

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JACKIE KAVASKIA MCMILLAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals
for the Eleventh Circuit*

(CA11 No. 22-12615)

Petition for Writ of Certiorari

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QUESTION PRESENTED

While “jurisdictions appear to treat at least some claims as unwaivable” via an appeal waiver in a plea agreement, this Court has not yet decided “what particular exceptions may be required.” *Garza v. Idaho*, 586 U.S. 232, 238 & n.6 (2019). This Petition asks this Court to consider one such potential exception, which has divided the Circuits below: an exception for an appeal alleging a facially illegal sentence.

Accordingly, the Question Presented here is the following:

1. Does the appeal waiver in Petitioner’s plea agreement foreclose an appeal raising a claim that his sentence is illegal on its face and thus beyond the authority of the district court to impose at all?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

PRIOR PROCEEDINGS

U.S. District Court for the Southern District of Georgia

United States v. McMillan, No. 5:20-cr-00007-LGW-BWC (S.D. Ga.). Judgment was entered on August 2, 2022.

U.S. Court of Appeals for the Eleventh Circuit:

United States v. McMillan, No. 22-12615 (11th Cir.). Judgment was entered on May 7, 2025, via an unpublished opinion. Rehearing was denied on June 13, 2025.

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Jackie Kavaskia McMillan respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit Court of Appeals did not select its opinion for publication. A copy is included in Appendix A. It can also be electronically accessed at *United States v. McMillan*, 2025 U.S. App. LEXIS 11021, 2025 WL 1331497 (11th Cir. May 7, 2025).

The district court did not issue any relevant oral or written opinion, but a copy of the judgment of conviction is included in Appendix B.

JURISDICTION

The district court had jurisdiction over the underlying criminal action pursuant to 18 U.S.C. § 3231. It entered final judgment on August 2, 2022.

The U.S. Court of Appeals for the Eleventh Circuit had jurisdiction to consider the district court's final judgment. 28 U.S.C. §§ 1291, 1294.

This Court has jurisdiction to review the Eleventh Circuit's judgment. 28 U.S.C. § 1254(1). Judgment was entered on May 7, 2025, and the petition for rehearing was denied on June 13, 2025.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3583:

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if

such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are—

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised

release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as

an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during non-working hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Pursuant to a plea agreement, Mr. McMillan pleaded guilty to drug offenses. His plea agreement included the following provision:

Defendant entirely waives his right to a direct appeal of his conviction and sentence on any ground (including any argument that the statute to which the Defendant is pleading guilty is unconstitutional or that the admitted conduct does not fall within the scope of the statute). The only exceptions are that the Defendant may file a direct appeal of his sentence if (1) the court enters a sentence above the statutory maximum, (2) the court enters a sentence above the advisory Sentencing Guidelines range found to apply by the court at sentencing; or (3) the Government appeals the sentence. Absent those exceptions, Defendant explicitly and irrevocably instructs his attorney not to file an appeal.

In addition to a term of imprisonment and the required special assessment, the district court imposed a sentence that included a four-year term of supervised release. Among the special provisions of supervised release was the following: “1. You must submit to substance abuse testing to determine if you have used a prohibited substance....” [Appendix B].

II. Proceedings in the Eleventh Circuit

Mr. McMillan filed a notice of appeal. As relevant here, he sought to raise on appeal the legality of delegating to the Probation Office the choice as to the maximum number of drug tests during the period of supervised release.

Upon motion of the Government, the Eleventh Circuit dismissed the appeal pursuant to the plea agreement’s appeal waiver. The opinion below noted that the Eleventh Circuit will accept plea waivers even as against constitutional challenges to a

sentence. [Appendix A (“We have held that improper delegation claims come within the scope of an appeal waiver even though they are constitutionally-barred, and we see no reason why the improper delegation argument here should be treated any differently.” (citations omitted))].

REASONS FOR GRANTING THE PETITION

Consistent with the contractual underpinnings of plea agreements, when an appeal waiver is asserted on appeal, the lower courts should first ask whether the appeal falls within the plain text of the waiver’s language. *E.g.*, *United States v. Toth*, 668 F.3d 374, 378 (6th Cir. 2012) (“First, we look to see if the claim raised on appeal falls within the scope of the appellate waiver....” (citation omitted)).

If an appeal does contravene the waiver’s text, courts should next ask whether the waiver was knowingly and voluntarily made at the change of plea. *See generally United States v. Ruiz*, 536 U.S. 622, 629 (2002) (“Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is voluntary and that the defendant must make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences.” (quotation omitted)). In federal court, the Federal Rules of Criminal Procedure specifically require the judge to review any appellate waivers during the plea colloquy. Fed. R. Crim. Pro. 11(b)(1)(N).

