

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KINGSLEY ITA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The **Fifth Circuit** strictly enforces a waiver of appeal and holds that the waiver bars challenging an illegal or unconstitutional sentence.¹ The waiver's only exceptions are: 1) ineffective assistance of counsel and 2) a sentence exceeding the statutory maximum.² There is no miscarriage of justice exception in the Fifth Circuit. For a sentencing court to consider information about a defendant extrinsic to his PSR without at least giving him prior notice violates Fed R. Crim P. 32 & U.S.S.G. Sec. 6A1.3³ and also violates his due process right to be sentenced upon information which is not false or materially incorrect.⁴ Although this error was preserved at Ita's sentencing, he was denied appellate review because his plea agreement contained a general waiver of appeal.⁵

In direct conflict, in the **Ninth Circuit**, a waiver of appeal does not bar a defendant from challenging an illegal sentence⁶ including due process violations.⁷

¹ *United States v. Jones*, 134 F.4th 831, 839-840 (5th Cir. 2025) citing *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020).

² *Jones*, 134 F.4th at 840.

³ *United States v. Garcia*, 797 F.3d 320, 325 (5th Cir. 2015)

⁴ *United States v. Smith*, 13 F.3d 860, 866 (5th Cir. 1994).

⁵ *United States v. Ita*, No. 24-40444, 2025 WL 2417750 (5th Cir. Aug 21, 2025)

⁶ *United States v. Wells*, 29 F.4th 580, 584 (9th Cir. 2022).

⁷ *United States v. Odachyan*, 749 F.3d 798, 801 (9th Cir. 2014).

Six Circuits recognize a miscarriage of justice exception to a general waiver of appeal.⁸ Only the **Fifth** and **Eleventh Circuits** maintain the rigid enforcement approach that categorically bars such claims.⁹

The **Sixth Circuit** has not officially recognized a miscarriage of justice exception to appellate waivers but has unofficially recognized a miscarriage of justice exception in several unreported opinions.¹⁰

The **Seventh Circuit** has recognized a limited exception for the miscarriage of justice in extraordinary circumstances but generally holds that a plea waiver is enforceable if the underlying plea agreement is enforceable.

The issue is actively percolating: the **Ninth Circuit** recently vacated *United States v. Atherton*¹¹ and granted rehearing en banc to reconsider the scope of these exceptions, expansion for procedural issues.

The questions presented are:

⁸ *United States v. Morillo*, 910 F.3d 1 (1st Cir. 2018) (3rd prong in enforcement test); *United States v. Khattak*, 273 F.3d 557 (3d Cir. 2001) (3rd prong in enforcement test); *United States v. Smith*, 134 F.4th 248 (4th Cir. 2024) (a narrow but not totally undefined exception); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (3rd prong in enforcement test); *United States v. Holzer*, 32 F.4th 875 (10th Cir. 2022) (3rd prong in enforcement test); *United States v. Guillen*, 561 F.3d 527 (D.C. Cir. 2009) (a prong in the enforceability test for material failure in sentencing procedure).

⁹ 5th Cir. cited above; 11th Cir. appeal waiver enforced if 1) knowingly, waiver does not apply to jurisdictional challenge, and sentence is greater than the statutory maximum. *United States v. DiFalco*, 837 F.3d 1207, 1215 (11th Cir. 2016).

¹⁰ *United States v. Riggins*, 577 F. App'x 268, 270 (6th Cir. 2017) (We may choose not to enforce even a knowingly entered, otherwise valid appellate waiver, when enforcement would result in a miscarriage of justice or undermine the proper functioning of the federal court). On this point Riggins has been cited in unpublished opinions 18 times by the 6th Cir. and none unfavorably.

¹¹ *United States v. Atherton*, 134 F.4th 1009 (9th Cir. 2025) granting en banc rehearing and vacating 106 F.4th 888 (9th Cir. 2024).

