

# United States Court of Appeals for the Fifth Circuit

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No. 25-11227

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United States Court of Appeals  
Fifth Circuit

**FILED**

August 27, 2026

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

KYLE LAMAR WEST,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 5:22-CR-37-1

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## PUBLISHED ORDER

Before SOUTHWICK, HIGGINSON, and OLDHAM, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellee's opposed motion to dismiss the appeal is carried with the case.

IT IS FURTHER ORDERED that Appellee's alternative motion for an extension of thirty (30) days from denial of motion to dismiss to file an Appellee's brief is GRANTED.

STEPHEN A. HIGGINSON, *Circuit Judge*, concurring:

Though the matter before us is simply an order carrying the government's motion to dismiss with the case to allow full briefing, I write separately to make several points.

First, I continue to believe that we were correct that parties in criminal cases cannot contract away our court's jurisdiction. *See United States v. West*, 138 F.4th 357, 358–62 (5th Cir. 2025) (Higginson, J., concurring in the denial of rehearing en banc).

Second, I am appreciative that what I thought before *did* need en banc clarification—confirming a miscarriage exception does apply to appeal waivers—now has been confirmed by the Supreme Court. *See Hunter v. United States*, 146 S. Ct. 1702, 1708 (2026) (“[A]n agreement not to appeal a sentence is unenforceable when it would result in a miscarriage of justice.”).

Those were my two principal concerns the last time around—the first, rightly decided by us; the second, rightly decided by the Supreme Court.

As for the instant appeal, it remains true that West pleaded guilty to a horrendous crime, which is not being challenged. Instead, our court now has before it a fifty-plus page record supporting the district court's restitution order, including evidence and analysis required by *Paroline*, as well as insights from the appointment of a guardian ad litem for the child victim. On limited remand, the district court conducted a restitution hearing, received evidence, and, in the end, ordered considerably more in restitution to the child victim. *See Paroline v. United States*, 572 U.S. 434 (2014). After the original plea agreement, West had been ordered to pay the child victim \$6,000; now, after appellate correction and remand, the district judge has ordered West to pay \$372,200.00 to the child victim. In other words, if this re-sentencing stands, it is the consequence of pursuing an appeal, despite an appeal waiver, so that our court applies controlling law, regardless of how the government and

defense counsel (but sometimes not victims) choose to truncate criminal proceedings submitted for resolution by federal courts, here including through an appeal waiver.

For good reason, appeal waivers are vital parts of plea agreements, applied every day by our court. *West*, 138 F.4th at 359. But just as the government may choose not to enforce them, courts can too. In this case, we leave further assessment of the appeal waiver to later, considered resolution, after full adversary briefing, both because *Hunter* is an intervening, corrective decision and also because our earlier appellate duty—which members of our court opposed as a windfall for West—apparently has resulted in a 6,200% increase in restitution the district court determined the law requires West to pay his child victim. This re-sentencing too, as before, is subject to review and this interim order does not limit whether and how that review proceeds.

ANDREW S. OLDHAM, *Circuit Judge*, dissenting:

As I explained last year, it is a travesty that our court refused to enforce the appeal waiver in this case. *See United States v. West*, 138 F.4th 357, 361–62 (5th Cir. 2025) (OLDHAM, J., dissenting from the denial of rehearing en banc). The majority again refuses to do it today. In doing so, it needlessly prolongs multi-year appellate proceedings that never should have been allowed in the first place.

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This entire sordid ordeal arises from Kyle Lamar West’s violent sexual assault of a 10-year-old and a 3-year-old. He also produced at least 100 photographs and 4 videos of child pornography. West pleaded guilty to his horrendous crimes and agreed to waive any right to appeal. *Id.* at 361. The district judge in this case accepted West’s plea and lawfully sentenced the sexual predator. *Ibid.* (discussing the district court proceedings).

After expressly waiving his right to appeal, West appealed anyway. Inexplicably, our court allowed it. *Id.* at 362. Why? Because the district judge purportedly “exceeded the statutory maximum” by imposing insufficient restitution. *Id.* at 361. You read that correctly: our court said the sentence was too high by being too low. *Id.* at 361–62. Lewis Carroll would blush.

On remand, the esteemed district court sentenced West again and dutifully increased the restitution award to \$372,000. It is unclear how this helps West’s victims because he’ll be in prison and unable to pay one penny for the next 60 years. But in any event, that should’ve been the second end of this case.

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Alas. Having “won” his first waiver-barred appeal by saddling his client with an even stiffer restitution award, West’s attorney decided to press

his “luck” and appeal a second time. But this time defense counsel’s theory was even more exotic: He contended that West’s plea agreement had penumbras, formed by emanations, that included an unwritten yet “implied covenant of good faith and fair dealing.” West Opp. at 1. Whatever one might’ve thought about West’s first appeal—including whether he “won” by getting a harsher sentence—this appeal is frivolous.

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Plea agreements are understandably controversial, and they can be abused by overzealous prosecutors. *See Hunter v. United States*, 146 S. Ct. 1702, 1715 (2026) (GORSUCH, J., concurring). But this one is a model of restraint. The Government charged West with only seven counts, ROA.14–15, and it entered a plea agreement that capped West’s prison sentence at 60 years, ROA.198–99. Both of these significantly understated West’s criminality and under-punished him for his crimes. The least that the People of the United States could get from this deal is finality. Justice delayed is justice denied.

I respectfully dissent.