the event that the Government violated the proffer agreement. The Government argued in its brief that any breach of the proffer agreement had no bearing on the waiver of appeal:

> Finally, even assuming Dekelbaum could show that the government violated the proffer agreement by introducing his statements at sentencing for a limited purpose-which he cannot-he fails to show how this has any bearing on the validity or applicability of his appeal waiver.

Dekelbaum argues that it is a miscarriage of justice for the Fifth Circuit to use Dekelbaum's waiver of appeal to defeat his complaint regarding the Government's violation of the proffer agreement.

Conclusion

For the foregoing reasons, Petitioner Dekelbaum respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera
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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 25th day of April, 2025.

/s/ John A. Kuchera
John A. Kuchera,
Attorney for Michael Samuel Dekelbaum

Appendix A

United States v. Dekelbaum

United States Court of Appeals for the Fifth Circuit

March 31, 2025, Filed

No. 24-10537 Summary Calendar

Reporter
2025 U.S. App. LEXIS 7434 *; 2025 WL 958278

UNITED STATES OF AMERICA, Plaintiff—Appellee, versus MICHAEL SAMUEL DEKELBAUM, Defendant—Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** Appeal from the United States District Court for the Northern District of Texas. USDC No. 4:22-CR-372-1.

Disposition: AFFIRMED.

Counsel: For United States of America, Plaintiff - Appellee: Stephen S. Gilstrap, Elise Aldendifer, U.S. Attorney's Office, Dallas, TX.

For Michael Samuel Dekelbaum, Defendant - Appellant: John Andrew Kuchera, Waco, TX.

Judges: Before SMITH, STEWART, and DUNCAN, Circuit Judges.

Opinion

PER CURIAM:[*]

Michael Samuel Dekelbaum appeals his guilty plea and sentence for conspiracy to possess with intent to distribute a mixture or substance containing methamphetamine. *See* 21 U.S.C. §§ 846, 841(b)(1)(C). As part of his plea agreement, he agreed to waive his right to appeal from his conviction or sentence, but he reserved the right to appeal a sentence exceeding the statutory maximum punishment or an arithmetic error at sentencing, to challenge the voluntariness of his plea or the waiver of appeal provision, and to raise a claim of ineffective assistance of counsel.

Dekelbaum first argues that the superseding information he pleaded guilty to was so impermissibly vague that he will not be able to argue a double-jeopardy violation in any future prosecution. He also argues that the record does not contain enough information to correct this **[*2]** deficiency. However, as the Government argues, the error, if any, is a non-jurisdictional defect that was waived by Dekelbaum's guilty plea. *See* United States v. Bell, 966 F.2d 914, 915 (5th Cir. 1992); United States v. Scruggs, 714 F.3d 258, 262 (5th Cir. 2013). In the alternative, we conclude that this issue is waived by the waiver of appeal provision in his plea agreement. *See* United States v. Higgins, 739 F.3d 733, 736 (5th Cir. 2014).

Next, Dekelbaum argues that the factual basis supporting his plea was insufficient. A challenge to the sufficiency of a factual basis is not barred by a waiver of appeal. *See* United States v. Alvarado-Casas, 715 F.3d 945, 951 (5th Cir. 2013). However, because he did not object on this basis in the district court, we conclude that plain error review

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

applies. *See* United States v. Rodriguez-Leos, 953 F.3d 320, 324 (5th Cir. 2020); Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). Therefore, we may consult the entire record. *See* United States v. Trejo, 610 F.3d 308, 313 (5th Cir. 2010). Dekelbaum has not shown that the district court committed an error that was clear or obvious.

We have held that the "buyer-seller" exception only applies where there is a single transaction. *See* United States v. Escajeda, 8 F.4th 423, 426 (5th Cir. 2021). Here, the record establishes that Dekelbaum made multiple sales to several different individuals. We also conclude that the record contains other evidence supporting the existence of a drug distribution conspiracy, such as multiple and regular sales of large amounts to the same individuals, distribution materials, sizeable amounts of cash, and multiple cellular telephones. *See* Escajeda, 8 F.4th at 427; **[*3]** United States v. Bams, 858 F.3d 937, 945 (5th Cir. 2017). Finally, as Dekelbaum asserts, a defendant may not conspire with a government informant or agent. *See* Escajeda, 8 F.4th at 426. However, as is the case here, a conspiracy may be based on an agreement and conduct that occurred prior to the start of cooperation with the Government. *See* United States v. Asibor, 109 F.3d 1023, 1032 (5th Cir. 1997). In addition, there was evidence that Dekelbaum conspired with others who did not later become confidential sources for the Government. The Government need not identify these individuals by name. *See* Escajeda, 8 F.4th at 427.

Finally, Dekelbaum raises three separate challenges involving the calculation of his sentence: (1) the district court erred by refusing to allow oral argument on his objections to the presentence report (PSR); (2) the district court erred by basing the determination of drug quantity on information from unreliable sources; and (3) the district court erred by refusing to grant a two-level "safety valve" reduction. Recognizing the existence of the waiver of appeal provision, Dekelbaum argues five reasons why the waiver should not apply: (1) the waiver does not cover a challenge to the manner in which the sentence was determined; (2) the waiver does not cover constitutional claims, such as his due process claim; (3) the waiver does **[*4]** not apply where there has been a miscarriage of justice; (4) the waiver does not apply because the district court indicated he could appeal the denial of his objections to the PSR; and (5) the waiver should not apply because the Government breached a proffer agreement. We conclude none of these arguments are persuasive, and therefore, the waiver of appeal applies.

AFFIRMED.

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