

**NONPRECEDENTIAL DISPOSITION**

To be cited only in accordance with FED. R. APP. P. 32.1

**United States Court of Appeals**

**For the Seventh Circuit  
Chicago, Illinois 60604**

Argued January 25, 2023  
Decided February 28, 2023

**Before**

DIANE S. SYKES, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2058

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

*v.*

JOHNNY KIMBLE,  
*Defendant-Appellant.*

Appeal from the United States District  
Court for the Northern District of Illinois,  
Eastern Division.

No. 1:20-CR-00619(1)

Charles R. Norgle,  
*Judge.*

**ORDER**

Johnny Kimble was arrested on an Illinois charge of unlawfully possessing a firearm as a felon. He spent time in state pretrial custody before being remanded to federal custody following his indictment for the counterpart federal crime. *See* 18 U.S.C. § 922(g)(1). The state case was eventually dismissed, and Kimble pleaded guilty to the federal charge.

In his written sentencing argument, Kimble asked the district judge to give him “credit” for the time he spent in state custody by imposing a commensurately lower sentence. But he did not press this argument at sentencing—raising it only in passing, in a single sentence—and the judge did not address it. Instead, the judge discussed Kimble’s other arguments in mitigation and imposed a 51-month sentence, the bottom of the Sentencing Guidelines range.

Kimble now argues that the judge committed procedural error by failing to address his request for a lower sentence to account for his time in state custody. We reject this argument and affirm the judgment. Because this was not a principal argument in mitigation, the judge was not required to discuss it.

### I. Background

In October 2019 Kimble was arrested and charged in Cook County Circuit Court with unlawfully possessing a firearm as a felon. He was released on bond, and ten months later—on August 16, 2020—he was again caught with a gun as he fled from Chicago police who were responding to the scene of a reported shooting. For this new conduct, Kimble was again charged in Cook County Circuit Court with unlawfully possessing a firearm as a felon. He remained in state custody while both state charges were pending. He would eventually plead guilty to the first charge, and the second one was dismissed.

Meanwhile, based on the August 2020 incident (the second of the two), Kimble was indicted by a federal grand jury for possessing a firearm as a felon in violation of § 922(g)(1). On January 8, 2021, he was brought to federal court for arraignment on a writ of *habeas corpus ad prosequendum*. At that point he was remanded to federal custody.

Kimble eventually pleaded guilty to the federal charge, and his attorney submitted a written sentencing argument focusing mainly on his difficult childhood experiences. The sentencing memorandum described Kimble’s mother’s death in a car accident; his father’s absence because of drug addiction; his battle with pediatric leukemia, for which he had to undergo treatment alone because of his parents’ absence; his learning disability and subsequent expulsion from school; and the violent west Chicago neighborhood in which he grew up. Relevant to this appeal, the memorandum also alluded to the time Kimble spent in state pretrial detention. On the last two pages of the 15-page document, counsel asked that Kimble’s sentence account for his time in state pretrial custody because the federal Bureau of Prisons would credit only his time in federal custody.

At sentencing the judge adopted the calculation of the Guidelines sentencing range—51 to 63 months in prison—as recommended in the presentence report. The government argued for a within-Guidelines sentence but did not make a more specific recommendation. Kimble’s attorney argued for a below-Guidelines sentence of 35 months, focusing her remarks almost entirely on his childhood traumas as described in the sentencing memorandum. In a single sentence at the end of her argument, she asked the judge to give Kimble “credit” for (by her count) the 145 days he spent in state pretrial detention before he was transferred to federal custody. In his allocution Kimble likewise focused on the deprivations he had suffered growing up.

The judge settled on a sentence of 51 months in prison, the bottom of the Guidelines range. After noting Kimble’s difficult background, the judge balanced it against his long criminal history and the insufficient deterrent effect of his prior sentences. The judge did not address Kimble’s request for credit for the time he spent in state pretrial custody. His only discussion of sentence credit concerned the time Kimble spent in federal custody after being arraigned and remanded on the § 922(g)(1) charge: “And, of course, you will be given credit for all time served in federal custody. But that will be determined ... by the Bureau of Prisons.”

At the conclusion of the hearing—long after the imposition of the sentence and explanation of supervised-release conditions and appeal rights— the judge turned to Kimble’s attorney and asked: “[H]ave I missed anything?” In response counsel asked the judge to run the sentence concurrently with Kimble’s state sentence and recommend that he serve it at a facility as close to Chicago as possible. She did not identify anything the judge had missed. More specifically, she did not mention the issue of “credit” for Kimble’s time in state custody.

## II. Analysis

Kimble’s sole argument on appeal is that the judge committed procedural error by ignoring his request for a lower sentence to account for his time in state pretrial detention before he was remanded into federal custody. Kimble contends that the amount of time at issue is 145 days; we accept this calculation without vouching for its accuracy.

As a preliminary matter, the government contends that Kimble waived this argument by not raising it in response to the judge’s inquiry at the end of the hearing asking whether he had “missed anything.” As a matter of best practices, we have encouraged judges to specifically ask defense attorneys “whether they are satisfied that

the [judge] has addressed their main arguments in mitigation”; an affirmative answer waives an appellate claim that the judge failed to address a mitigation argument. *United States v. Garcia-Segura*, 717 F.3d 566, 569 (7th Cir. 2013).