In contrast to the widespread agreement in the lower courts with respect to the preceding analysis, the federal circuits are divided as which exceptions, if any, exist

to an otherwise valid appeal waiver. This Petition presents an important question and is a good vehicle for the issue presented.

I. The Circuits Are Divided About Which Exceptions, if any, Exist to an Otherwise Valid Appeal Waiver.

A. *Many Circuits Impose Some Exceptions on Appeal Waivers.*

While plea agreements may sound in contract law, they are not only subject to contractual principles of interpretation. Constitutional concerns may sometimes require relaxation of otherwise applicable contract principles:

This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. *E.g., Blackledge v. Allison*, 431 U.S. 63, 75, n. 6 (1977). It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

Ricketts v. Adamson, 483 U.S. 1, 16 (1987).

Given those considerations, many circuits recognize at least some extra-textual exceptions to appeal waivers:

[A] sentence based on constitutionally impermissible criteria, such as race, *United States v. Hicks*, 129 F.3d 376, 377 (7th Cir. 1997); *United States v. Johnson*, 347 F.3d 412, 414-15 (2d Cir. 2003); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992), or a sentence in excess of the statutory maximum sentence for the defendant's crime, *United States v. Feichtinger*, 105 F.3d 1188,

1190 (7th Cir. 1997); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000), can be challenged on appeal even if the defendant executed a blanket waiver of his appeal rights. *See also United States v. Sines*, 303 F.3d 793, 798 (7th Cir. 2002); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (*en banc*) (*per curiam*).

United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005).

Some circuits also recognize an exception for a manifest injustice in the sentence that was imposed. *Compare, e.g., United States v. Corso*, 549 F.3d 921, 927 (3rd Cir. 2008) (explaining that the Circuit will decline to “enforce[e] the waiver [when it] would work a miscarriage of justice” (citations omitted)) and *United States v. Andis*, 333 F.3d 886, 889-90 (8th Cir. 2003) (*en banc*) (“Even when [a waiver was knowingly made and the appeal falls within it] ..., we will not enforce a waiver where to do so would result in a miscarriage of justice.”). Before invoking this exception to excuse an appeal waiver, courts will consider “a litany of factors, such as the clarity of the error, its gravity and character, its impact on the defendant, the government’s interest in enforcing the waiver, and the extent to which the defendant acquiesced in the result below.” *United States v. Andruchuk*, 122 F.4th 17, 24 (1st Cir. 2024) (citation omitted). At least some circuits deem “[a] proper showing of ‘actual innocence’ [as] sufficient to satisfy the ‘miscarriage of justice’” exception to appeal waivers. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (quotation omitted).

The Seventh Circuit has recognized an exception that permits an appeal over “obviously vague special conditions” of supervised release. *United States v. Adkins*, 743 F.3d 176, 193 (7th Cir. 2014) (declining to enforce appeal waiver and vacating special condition of supervised release on plain-error review).

Finally, the Ninth Circuit has an explicit rule—that would have protected Mr. McMillan below—that an appeal waiver “does not bar a defendant from challenging an *illegal* sentence. In this context, an ‘illegal sentence’ has a very limited and precise meaning.... [A]n appeal waiver does not apply to a sentence if it exceeds the permissible statutory penalty for the crime or violates the Constitution.” *United States v. Wells*, 29 F.4th 580, 584 (9th Cir. 2022) (quotation and citations omitted). Thus, in addition to vagueness and First Amendment challenges to provisions of supervised release, a claim that a provision of supervised release amounts to an “unconstitutional delegation of authority” to the probation officer will survive an appeal waiver in the Ninth Circuit. *Id.* at 588. The Fourth Circuit, Seventh Circuits, and Eighth Circuits agree with the Ninth Circuit that facially illegal sentences survive an appeal waiver. *See United States v. Thornsbury*, 670 F.3d 532, 539 (4th Cir. 2012) (explaining that the Fourth Circuit will not enforce an appeal waiver when “the sentence is alleged to have been beyond the authority of the district court to impose” pursuant to statutory or constitutional provisions (collecting cases)); *United States v. Litos*, 847 F.3d 906, 911 (7th Cir. 2017) (holding that an appeal waiver did not bar an appeal over a restitution order because the order was “contrary to the applicable statute and therefore illegal—just as a prison term that exceeded a statutory maximum would be illegal”); *Andis*, 333 F.3d at 891-92 (“[A] defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver.... [A] sentence is illegal when it is not authorized by law; for example, when the sentence is in excess of a statutory provision or otherwise contrary to the applicable statute.”).