- I. Does a general appeal waiver in a plea agreement bar a criminal defendant from challenging a sentence on due process grounds when the sentencing court relies on evidence outside of the case record (i.e., *sua sponte* recollection of evidence from a co-defendant's trial) without providing prior notice to the defendant?**
- II. If a challenge is permitted, is the Due Process Clause violated when evidence from outside the record is relied upon by the sentencing judge, especially without prior notice to the defendant?**

PARTIES TO THE PROCEEDING

Petitioner Kingsley Ita was the defendant-appellant in the United States Court of Appeals for the Fifth Circuit and the defendant in the United States District Court for the Eastern District of Texas.

Respondent United States of America was the plaintiff-appellee in both courts.

RELATED PROCEEDINGS

United States v. Ita, et al, No. 4:21-CR-00253-ALM, U.S. District Court for the Eastern District of Texas, Sherman Division. Judgment entered June 20, 2024. Here is the list of defendants with their respective numbers¹² and their corresponding appellate case number in the Fifth Circuit Court of Appeals.

| Defendant | Appellate Case |
|--|----------------|
| (1) Kingsley Ita (also known as Baron, Sifk) | 24-40444 |
| (2) Irabor Fatarr Musa (also known as Fatai, Head JJ) | |
| (5) Solomon Esekheigbe | |
| (6) Sandra Iribhogbe Popnen (also known as General, Santos) | 25-40372 |
| (7) Edgal Iribhogbe (also known as Oseme) | 25-40378 |

¹² Some Defendants names are under seal.

| | |
|---|----------|
| (9) Damilola Kumapayi (also known as Luke Morris, Lil unc unc) | 25-40379 |
| (10) Ehiedu Onyeagwu (also known as Young) | |
| (11) Mathew Okpu | |
| (12) Benedicta Atakare | |
| (13) Segun Adeoye | |
| (14) Chidindu Okeke (also known as Steve, Gerard) | 25-40378 |
| (15) Ngozi Okeke | |
| (17) Nosoregbe Asemota (also known as Patrick Asemota) | 24-40666 |
| (18) Chigozi Ekwenugo (also known as Gozie) | |
| (19) Bukola Obaseki | |
| (20) Stella Hadome | |
| (21) Jequita Batchelor | |
| (22) Osaretin Eghaghe (also known as Biggie) | |
| (23) Ejiro Ohwovoriole | |
| (24) Isaac Asare (also known as Asarko) | |
| (25) Peter Ude | 24-40505 |

(26) Gold Ude

(27) Henrietha Oziegbe (also known as

Henrientha, Hetty)

(28) Kingsley Oziegbe

(29) Chiagoziem Kizito Okeke (also known as

25-40378

Alex)

(30) Ebere Peter Omeiri

OPINIONS BELOW

The Fifth Circuit's unpublished per curiam opinion (App. A) is available at *United States v. Ita*, No. 24-40444, 2025 U.S. App. LEXIS 21448, 2025 LX 364357, 2025 WL 2417750 (5th Cir. Aug. 21, 2025). The district court's judgment of conviction and sentence (App. B) is unreported.

JURISDICTION

The Fifth Circuit entered judgment on August 21, 2025. No rehearing was sought. A motion directing the Clerk of the Court to file this petition out of time is filed with this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

18 U.S.C. § 1349 provides: “Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

Federal Rule of Criminal Procedure 32(i)(1)(C) provides: “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.”

U.S.S.G. § 6A1.3 (Resolution of Disputed Factors) provides in relevant part: “When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.”

STATEMENT OF THE CASE

A. The Guilty Plea and Appeal Waiver

Kingsley Ita pleaded guilty to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, as part of a large multi-defendant prosecution in the Eastern District of Texas involving allegations of wire fraud connected to an organization known as "Black Axe."

As part of his plea agreement, Mr. Ita waived the right to appeal his conviction and sentence "on all grounds," reserving only the right to appeal (1) a sentence exceeding the statutory maximum, and (2) claims of ineffective assistance of counsel. ROA.292.

The plea agreement did not specifically address whether Mr. Ita was waiving his right to challenge constitutional violations occurring at the sentencing proceeding itself—violations that could not have been anticipated at the time the agreement was signed.

B. The Presentence Investigation Report

The Presentence Investigation Report ("PSR") calculated Mr. Ita's advisory guideline range at 21 to 27 months' imprisonment, based on an offense level of 16 and a criminal history category of I.¹³ Mr. Ita had no prior criminal history.

¹³ ROA.305-306, 309).

The Government filed a motion for upward variance just two days before the sentencing hearing. Defense counsel objected to the motion as untimely. ROA.274.

C. The Sentencing Hearing

At sentencing, the district court overruled the timeliness objection, stating it would have considered an upward variance on its own motion regardless. ROA.274-75.

The court then made a statement that forms the crux of this petition. Having presided over the trials of Mr. Ita's co-defendants—trials in which Mr. Ita did not participate and had no opportunity to observe, cross-examine witnesses, or review evidence—the court stated:

"But the full picture — since I did go to trial on other defendants, I've seen the full picture of the whole — this large conspiracy."¹⁴

Based in part on this undisclosed information, the court imposed a sentence of **120 months—more than four times the top of the guideline range**. ROA.279. This "ambush" sentencing procedure denied Mr. Ita any meaningful opportunity to contest the evidence used against him.

At no point was Mr. Ita provided with:

- Transcripts of the co-defendant trials;
- Identification of the specific evidence the court intended to consider;

¹⁴ ROA.278.

- Notice of the witnesses whose testimony would be used against him;
- An opportunity to review, respond to, or rebut that evidence; or
- An opportunity to cross-examine any witness.

The first notice Mr. Ita received that the court would rely on co-defendant trial evidence came at the sentencing hearing itself—after the court had already formed its sentencing view.

D. The Fifth Circuit's Decision

Mr. Ita appealed, arguing that the district court violated his due process rights by relying on evidence from co-defendant trials without providing notice or an opportunity to be heard.

The Fifth Circuit dismissed the appeal, holding that the appeal waiver barred consideration of Mr. Ita's constitutional claim. Applying its two-step inquiry from *United States v. Bond*,¹⁵ the court found that: (1) the waiver was knowing and voluntary, and (2) the waiver's plain language covered Mr. Ita's due process challenge.

The court declined to reach the merits of the constitutional claim, holding that the waiver applied regardless of whether the sentencing proceeding violated the Constitution.

¹⁵ *United States v. Bond*, 414 F.3d 542 (5th Cir. 2005)

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON WHETHER APPEAL WAIVERS BAR CONSTITUTIONAL CHALLENGES TO SENTENCING

The federal circuits have adopted conflicting approaches to determining whether a general appeal waiver bars a defendant from challenging a sentence imposed in violation of the Constitution. This deep and acknowledged division means that a defendant's ability to vindicate fundamental constitutional rights depends entirely on the circuit in which they are sentenced.

Circuit Split Summary

| Category | Circuits | Count |
|-----------------------------------|-------------------------------------|-------|
| Have MOJ/Constitutional Exception | 1st, 3rd, 4th, 8th, 9th, 10th, D.C. | 7 |
| No Exception (Rigid Enforcement) | 5th, 11th | 2 |
| Limited Adoption | 2nd, 6th, 7th | 3 |

A. The Ninth Circuit: Constitutional Claims Survive Generic Waivers

In *United States v. Wells*,¹⁶ the Ninth Circuit established a three-part test for determining whether a constitutional challenge survives an appeal waiver:

¹⁶ *United States v. Wells*, 29 F.4th 580 (9th Cir. 2022).

"[A] waiver of the right to appeal a sentence 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."

Id. at 587 (emphasis added). The *Wells* court explained the rationale for this approach: "[T]he basis for not enforcing the waiver of appeal is that a constitutional challenge was raised, whatever the outcome of that challenge." *Id.* This prevents the "circularity" problem that arises when courts must analyze the merits of a constitutional claim before deciding whether the claim is barred—a process that effectively provides appellate review while simultaneously denying it.

Under this rule, Petitioner's claim that he was sentenced based on secret, *ex parte* evidence would have been heard on the merits.

The importance of the *Wells* rule is underscored by recent developments: on October 17, 2025, the Ninth Circuit vacated *United States v. Atherton*,¹⁷ and granted rehearing en banc to reconsider the scope of constitutional exceptions to appeal waivers.¹⁸ This demonstrates that the issue remains unsettled and of significant importance even within circuits that recognize exceptions.

¹⁷ *United States v. Atherton*, 111 F.4th 1075 (9th Cir. 2024)

¹⁸ On October 17, 2025, the Ninth Circuit vacated *United States v. Atherton*, 111 F.4th 1075 (9th Cir. 2024), and granted rehearing en banc. The en banc court will reconsider the scope of constitutional

B. The Tenth Circuit: Explicitly Rejects the Ninth Circuit's Approach

In direct conflict, the Tenth Circuit has expressly rejected the *Wells* rule. In *United States v. Holzer*, the court stated: "[Defendant] argues we should adopt the Ninth Circuit's rule . . . **We decline to follow [the Ninth Circuit].**"¹⁹

Instead, the Tenth Circuit enforces waivers against constitutional claims unless they result in a "miscarriage of justice," creating a direct split with the Ninth Circuit. *See also United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (establishing four-factor test including "miscarriage of justice" exception).

C. The Fifth Circuit: The Rigid Outlier

Standing alone at the extreme end of this spectrum is the Fifth Circuit. It employs a rigid "two-step inquiry" that asks only: (1) whether the waiver was knowing and voluntary, and (2) whether the waiver's language covers the claim.²⁰ If both answers are yes, the appeal is barred—regardless of whether the defendant's constitutional rights were violated.

Unlike its sister circuits, the Fifth Circuit has repeatedly declined to adopt a "miscarriage of justice" exception. In *United States v. Barnes*,²¹ the court noted that "we have declined explicitly either to adopt or to reject" the exception. More recently,

exceptions to appeal waivers, demonstrating that this issue remains unsettled and of significant importance to the circuits.

19 *United States v. Holzer*, 32 F.4th 875, 886 (10th Cir. 2022).

20 *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

21 *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020)

in *United States v. Jones*,²² the court explicitly stated: "We decline to recognize and apply a miscarriage-of-justice exception here." The Fifth Circuit thus prioritizes finality over fairness, enforcing waivers even when doing so shields unconstitutional sentencing procedures from any review.

The dissent in *Jones* observed that the defendant urged the court "to adopt, as **most of our sister circuits have done**, a miscarriage-of-justice exception to collateral-review waivers." 134 F.4th at 847 (Dennis, J., dissenting).

Consequently, Petitioner—sentenced in the Fifth Circuit—was subject to the strictest enforcement regime in the country. His claim of a fundamental Due Process violation was barred by a waiver that would have been bypassed in the Ninth Circuit (*Wells*) and subjected to scrutiny in the Tenth (*Holzer*). This Court should intervene to resolve this untenable disparity.

D. The Majority of Circuits Recognize Some Form of Exception

The Fifth Circuit stands in a distinct minority. *Jones* itself catalogued the circuits that have adopted the miscarriage of justice exception: the **First Circuit** (*United States v. Teeter*, 257 F.3d 14 (2001)); the **Third Circuit** (*United States v. Khattak*, 273 F.3d 557 (2001)); the **Fourth Circuit** (*United States v. Adams*, 814 F.3d 178 (2016)); the **Eighth Circuit** (*United States v. Andis*, 333 F.3d 886 (2003) (en banc)); the **Tenth Circuit** (*United States v. Hahn*, 359 F.3d 1315 (2004) (en banc));

²² *United States v. Jones*, 134 F.4th 831, 842 (5th Cir. 2025).

and the **D.C. Circuit** (*United States v. Guillen*, 561 F.3d 527 (2009)). *See Jones*, 134 F.4th at 841 n.52.

Adding the Ninth Circuit's constitutional exception under *Wells*, **at least seven circuits** recognize some form of exception that would permit review of constitutional sentencing claims despite a general appeal waiver. Only the Fifth and Eleventh Circuits maintain the rigid enforcement approach that categorically bars such claims.

This overwhelming consensus makes the Fifth Circuit's position untenable. A defendant's ability to obtain appellate review of a fundamental due process violation should not depend on geographic happenstance—the circuit in which the prosecution happens to be brought.