The government concedes that the judge’s question—asking Kimble’s counsel if he had “missed anything”—is not the normal formulation we encourage. Still, the government maintains that the judge’s imprecise exchange with defense counsel should nonetheless result in waiver because Kimble’s attorney responded by raising other aspects of the sentence without mentioning Kimble’s time in state pretrial custody. Counsel’s response, the government continues, shows that she understood the judge’s inquiry to be more than “perfunctory,” and so her failure to raise the issue of state custody should be construed as intentional.

We have held that a negative response to a judge’s generic wrap-up question at sentencing is ordinarily not construed as a waiver. *United States v. Hancock*, 825 F.3d 340, 343–44 (7th Cir. 2016); *United States v. Morris*, 775 F.3d 882, 886 (7th Cir. 2015). Waiver is the intentional surrender of a known right, and nonspecific concluding questions from the judge—like “anything else?”—are normally too general to trigger waiver. *Hancock*, 825 F.3d at 343–44. When we have found waiver in the absence of the *Garcia-Segura* formulation, it has been when the judge’s more general question came directly on the heels of a discussion of mitigation arguments. See *United States v. Patel*, 921 F.3d 663, 671 n.4 (7th Cir. 2019). In that situation a judge’s general question can reasonably be understood to “direct the defendant to [a] specific issue.” *Hancock*, 825 F.3d at 343.

Here, the judge’s concluding question—“have I missed anything”—came at the very end of the sentencing hearing, quite removed from his consideration of the parties’ sentencing arguments and explanation of the sentence. Although Kimble’s attorney took the opportunity to respond and did not mention the issue now raised on appeal, we’re not inclined to find the issue waived given the absence of the approach specifically approved in *Garcia-Segura*.

Moving to the merits, Kimble argues that the judge committed procedural error by not addressing his argument for “credit” for the time he spent in state custody. A judge need not specifically address every one of a defendant’s sentencing arguments but must address the “principal” arguments in mitigation. *United States v. Sanchez*, 989 F.3d 523, 540 (7th Cir. 2021); *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). Deciding whether a mitigation argument ranks as “principal” requires a contextual inquiry, and the amount of time defense counsel devoted to one argument relative to others at the sentencing hearing is a key (although not dispositive) factor. See

*United States v. Stephens*, 986 F.3d 1004, 1010–11 (7th Cir. 2021). A mitigation argument is less likely to rank as “principal” if the defense attorney doesn’t explore it in any substantial way at the sentencing hearing; this is so even if the issue was developed in the defendant’s sentencing memorandum. *Id.* at 1011.

Kimble’s mitigation argument regarding “credit” for state pretrial detention was not a principal one because his attorney did not discuss it in any meaningful way during the sentencing hearing. True, his attorney did develop the argument in two pages of his 15-page sentencing memorandum. But she devoted nearly all of her presentation at the sentencing hearing to other mitigation arguments—namely, Kimble’s significant childhood traumas, including his parents’ absence through death or incarceration, his learning disability and related bullying, and his battle with childhood leukemia. She raised the issue of Kimble’s state pretrial custody only as an afterthought, in a single sentence at the very end of her argument: “[W]e would ask for a sentence of 35 months, with credit for the 145 days that he’s spent in state custody for this case before he was brought over to federal custody.”

This cursory sentence failed to convey the true gist of the argument, much less meaningfully develop it. Counsel used the word “credit,” but that was somewhat misleading. As the judge properly noted, the Bureau of Prisons (not the sentencing judge) calculates and awards credit for the time the defendant spent in custody prior to the commencement of the sentence. 18 U.S.C. § 3585(b); *United States v. Wilson*, 503 U.S. 329, 333 (1992). And Kimble’s argument wasn’t about sentence “credit” at all; as counsel explained at oral argument in this court, it was an argument for a lower sentence to account for the time he spent in state pretrial custody before the transfer to federal custody. The judge had the discretion to consider this factor. *United States v. Whitlow*, 740 F.3d 433, 440 (7th Cir. 2014) (explaining that judges have the discretion to impose a lower sentence based on time in pretrial custody that the Bureau of Prisons will not credit). The problem is that this distinction was not made clear to the judge—either in the sentencing memorandum or at the sentencing hearing.

Given this passing and undeveloped treatment of the issue, the judge understandably passed over it, focusing instead on the mitigation arguments counsel *did* develop at sentencing. In short, “it is hard to fault the [judge] for not discussing ... a topic [that Kimble] scarcely mentioned in [the] hearing.” *Stephens*, 986 F.3d at 1011.

We reached a similar conclusion in a case with nearly identical facts, albeit in a nonprecedential order. In *United States v. Ochoa-Montano*, the defense attorney raised mitigation arguments about the defendant’s family circumstances and then sought a

lower sentence to account for the defendant's time in state pretrial detention. 666 F. App'x 554, 556–57 (7th Cir. 2016). On appeal the defendant argued that the judge committed procedural error by failing to consider his argument about time spent in state custody. *Id.* at 558. We rejected that contention because the defendant barely addressed the state-custody issue at sentencing—raising it in just two sentences—and the context showed that the thrust of his sentencing argument concerned his family background. *See id.* The same is true here. Because Kimble's argument about his time in state custody was not a principal argument in mitigation, the judge was not required to specifically address it.

AFFIRMED