B. Some Circuits Do Not Recognize Non-Textual Exceptions.

In contrast to the clear weight of authority from other circuits, that an otherwise applicable appeal waiver will be excused in at least some situations, the Sixth Circuit holds that no extratextual exceptions exist to an appeal waiver. *United States v. Milliron*, 984 F.3d 1188, 1193 (6th Cir. 2021) (“Because Milliron’s plea withdrawal claim falls within the scope of the appeal waiver provision, only challenges to the validity of the plea agreement and the appeal waiver therein will be entertained.” (footnote and citation omitted)). The rule is iron clad. The Sixth Circuit does not even view challenges to the district court’s jurisdiction as sufficient to excuse an appeal waiver. *See United States v. Gibney*, 519 F.3d 301, 305 (6th Cir. 2008) (enforcing an appeal waiver even though the defendant sought to argue that the district court “lacked jurisdiction” to impose the sentence).

For their parts, the Fifth and the Eleventh Circuits do not recognize the miscarriage-of-justice exceptions that other Circuits do. *United States v. Chaney*, 120 F.4th 1300, 1303 (5th Cir. 2024) (“We have not adopted a miscarriage-of-justice exception for appeal waivers....” (citation omitted)), and *King v. United States*, 41 F.4th 1363, 1368 n.2 (11th Cir. 2022) (“[O]ur Circuit has never adopted a general ‘miscarriage of justice’ exception to the rule that valid appeal waivers must be enforced according to their terms.” (citations omitted)).

II. This Petition Presents an Important Question.

“[C]riminal justice today is for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In the federal system, appeal waivers are a frequent component of plea agreements. One study, for example, found that 90% of plea agreements in the Ninth Circuit contained appeal waivers. Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 232 (2005).

While enforcement of promises in a plea agreement is generally important, or else the parties will not bargain at all, a rule that provides the parties with no recourse if the sentencing court violates the law is inconsistent with their reasonable expectations at the time of contracting. *See, e.g., United States v. Ready*, 82 F.3d 551, 559 (2nd Cir. 1996) (“[W]e presume that both parties to the plea agreements contemplated that all promises made were legal, and that the non-contracting ‘party’ who implements the agreement (the district judge) will act legally in executing the agreement.” (citation omitted)). Requiring defendants to assume the risk that the district court will impose an illegal sentence reduces the incentive for defendants to enter into plea bargains at all.

Allowing the Government to enforce an appeal waiver in the face of a claim of illegality also undermines public confidence in the judiciary. *See generally United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (“[W]ith respect to federal prosecutions, the courts’ concerns [with implementing plea bargains] run even wider than protection of the defendant’s individual constitutional rights—to concerns for the

honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.” (citation omitted)).

Whether an appeal waiver will be enforced in the face of the claim of an illegal sentence is thus an important question that would merit the Court’s review, even if the Circuits had not already been divided.

III. This Petition Is a Good Vehicle.

Several Circuits have previously held that, per the “as determined by the court” language for drug testing under 18 U.S.C. § 3583(d), a district court may never delegate to the Probation Office unfettered discretion as to drug testing. *United States v. Tejeda*, 476 F.3d 471, 473 (7th Cir. 2007) (reversing a condition that the defendant “participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer....’ because [n]o limit was placed on the number of drug tests which the probation office could require.” *Id.* at 473 (quoting special condition); *United States v. Stephens*, 424 F.3d 876, 883 (9th Cir. 2005) (“While allowing the probation officer to determine the timing of tests is a permissible administrative task, it is for the court to determine how many times a defendant may be placed in jeopardy of being tested.”); *United States v. Miller*, 978 F.3d 746, 756, 764 (10th Cir. 2020) (rejecting a special condition of supervised release that allowed the probation officer to determine the number of drug tests as violating § 3583(d)’s “clear statutory language”).