E. The Fifth Circuit's Own Precedent Recognizes This Due Process Violation

Notably, the Fifth Circuit itself has recognized that reliance on undisclosed co-defendant trial evidence at sentencing violates fundamental due process principles. In *United States v. Garcia*, 797 F.3d 320 (5th Cir. 2015), the Fifth Circuit vacated a sentence where the district court relied on testimony from a co-defendant's separate trial without providing the defendant notice.²³ The court held that "when a court

²³ *Garcia* was decided on procedural grounds under Rule 32 and § 6A1.3, but the Fifth Circuit's reasoning demonstrates that reliance on undisclosed co-defendant trial evidence violates fundamental principles of notice and opportunity to be heard.

intends to rely on testimony from a different proceeding in its . . . decision, the court must timely advise the defendant in advance." *Id.* at 324.

Yet under the Fifth Circuit's appeal waiver jurisprudence, a defendant who signed a general appeal waiver would be barred from raising the very same claim that *Garcia* recognized as error. The result is that constitutional protections vary based solely on whether the defendant signed a plea agreement—not on the merits of the constitutional claim.

II. THE FIFTH CIRCUIT'S APPROACH CONFLICTS WITH THIS COURT'S DECISION IN *CLASS v. UNITED STATES*

The Fifth Circuit's categorical approach to appeal waivers conflicts with this Court's holding in *Class v. United States*.²⁴

In *Class*, this Court held that a guilty plea, by itself, does not bar a defendant from challenging the constitutionality of the statute of conviction on direct appeal. *Id.* at 181. The Court reasoned that constitutional claims that "implicate the very power of the State" to prosecute or punish survive a guilty plea absent express waiver. *Id.*

The logic of *Class* applies with equal force here. A sentencing proceeding conducted in violation of Due Process—where the judge relies on evidence the defendant cannot see, rebut, or challenge—lacks the constitutional legitimacy to produce a valid sentence. Just as a conviction under an unconstitutional statute exceeds the government's power to prosecute, a sentence imposed through unconstitutional procedures exceeds the court's power to punish.

This Court has long recognized that due process requires notice and an opportunity to be heard at sentencing.²⁵

The right to notice and an opportunity to be heard is "the most basic requirement of due process."²⁶ A waiver executed before the sentencing proceeding

²⁴ *Class v. United States*, 583 U.S. 174 (2018).

²⁵ *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[T]he sentencing process . . . must satisfy the requirements of the Due Process Clause."); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (defendant entitled to "reasonable notice" of information used at sentencing).

²⁶ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

even occurs cannot reasonably be construed to waive the right to challenge unconstitutional conduct that the defendant could not have anticipated.

The Fifth Circuit's approach creates an impermissible circularity: to determine whether the appeal waiver applies, the court must analyze whether a constitutional violation occurred; but having determined that a violation occurred (or assuming one did), the court dismisses the appeal without providing any remedy. The result is that sentencing courts can engage in unconstitutional conduct with impunity, so long as the defendant signed a general appeal waiver.

III. THE QUESTION PRESENTED IS OF EXCEPTIONAL NATIONAL IMPORTANCE

The question presented affects the overwhelming majority of federal criminal defendants. Approximately 97% of federal criminal cases are resolved through guilty pleas.²⁷ The vast majority of these pleas include appeal waivers. The circuit split thus creates a system where constitutional protections at sentencing vary dramatically based on geography.

This case also implicates the integrity of the federal criminal justice system. If general appeal waivers can insulate constitutional violations at sentencing from appellate review, defendants have no meaningful recourse when sentencing courts violate their due process rights. The only check on unconstitutional sentencing

²⁷ Approximately 97% of federal criminal cases are resolved through guilty pleas. See U.S. Sentencing Comm'n, 2023 Annual Report.

conduct would be the conscience of the sentencing judge—which this Court has never held to be a sufficient substitute for appellate review.

