

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP A. MEARING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To: Chief Justice John G. Roberts, Jr., Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

1. Pursuant to this Court's Rules 13.5 and 22, Applicant Philip A. Mearing requests an extension of thirty (30) days to file a petition for a writ of certiorari in this case. The petition will challenge the decision of the Fourth Circuit in *United States v. Mearing*, 4th Cir. No. 18-4026 (May 29, 2018), a copy of which is attached. In support of this application, Applicant states:

2. The Fourth Circuit issued its opinion on May 29, 2018. Without an extension, Applicant's petition for a writ of certiorari would be due on August 27, 2018. With the requested extension, the petition would be due on September 26, 2018. This Court's jurisdiction will be based on 28 U.S.C. § 1254(1). In accordance with Supreme Court Rule 13.5, Applicant is filing this application at least ten days before the current due date.

3. This case is a serious candidate for review. It involves two important, related issues regarding the scope and enforceability of appellate waivers commonly included in plea agreements: (1) whether a defendant's waiver of the right to appeal his "sentence" covers an appeal of a restitution order, and (2) whether a defendant's waiver of the right to appeal an order of restitution or forfeiture is enforceable with respect to claims that the amount of restitution or forfeiture ordered exceeds statutory limits.

Several courts of appeals, including the Fourth Circuit, have acknowledged the existence of a circuit conflict on the first issue—whether a defendant’s waiver of the right to appeal his “sentence” bars a restitution appeal. *See United States v. Cohen*, 459 F.3d 490, 497 (4th Cir. 2006); *United States v. Perez*, 514 F.3d 296, 299 & n.2 (3d Cir. 2007); *United States v. Salas-Fernandez*, 620 F.3d 45, 47-48 (1st Cir. 2010); *United States v. Worden*, 6 F.3d 499, 503-04 (7th Cir. 2011); *In re Sealed Case*, 702 F.3d 59, 65 (D.C. Cir. 2012). Five circuits hold that a defendant’s waiver of the right to appeal his “sentence” does not reach restitution, at least where, as here, the plea agreement allows the defendant to claim on appeal that his sentence exceeds the “statutory maximum.” *See United States v. Schulte*, 436 F.3d 849, 850 (8th Cir. 2006); *United States v. Oladimeji*, 463 F.3d 152, 156-57 (2d Cir. 2006); *United States v. Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *In re Sealed Case*, 702 F.3d at 63-65. By contrast, the Fourth Circuit and three others hold that a defendant’s waiver of the right to appeal his “sentence” includes restitution. *See App. 2; Cohen*, 459 F.3d at 497; *Perez*, 514 F.3d at 298; *Worden*, 646 F.3d at 502; *United States v. Grundy*, 844 F.3d 613, 615 (6th Cir. 2016).

There is also widespread disagreement on the second question—whether an appeal waiver can be enforced to prevent a defendant from advancing a claim that the amount of restitution or forfeiture is too high. Three Circuits hold that an appeal waiver is unenforceable against claims that the amount of restitution ordered is too high, with the Ninth Circuit permitting any such claim to go forward,

and the Seventh and Tenth Circuits holding that claims of legal error in the court's calculation of restitution survive. *See United States v. Gordon*, 393 F.3d 1044, 1050 (9th Cir. 2004); *United States v. Litos*, 847 F.3d 906, 911 (7th Cir. 2017); *United States v. Gordon*, 480 F.3d 1205, 1210-11 (10th Cir. 2007). On the other side of the divide, the Fourth, Sixth, and Eighth Circuits hold that appeal waivers are enforceable against claims of legal or factual error in calculating the amount of restitution. App. 4; *Cohen*, 459 F.3d at 498, 500; *Grundy*, 844 F.3d at 617; *Schulte*, 436 F.3d at 850-51.

4. The questions about the scope and enforceability of appellate waivers raised in this case are important and recurring, as the large number of decisions grappling with them confirms. The vast majority of criminal cases are resolved by plea agreements, and such agreements regularly include appeal waiver provisions. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005). Clear, uniform rules regarding the effect of waiver provisions would improve predictability for both defendants and the government in plea negotiations.