If those Circuits are right, then the drug-testing condition at issue here was beyond the district court’s authority to impose on any defendant. Indeed, as Mr. McMillan argued below, the express exception in his plea agreement—i.e., that the waiver would not apply if “the court enters a sentence above the statutory maximum”—should have allowed his appeal to proceed. But to whatever extent that it did not, the other Circuits correctly hold that an appeal waiver in a plea agreement cannot excuse a facially illegal sentence, such as one involving an impermissible delegation. *Wells*, 29 F.4th at 586 (holding that vagueness, First Amendment, and anti-delegation challenges to provisions of supervised release survived an appeal waiver and explaining that “an appeal waiver will not apply if the sentence subsequently imposed by the court is inherently unlawful.”). After all, neither party to a plea agreement could have contemplated that a district court would violate the law. *Cf. generally United States v. Yemitan*, 70 F.3d 746, 748 (2nd Cir. 1995) (“[A] sentence tainted by racial bias could not be supported on contract principles, since neither party can be deemed to have accepted such a risk or be entitled to such a result as a benefit of the bargain.”).

Because the 11th Circuit dismissed his appeal, Mr. McMillan was not allowed to litigate the facial illegality of his conditions of supervised release. Thus, the issue of the appeal waiver’s inapplicability or invalidity is squarely presented here.

CONCLUSION

For the foregoing reasons, Mr. McMillan requests that the Court grant the Petition and reverse the judgment below.

Dated: September 8, 2025

Respectfully submitted,

JACKIE KAVASKIA McMILLAN

A handwritten signature in blue ink, appearing to read 'Jackie Kavaskia McMILLAN', written over a horizontal line.

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Appendix to
Petition for *Writ of Certiorari*

APPENDIX A:

OPINION, *UNITED STATES V. MCMILLAN*, NO. 22-12615 (11TH CIR. MAY 7, 2025).

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12615

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACKIE KAVASKIA MCMILLAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 5:20-cr-00007-LGW-BWC-1

Before JORDAN, LAGOA, and WILSON, Circuit Judges.

PER CURIAM:

Jackie McMillan pled guilty to possessing five grams or more of methamphetamine and marijuana with the intent to distribute. His advisory range under the Sentencing guidelines was 480 months' imprisonment, but the district court varied downward and imposed a sentence of 144 months to run consecutively to a state-court sentence.

On appeal, Mr. McMillan challenges two aspects of his sentence. First, he asserts that the district court did not orally pronounce two discretionary conditions of supervised release (1) obstruction or tampering with drug testing methods and (2) warning other occupants that his residence might be subject to searches – and erred by including them in the written judgment. Second, he argues that the district court improperly delegated to the probation office the maximum number of drug tests he would be subject to.

Following review of the record and the parties' briefs, we dismiss the appeal. As explained below, both of Mr. McMillan's sentencing challenges are barred by the appeal waiver in his plea agreement.

The appeal waiver provision stated that Mr. McMillan "waive[d] his right to a direct appeal of his conviction and sentence on any ground," except that he could appeal if (1) the district court imposed a sentence above the statutory maximum, (2) the court imposed a sentence above the applicable Sentencing Guidelines

range, or (3) the government appealed the sentence. *See* D.E. 1431 at ¶ 10.a. The district court advised Mr. McMillan about the appeal waiver at the change-of-plea hearing. He said he understood the waiver and its exceptions and had no questions. *See* D.E. 1670 at 16.

“Appeal waivers bar not only frivolous claims but also difficult and debatable legal issues. A defendant who waives his right to appeal gives up even the right to appeal blatant error[] because the waiver would be nearly meaningless if it included only those appeals that border on the frivolous.” *United States v. Reed*, 118 F. 4th 1317, 1320 (11th Cir. 2024) (citation and internal quotation marks omitted).

Mr. McMillan’s first challenge is barred by the appeal waiver. At the sentencing hearing, the district court stated that, as par of his supervised release, Mr. McMillan would be “subject to substance abuse testing,” could not “tamper with the testing methods,” and would be “subject to certain searches as directed by probation.” D.E. 1669 at 40. The written judgment expanded on and added details to these conditions. It stated that Mr. McMillan “must submit to substance abuse testing; and “must not attempt to obstruct or tamper with the testing methods.” D.E. 1587 at 5. It also stated that Mr. McMillan had to submit his person, property, house, residence, or office, etc. to searches conducted by probation and that he had to “warn any other occupants that the premises might be subject to searches[.]” *Id.*

Although Mr. McMillan suggests that he is simply trying to “seek[] correction of the written judgment” to conform to the oral sentence,” he is really “challeng[ing] the way the district court imposed his sentence[;]” he “argues that the district court failed to describe each . . . condition that it imposed.” *Reed*, 118 F. 4th at 1322. Because the “written judgment only adds details to the oral pronouncement,” Mr. McMillan’s first claim is barred by the appeal waiver. *See id.* at 1322-23 (holding that a similarly worded appeal waiver barred review of claim that the written judgment contains details about the conditions of supervised release that were not orally pronounced).