The issue is particularly urgent in multi-defendant prosecutions, which have become increasingly common in federal practice. Conspiracy and RICO cases routinely involve multiple defendants tried separately, creating the precise scenario presented here: a sentencing judge who has presided over some trials but not others, and who may be tempted to rely on evidence from those trials when sentencing defendants who did not participate.

The issue is actively percolating. The Ninth Circuit's decision to grant en banc review in *Atherton* demonstrates that even circuits with established exceptions are reconsidering their scope. Without this Court's intervention, the circuits will continue to diverge on this fundamental question.

IV. THIS CASE IS AN IDEAL VEHICLE

This case presents an ideal vehicle for resolving the circuit split.

First, the question is squarely presented. The Fifth Circuit explicitly applied its *Bond* framework to dismiss Mr. Ita's appeal without reaching the merits of his constitutional claim. There is no question that the outcome would have been different in the Ninth Circuit, where the *Wells* framework would have permitted appellate review of the due process claim.

Second, the underlying constitutional violation is clear. The sentencing court explicitly stated that it was relying on its knowledge from co-defendant trials. Mr. Ita

had no notice, no opportunity to review the evidence, and no ability to respond. This is precisely the type of due process violation that this Court condemned in *Gardner* and *Townsend*.

Third, the stakes are substantial. Mr. Ita received a 120-month sentence—more than four times the top of the advisory guideline range. The difference between the guideline sentence (21-27 months) and the imposed sentence (120 months) represents years of liberty.

Fourth, the issue is cleanly presented. Mr. Ita does not challenge the voluntariness of his plea or waiver. He does not argue that the waiver is ambiguous. He presents a pure legal question: whether a general appeal waiver bars a due process challenge to a sentencing proceeding conducted in violation of the Constitution.

Finally, this case involves no procedural complications that would prevent this Court from reaching the merits. The issue was preserved below, the record is complete, and the constitutional question is squarely presented for resolution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

- A Opinion and Judgment of Court of Appeals
- B Criminal Judgment of District Court

ATTACHMENT A

United States Court of Appeals for the Fifth Circuit

No. 24-40444
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
August 21, 2025

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

KINGSLEY ITA,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:21-CR-253-1

Before KING, HAYNES, and HO, *Circuit Judges.*

PER CURIAM:*

Kingsley Ita appeals the above-guidelines sentence for his conviction of conspiracy to commit wire fraud. He contends that the district court violated his due process rights at sentencing by relying on evidence and argument from outside his case without first giving him notice. The

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

No. 24-40444

Government argues that the appeal should be dismissed because Ita's argument is barred by the appeal-waiver provision in his plea agreement.

Whether an appeal waiver bars an appeal is a question this court reviews de novo. *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). The question turns on “a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement.” *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). The record reflects that both conditions are met here. Ita, relying on extra-circuit cases and a Supreme Court case that is distinguishable from his own, maintains he may bring his due process challenge to his sentence despite his appeal waiver. We have rejected the argument that, absent circumstances that are not present here, a criminal defendant cannot “waive his right to challenge an illegal or unconstitutional sentence.” *United States v. Barnes*, 953 F.3d 383, 388 (5th Cir. 2020).

Accordingly, the appeal is DISMISSED. Ita moves pro se to relieve appointed counsel and for the appointment of substitute counsel. That relief is not warranted here, *see FIFTH CIRCUIT PLAN UNDER THE CRIMINAL JUSTICE ACT*, § 5(B); 18 U.S.C. § 3006A(c). Ita's pro se motions are therefore DENIED.

ATTACHMENT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

UNITED STATES OF AMERICA

v.

KINGSLEY ITA**JUDGMENT IN A CRIMINAL CASE**

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§

§

§ Case Number: **4:21-CR-00253-ALM-KPJ(1)**§ USM Number: **66400-509**§ **Douglas Schopmeyer**

§ Defendant's Attorney

THE DEFENDANT:

| | | |
|-------------------------------------|---|--|
| <input type="checkbox"/> | pleaded guilty to count(s) | |
| <input checked="" type="checkbox"/> | pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court. | 1 of the First Superseding Indictment |
| <input type="checkbox"/> | pleaded nolo contendere to count(s) which was accepted by the court | |
| <input type="checkbox"/> | was found guilty on count(s) after a plea of not guilty | |

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section / Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|--|---------------------------------|--------------|
| 18 U.S.C. § 1349 | Conspiracy to Commit Wire Fraud | 11/10/2022 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)
 All remaining counts and underlying indictment(s) is are dismissed 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.