5. This case presents an ideal vehicle for this Court to resolve the conflicts described above. The waiver language in Applicant's plea agreement is typical of those in the federal system. And the facts of this case place the consequences of the Fourth Circuit's waiver jurisprudence in stark relief. Applicant claims on appeal that the district court's legal errors resulted in the court imposing a restitution order of over \$15 million, when the proper amount should have been less than \$1

million, and a forfeiture order of over \$13 million, when the proper amount should have been less than \$4 million. All told, the legality of roughly \$23 million in penalties is at stake. In addition, both questions presented are outcome-determinative here.

6. This application for a 30-day extension is not filed for purposes of delay. The extension is needed so that undersigned counsel may fully familiarize themselves with the record, the decisions below, and the relevant case law. Mr. Fisher also has primary responsibility for several other matters currently pending before this Court, including *Jam v. International Finance Corp.* (No. 17-1011), in which the brief on the merits was just recently filed, and *United States v. Sims* (No. 17-766), in which the brief on the merits is due on August 14, 2018. The time sought here is necessary for counsel to adequately prepare Applicant's petition for a writ of certiorari.

For these reasons, Applicant requests entry of an order extending his time to file a petition for a writ of certiorari until September 26, 2018.

Respectfully submitted,

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Dated: August 7, 2018

Appendix A

FILED: May 29, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4026
(2:17-cr-00094-AWA-DEM-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PHILIP A. MEARING,

Defendant - Appellant.

O R D E R

Philip A. Mearing seeks to appeal the forfeiture and restitution orders imposed by the district court after Mearing pled guilty, pursuant to a written plea agreement, to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 (2012). He contends that the restitution order should be reduced from \$15,413,029.76 to \$870,304.20, and that the forfeiture order should either be vacated for lack of jurisdiction or reduced to \$3,874,635.00, offset by the restitution amount. The Government has moved to dismiss the appeal as barred by Mearing's appeal waiver. Although Mearing does not contest the facial validity of his appeal waiver, he contends that the waiver does

not cover the right to appeal as to restitution and forfeiture, and that even if it did, the restitution and forfeiture orders exceeded the district court's statutory authority and the Government breached the plea agreement. Because we conclude that the issues Mearing seeks to raise on appeal fall squarely within the compass of his knowing and voluntary waiver of appellate rights, we grant the Government's motion to dismiss.

Mearing contends that he did not waive his right to appeal the restitution order because the appeal waiver provision does not specifically mention restitution, the magistrate judge did not explicitly tell him at the Fed. R. Crim. P. 11 hearing that he was waiving his right to appeal as to restitution, and any ambiguity in the plea agreement must be construed against the Government. However, "restitution is [] part of the criminal defendant's sentence" and, "as a general rule, a defendant who has agreed to waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed has waived his right to appeal a restitution order." *United States v. Cohen*, 459 F.3d 490, 496-97 (4th Cir. 2006) (brackets and internal quotation marks omitted). Mearing has not shown that his case is an exception to this general rule. Having been fully assisted by counsel and properly questioned by the district court at the Fed. R. Crim. P. 11 hearing, Mearing pled guilty and knowingly and voluntarily waived his right to appeal his sentence. He therefore waived the right to appeal the restitution order imposed as part of that sentence.

Mearing also argues that his waiver of the right to appeal the restitution order is unenforceable because the Government breached the provision of the plea agreement in which the parties agreed to litigate the loss amount at sentencing. This argument is

without merit. The Government argued at sentencing that the statement of facts attached to the plea agreement conclusively established a loss amount of \$15,413,029.76. Mearing submitted the written reports of two expert witnesses, who also testified at the sentencing hearing, in support of his argument that the actual loss amount was, at most, \$870,304.20. After hearing all of the evidence and the parties' arguments, the district court concluded that the loss amount was \$15,413,029.76. Mearing contends that by arguing to the district court that the statement of facts established the loss amount, the Government deprived him of the opportunity to litigate the loss amount. But Mearing had a full opportunity to litigate the loss amount, and the district court considered his evidence and arguments. His complaint is not that the Government prevented him from litigating, but that he litigated and lost. The Government did not breach the plea agreement by making an argument that the district court ultimately found persuasive.

Mearing also asserts that the restitution order is not within the scope of the appeal waiver because the order exceeded the district court's statutory authority under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A-3664 (2012). We explained in *Cohen* that

[j]ust as a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute . . . , a defendant could not be said to have waived his right to appellate review of a restitution order imposed when it is not authorized by the [applicable restitution statute]. This is because federal courts do not have the inherent authority to order restitution, but must rely on a statutory source. Because a restitution order that exceeds the authority of the statutory source is no less illegal than a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of restitution orders are similarly outside the scope of a defendant's otherwise valid appeal waiver.