Mr. McMillan’s second challenge is also barred by the appeal waiver. The argument that the district court improperly delegated to probation the maximum number of times he would be subject to drug testing. We have held that improper delegation claims come within the scope of an appeal waiver even though they are constitutionally-barred, and we see no reason why the improper delegation argument here should be treated any differently. *See United States v. Brown*, 415 F.3d 1257, 1272 (11th Cir. 2005) (“Because Brown’s non-delegation argument [that 21 U.S.C. § 813 violated the non-delegation doctrine of Article I of the Constitution] as clearly outside the exceptions to the appeal waiver, he has waived his right to raise it.”). *See also United States v. Bascomb*, 451 F.3d 1292, 1297 (11th Cir. 2006) explaining that a defendant, through an appeal waiver, is “free to bargain away his right to raise constitutional issues as well as non-constitutional ones”).

APPEAL DISMISSED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 07, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-12615-JJ
Case Style: USA v. Jackie McMillan
District Court Docket No: 5:20-cr-00007-LGW-BWC-1

Opinion Issued

Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing

The time for filing a petition for panel rehearing or rehearing en banc is governed by 11th Cir. R. 40-2. Please see FRAP 40 and the accompanying circuit rules for information concerning petitions for rehearing. Among other things, **a petition for rehearing must include a Certificate of Interested Persons.** See 11th Cir. R. 40-3.

Costs

No costs are taxed.

Bill of Costs

If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees

The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

APPENDIX B:

JUDGMENT, *UNITED STATES V. MCMILLAN*, NO. 5:20-CR-00007-LGW-BWC (S.D. GA. AUG. 2, 2022).

GAS 245B
DC Custody TSR

(Rev. 06/21) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

UNITED STATES OF AMERICA

v.

Jackie Kavaskia McMillana/ka/ "Bijay"**JUDGMENT IN A CRIMINAL CASE**Case Number: 5:20CR00007-1USM Number: 26199-509Daveniya E. Fisher
Defendant's Attorney**THE DEFENDANT:**

- ☒ pleaded guilty to a lesser included offense of Count 1 of the Indictment.
- ☐ pleaded nolo contendere to Count(s) _____ which was accepted by the court.
- ☐ was found guilty on Count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of this offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846, 21 U.S.C. § 841(b)(1)(B), and 21 U.S.C. § 841(a)(1)	Conspiracy to possess with intent to distribute, and to distribute, 5 grams or more of methamphetamine and a mixture or substance containing a detectable amount of marihuana	May 20, 2020	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on Count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed as to this defendant on the motion of the United States.

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

July 29, 2022

Date of Imposition of Judgment

Signature of Judge

LISA GODBEY WOOD
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

Date

August 1, 2022

DEFENDANT: Jackie Kavaskia McMillan
CASE NUMBER: 5:20CR00007-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 444 months, to be served consecutively to the prison term he is currently serving in Coffee County Superior Court, Docket Number 2001R-08-184.

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant be evaluated by Bureau of Prisons officials to establish his participation in an appropriate program of substance abuse treatment and counseling, including the Residential Drug Abuse Program (RDAP), during his term of incarceration.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____ .
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____ .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jackie Kavaskia McMillan
CASE NUMBER: 5:20CR00007-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 4 years.

MANDATORY CONDITIONS

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

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

DEFENDANT: Jackie Kavaskia McMillan
CASE NUMBER: 5:20CR00007-1

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: Jackie Kavaskia McMillan
CASE NUMBER: 5:20CR00007-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.
2. You must submit your person, property, house, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: Jackie Kavaskia McMillan
CASE NUMBER: 5:20CR00007-1

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment **</u>
TOTALS	\$100	N/A	None	N/A	N/A

- ☐ The determination of restitution is deferred until _____ . *An Amended Judgment in a Criminal Case (AO 245C)*
will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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

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

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

DEFENDANT: Jackie Kavaskia McMillan
CASE NUMBER: 5:20CR00007-1

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$100 is due immediately.
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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

- ☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

APPENDIX C

**ORDER DENYING REHEARING, *UNITED STATES v. McMILLAN*, No. 22-12615 (11TH
CIR. JUNE 13, 2025).**

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12615

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACKIE KAVASKIA MCMILLAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 5:20-cr-00007-LGW-BWC-1

2

Order of the Court

22-12615

Before JORDAN, LAGOA, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Jackie Kavaskia
McMillan is DENIED.