June 20, 2024

Date of Imposition of Judgment



Signature of Judge

AMOS L. MAZZANT, III
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

June 20, 2024

Date

DEFENDANT: KINGSLEY ITA
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 120 months.

The court makes the following recommendations to the Bureau of Prisons: The Court recommends the Defendant be housed in a BOP facility in Colorado, if available. It is recommended the defendant participate in the Inmate Financial Responsibility Program in accordance with the requirements of the Inmate Financial Responsibility Program. If the defendant participates in the Inmate Financial Responsibility Program, the defendant shall pay 50% of earnings per pay period to the defendant's outstanding monetary penalties.

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: KINGSLEY ITA
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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **two (2) 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 which 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 additional conditions on the attached page.

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STANDARD CONDITIONS OF SUPERVISION

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

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

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SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and employment.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless payment of any financial obligation ordered by the Court has been paid in full.

You must not participate in any form of gambling unless payment of any financial obligation ordered by the Court has been paid in full.

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CRIMINAL MONETARY PENALTIES

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

| | <u>Assessment</u> | <u>Restitution</u> | <u>Fine</u> | <u>AVAA Assessment*</u> | <u>JVTA Assessment**</u> |
|---------------|-------------------|--------------------|-------------|-------------------------|--------------------------|
| TOTALS | \$100.00 | \$TBD | \$.00 | \$.00 | \$.00 |

The determination of restitution is deferred until September 16, 2024. An *Amended Judgment in a Criminal Case* (AO245C) 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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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 the schedule of payments page 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:

| | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> 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.

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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 payments of \$ 100.00 due immediately, balance due
 - 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 20 (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:

It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 on Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Any monetary penalty that remains unpaid when your supervision commences is to be paid on a monthly basis at a rate of at least 10% of your gross income. The percentage of gross income to be paid with respect to any restitution and/or fine is to be changed during supervision, if needed, based on your changed circumstances, pursuant to 18 U.S.C. § 3664(k) and/or 18 U.S.C. § 3572(d)(3), respectively. If you receive an inheritance, any settlements (including divorce settlement and personal injury settlement), gifts, tax refunds, bonuses, lawsuit awards, and any other receipt of money (to include, but not be limited to, gambling proceeds, lottery winnings, and money found or discovered) you must, within 5 days of receipt, apply 100% of the value of such resources to any financial penalty ordered. None of the payment terms imposed preclude or prohibit the government from enforcing the unpaid balance of the restitution or monetary penalties imposed herein.

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

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

 - Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
 - 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

UNITED STATES OF AMERICA §
§
V. § NO. 4:21CR253
§ (Judge Mazzant)
KINGSLEY ITA §

DEFENDANT'S NOTICE OF APPEAL

Pursuant to the Defendant's request and the holding in United States v. Guerra, 94 F.3d 989 (5th Cir.1996)(holding that defense counsel's failure to file direct appeal as of right from conviction despite defendant's request to do so constituted ineffective assistance of counsel), notice is hereby given that Defendant in the above numbered and styled cause, hereby appeals to the United States Court of Appeals for the 5th Circuit from the Judgment in a Criminal Case and sentence entered in this action on the 20th of June 2024

Dated this the 27th day of June 2024.

Respectfully submitted,

/s/Doug Schopmeyer
DOUG SCHOPMEYER
Assistant Federal Defender
Eastern District of Texas
600 E. Taylor, Suite 4000
(903) 892-4448
FAX: (903) 892-4808
State Bar Number: 17806780

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March 2024, a true and correct copy of the foregoing Defendant's NOTICE OF APPEAL was delivered to:

Heather Rattan
Assistant United States Attorney
101 E. Park Blvd, Suite 500
Plano, Texas 75074

/s/Doug Schopmeyer
DOUG SCHOPMEYER
Attorney for Defendant