Cohen, 459 F.3d at 497-98 (citations and internal quotation marks omitted).

Mearing does not dispute that MVRA authorized and required the district court to order him to pay restitution to the victim (the Government) in the amount of the loss caused by the offense. *See* 18 U.S.C. §§ 3663A(b)(1)(B)(i), 3664(f)(1). Mearing contends that the district court exceeded its statutory authority because it imposed a restitution amount larger than what Mearing claims was the victim's actual loss amount. Under this reasoning, a defendant could always challenge the district court's determination of the restitution amount even if he had waived the right to appeal his sentence. Mearing's actual argument is rather that the district court committed legal error in determining the restitution amount, and Mearing waived the right to make such arguments on appeal. *See United States v. Thornsberry*, 670 F.3d 532, 539 (4th Cir. 2012) (contrasting "illegal" sentences, which can be appealed even if defendant entered valid appeal waiver, with sentences "imposed in violation of law," which are generally encompassed within valid appeal waiver); *Cohen*, 459 F.3d at 500 ("Because the district court's restitution award was within the scope of its authority under the MVRA, Cohen's challenge to the amount of restitution ordered falls within the scope of the appeal waiver contained in the plea agreement.").

Regarding forfeiture, Mearing first argues that the district court lacked jurisdiction under Fed. R. Crim. P. 32.2 to enter a forfeiture order because the court entered the order after the sentencing hearing. "Criminal forfeiture is part of the defendant's sentence. The procedure used to effectuate criminal forfeiture is set forth in Rule 32.2." *United*

States v. Martin, 662 F.3d 301, 306–07 (4th Cir. 2011) (citation omitted). We held in *Martin* that although Rule 32.2 “required a district court to finalize forfeiture orders at sentencing and include them in a final judgment, . . . missing the deadline set in Rule 32.2 does not deprive a district court of jurisdiction to enter orders of criminal forfeiture so long as the sentencing court makes clear prior to sentencing that it plans to order forfeiture.” *Id.* at 307; *see United States v. Marshall*, 872 F.3d 213, 223 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1274 (2018) (reaffirming that “the timing requirements in Rule 32.2 [are] time-related directives” rather than jurisdictional requirements (brackets and internal quotation marks omitted)).

Mearing correctly points out that, unlike the defendants in *Marshall* and *Martin*, he was not on notice of what the forfeiture amount would be at the time of sentencing, because the amount was disputed. *Id.*; *Martin*, 662 F.3d at 309. However, Mearing knew the amount of forfeiture sought by the Government, and given the extensive language regarding forfeiture in his plea agreement, Mearing cannot credibly argue that he did not know prior to sentencing that the district court would impose forfeiture. Accordingly, the district court retained jurisdiction under Fed. R. Crim. P. 32.2 to enter the forfeiture order.

Mearing’s remaining arguments as to why his appeal of the forfeiture order is not barred by the appeal waiver are similar to his arguments regarding restitution: the appeal waiver does not explicitly mention forfeiture, the Government breached the plea agreement, and the forfeiture order exceeded the district court’s statutory authority. These arguments are similarly without merit as to forfeiture. Forfeiture, like restitution,

is part of a defendant's sentence, *Martin*, 662 F.3d at 306-07, and Mearing's appeal waiver thus encompasses the forfeiture order. Moreover, Mearing's plea agreement includes a separate provision that explicitly and unambiguously waives the right to make any further constitutional or statutory challenges to any forfeiture imposed under the agreement. Mearing's breach argument is as inapposite to forfeiture as it is to restitution: he had the full opportunity to litigate the forfeiture amount, but lost. Finally, although Mearing seeks to challenge the amount of forfeiture as legally erroneous, he has not raised a colorable claim that the order is illegal, such that the claim could potentially fall outside of Mearing's valid and unambiguous appeal waiver.

Mearing knowingly and voluntarily waived his right to appeal his sentence. Because the issues Mearing seeks to raise on appeal fall squarely within the scope of the waiver, we grant the Government's motion to dismiss.

Entered at the direction of the panel: Judge King, Judge Diaz, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk