

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVANTAE LONDON,
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

J. Dennis Hester
Counsel of Record
4801 Woodway Drive, Suite 300
Houston, Texas 77056
Tel. 325-212-8272
dennis_hester@outlook.com

QUESTIONS PRESENTED

In the decision below, the court of appeals held that a plea agreement's general appeal waiver that does not address the consecutive nature of a sentence bars such a challenge. The circuits are divided on this issue. The court also declined to consider whether a "clear and nonharmless" error in the Sentencing Guideline calculation may result in a miscarriage of justice that sets aside an appeal waiver.

The questions presented are:

1. Whether a general appeal waiver that does not mention the right to challenge the consecutive nature of a sentence bars such a challenge.
2. Whether a "clear and nonharmless" error in calculating the Sentencing Guidelines range may constitute a miscarriage of justice sufficient to overcome an appeal waiver.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b)(i) counsel states that the parties to this case in the United States Court of Appeals for the Fifth Circuit are Davantae London and the United States of America. No stock ticker symbols are associated with the parties.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

London v. United States, 25-6850 (U.S. Sup. Ct) (judgment vacated)

United States v. London, No. 25-20102 (5th Cir.) (appeal dismissed).

United States v. London, No. 4:20-CR-154-1 (S.D. Tex).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Davantae London petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's first order dismissing this case is unreported. Pet. App. 1a. The Fifth Circuit's second order dismissing this case, Pet.App. 2a-3a, is reported at 186 F.4th 884.

JURISDICTION

The Fifth Circuit entered a judgment on August 21, 2026. Pet. App. 2a. The deadline to file a petition for writ of certiorari is November 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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" U.S. CONST. AM. V.

STATEMENT OF THE CASE

A. District Court Proceedings.

On March 4, 2020, while serving a 10-year state sentence based on a Texas robbery conviction, London was federally indicted in the United States District Court for the Southern District of Texas. C.A. ROA.18. A superseding indictment

charged London with eight counts of robbery (Counts 1, 2, 4, 5, 7, 9, 10, and 12); three counts of brandishing a firearm in connection with a robbery (Counts 3, 11, and 13); and two counts of discharging a firearm in connection with a robbery (Counts 6 and 8). ROA.92-101.

London entered into a plea agreement pleading guilty to two counts of robbery and two counts of brandishing a firearm. C.A. ROA.216. The plea agreement contained an appeal waiver, which stated:

Defendant is aware that Title 28, United States Code, section 1291, and Title 18, United States Code, section 3742, afford a defendant the right to appeal the conviction and sentence imposed. . . . Defendant knowingly and voluntarily waives the right to appeal . . . the conviction and sentence, except that Defendant does not waive the right to raise a claim of ineffective assistance of counsel on direct appeal

Pet.App. 6a-7a.

Prior to sentencing, a Presentence Investigation Report (PSR) was issued. The PSR recommended that London's federal sentence run consecutively to his ongoing term of state incarceration. C.A. ROA. 388 (PSR ¶ 85). London objected, asserting that USSG § 5G1.3(b) required concurrent sentences because the federal conviction was "relevant conduct" to the state "term of imprisonment." C.A. ROA. 422-23. London highlighted that the 10-year state sentence was imposed because his state probation was revoked based on the October 2019 robbery to which he pleaded guilty in the federal case. *See* C.A. ROA.382 (PSR ¶ 55). Thus, although the original

sentence of state probation was for an unrelated robbery, that term of state probation was revoked, and London’s underlying “term of [state] imprisonment,” was based on the federal robbery conduct. C.A. ROA. 383 (PSR ¶ 55); USSG § 5G1.3(b) (requiring a concurrent sentence where the defendant is serving a “term of imprisonment” for another offense that is relevant conduct).

At sentencing, the district court agreed that it was “clear from the facts” that London’s state probation was revoked because of one of the federal robberies. C.A. ROA. 344. Nonetheless, the court overruled the defense’s objection because the *original* state case—for which London was placed on probation—was for a different robbery. C.A. ROA. 344-45. It therefore applied USSG § 5G1.3(d), which permits imposition of a consecutive sentence. On the two robbery counts, the court imposed a total sentence of 20 months to run consecutive to London’s ongoing state sentence. C.A. ROA.359.

The court also imposed the mandatory minimum consecutive sentence of 84 months for each brandishing a firearm conviction under 18 U.S.C. § 924(c). C.A. ROA. 360. The total term of imprisonment, therefore, was 188 months, which was imposed consecutively to London’s undischarged state sentence. C.A. ROA. 360-61.

B. Appeal Proceedings.

London appealed challenging the consecutive nature of the district court’s 20-month sentence.¹ The appeal was dismissed based on the appeal waiver in the plea agreement. Pet.App. 1a. London then filed a petition for writ of certiorari in this Court. This Court granted London’s petition, vacated the judgment, and remanded this case to the appellate court for further consideration in light of *Hunter v. United States*, 608 U.S. 713, 727 (2026)—where this Court held that an appeal waiver may be set aside if it results in a miscarriage of justice. *See London v. United States*, No. 25-6850, 2026 WL 1854988 (June 29, 2026).

On remand, the Fifth Circuit ordered briefing addressing *Hunter*. Then the court dismissed the appeal finding that London’s case involved a “run-of-the-mill challenge” to the Guideline calculation and that enforcement of the appeal waiver would not result in a miscarriage of justice. Pet.App. 3a.

¹ London did not challenge the consecutive nature of the 18 U.S.C. § 924(c) sentences, as those were required to be imposed consecutively to any other sentence, including to a state sentence. *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

REASONS TO GRANT THE PETITION

A. The Circuits are split on whether a general appeal waiver bars a challenge to the consecutive nature of a sentence.

Question one presents an entrenched circuit split over whether a defendant's general waiver of the right to appeal a sentence also waives the right to challenge the sentence's consecutive nature. U.S. SUP. CT. R. 10(a).

This "important matter" is squarely presented in this case. U.S. SUP. CT. R. 10(a). London challenged the consecutive nature of the sentence, both in district court and on appeal. In the court of appeals, he argued that the general appeal waiver did not cover his challenge to the consecutive nature of the sentence and cited cases on his side of the circuit split. *United States v. London*, No. 25-20102 (5th Cir.), Appellant's Br. (D.E. 38) at 10; Resp. to Mtn to Dismiss (D.E. 43) at 2. The Fifth Circuit has now twice dismissed the appeal based on the appeal waiver. Pet.App. 1a, 3a. The appeal waiver in this case is general in nature and does not address the consecutive nature of the sentence. Pet. App. 6a-7a. It states only that Mr. London "knowingly and voluntarily waives the right to appeal . . . the conviction and sentence" Pet.App. 7a. This issue is squarely presented.

The Second and First Circuits are on one side of the circuit split, holding that a general waiver of appeal does not prohibit a challenge to the consecutive nature of a sentence. *United States v. Williams*, 260 F.3d 160, 164-65 (2d Cir. 2001); *United*

States v. Rivera-Santiago, 834 F. App'x 630, 632 (2d Cir. 2020) (collecting cases); *United States v. Santiago-Burgos*, 750 F.3d 19, 23 (1st Cir. 2014).

On the other side, the Third, Fifth, Seventh, Tenth, and D.C. Circuits hold that, unless the consecutive nature of the sentence is specifically exempted from the waiver, a general appeal waiver bars such a challenge. *See United States v. Banks*, 743 F.3d 56, 59 (3d Cir. 2014); *United States v. Ortiz*, 784 F. App'x 285, 286 (5th Cir. 2019) (unpublished); *United States v. Lacy*, 813 F.3d 654, 657 (7th Cir. 2016); *United States v. Belcher*, 637 F. App'x. 515, 516–17 (10th Cir. 2016) (unpublished); *United States v. Jackson*, 26 F.4th 994, 1000 (D.C. Cir. 2022).

A comparison of two cases from conflicting circuits shows the entrenchment of the split. The D.C. Circuit has stated that an appeal waiver that generally addresses the length of the sentence waives a challenge to the consecutive nature of the sentence because, “whether a sentence runs consecutively or concurrently to another sentence is inherently determinative of the duration of that sentence.” *Jackson*, 26 F.4th at 1000. In direct conflict, the Second Circuit holds that a defendant’s waiver of his right to appeal the “length of his sentence” does not waive such a challenge. *United States v. Stearns*, 479 F.3d 175, 178 (2d Cir. 2007).

The Sixth Circuit takes a different approach. *See United States v. Callier*, 565 F. App'x 423, 425 (6th Cir. 2014) (unpublished) (discussing various cases). Like the First and Second Circuits, a general waiver that does not address the consecutive

nature of a sentence does not prohibit such a challenge. *Id.* (discussing *United States v. Bowman*, 634 F.3d 357 (6th Cir. 2011)). But if the waiver refers to 18 U.S.C. § 3742, which provides for the right to appeal a sentence, the challenge is waived. *Callier*, 565 F. App'x at 425 (discussing *United States v. Darby*, 549 Fed.App'x. 499, 500–01 (6th Cir. 2014)).

These varying approaches call for intervention by this Court. The question presented is a recurring and “important matter,” U.S. SUP. CT. R. 10(a), because 97.7% of federal criminal cases are resolved by guilty plea. U.S. SENT. COMM’N, *Sourcebook of Federal Sentencing Statistics* (2025) at Table 11. In 2025, 65,099 out of 66,662 federal criminal cases were resolved by a guilty plea. *Id.* And there is little doubt that many, if not most, of those cases involved a plea agreement. *See* USSG Ch. 1, Pt. A (stating “many of the[] cases [resolved by a guilty plea] involve some form of plea agreement”); *Missouri v. Frye*, 566 U.S. 134, 143 (2012). There is, furthermore, little doubt that most plea agreements contain appeal waivers. Such waivers have “become the norm” in federal criminal cases. *Cook v. United States*, 111 F.4th 237, 254 (2d Cir. 2024) (Robinson, J., dissenting from denial of reh’g en banc). A nationwide study from 2005 found that 65.2% of defendants who entered plea agreements waived appellate rights. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 231 (2005). “There is no reason to suspect that these numbers would be lower today.” *Cook*, 111

F.4th at 254 (Robinson, J., dissenting). Appeal waivers, therefore, are involved in tens of thousands of criminal cases each year. This petition should be granted to resolve the circuit split.

B. The petition should be granted to clarify that “clear and nonharmless” Sentencing Guideline errors can result in a miscarriage of justice.

Second, this petition should be granted because the Fifth Circuit “decided an important federal question in a way that conflicts with relevant decisions of this Court.” SUP. CT. R. 10(c). This Court recently overruled Fifth Circuit precedent that refused to recognize a “miscarriage of justice” exception to the enforcement of appeal waivers. *Hunter v. United States*, 608 U.S. 713, 726-27 (2026). Now, an appeal waiver should be set aside if it results in a miscarriage of justice, meaning a defect that would bring the judicial system into disrepute. *Id.* at 727. “[S]tandard-fare errors” do not cancel an appeal waiver, *id.* at 727, but a sentence that is imposed without “minimum of civilized procedure,” such as when the judge refuses “to hold a hearing consonant with basic principles of law” results in a miscarriage of justice, *id.* at 728. Justice Gorsuch, joined by Justice Sotomayor and Justice Jackson, explained in *Hunter* that “a *plain and nonharmless* error in calculating an advisory [sentencing] guidelines range,” may meet that standard. *Id.* at 740 (Gorsuch, J., concurring) (emphasis added). This case involves such an error.

First, the error was plain. London's state probation was revoked based on the same conduct one of the federal convictions. And USSG § 5G1.3(b) plainly requires a concurrent sentence to "a term of imprisonment [that] resulted from another offense that is relevant conduct to the instant offense of conviction." USSG § 5G1.3(b). The district court recognized that the conduct that caused London's state probation to be revoked resulting in the 10-year state sentence was the same as one of the federal convictions. C.A. ROA 344. Section 5G1.3(b) plainly required a concurrent sentence. *See United States v. Domingue*, 413 F. App'x 680, 682 (5th Cir. 2010).

Second, the error was harmful. It increased Mr. London's sentence by 20 months of incarceration, thereby affecting his substantial rights. FED. R. CRIM. P. 52(a). A Guideline error that results in *any* additional jail time "is significant" and will usually meet even the plain error standard of review for harm. *See Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018). It therefore meets the lower bar to satisfy harmless error review. Mr. London's total term of incarceration should have been 20 months lower.

The court of appeals did not consider whether the Guideline error in this case would satisfy the "plain and nonharmless" standard. Pet.App. 2a-3a. Instead, it characterized London's challenge as "run-of-the-mill" and implied that Guideline errors can never result in a miscarriage of justice. Pet.App. 3a. Other courts,

moreover, have considered Justice Gorsuch’s concurring opinion, but refused to apply it to a Guideline issue—even suggesting that the concurrence is inconsistent with *Hunter*. See e.g. *United States v. Matos*, —F.4th—, 2026 WL 2339567, at *6 n.6 (2d Cir. Aug. 13, 2026). But as Justice Gorsuch explained, a “plain and nonharmless” error in the Guideline calculation may cancel an appeal waiver under *Hunter*’s “miscarriage of justice” standard. *Hunter*, 608 U.S. at 740 (Gorsuch, J., concurring). Courts are already departing from *Hunter* on this issue. The petition should be granted to correct this deviation.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Dennis Hester

J. Dennis Hester

Counsel of Record

4801 Woodway Drive, Suite 300

Houston, Texas 77056

Tel. 325-212-8272

dennis_hester@outlook.com