No. 18-__

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, or under what circumstances, a criminal defendant's waiver in his plea agreement of the right to appeal his "sentence" covers an appeal of an order of restitution.

2. Whether, or under what circumstances, a defendant's waiver of the right to appeal an order of restitution or forfeiture precludes an appeal on the ground that the order exceeds the amount the statutory scheme allows.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip A. Mearing respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals is unreported and reprinted in the Appendix to the Petition ("App.") at 1a-7a. The relevant order of the district court is unpublished and reprinted at App. 8a-17a.

JURISDICTION

The court of appeals issued its decision on May 29, 2018. App. 1a. On August 9, 2018, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including September 26, 2018. *See* No. 18A144. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent provisions in the U.S. Code dealing with restitution and forfeiture are reprinted at App. 30a-35a.

INTRODUCTION

Federal law provides for restitution and forfeiture across a wide array of offenses, from white-collar crime to drug trafficking. It is also increasingly common—indeed, now customary—for plea agreements in cases in which such financial penalties are imposed to provide for a waiver of at least certain aspects of the right to appeal. Yet this Court has never addressed how to construe such waivers or the circumstances under which they are unenforceable.

This case provides that opportunity. It presents two important, related questions, over which the courts of appeals are in open disagreement: (1) whether a defendant's waiver of the right to appeal his "sentence" covers an appeal of a restitution order, and (2) whether a waiver that does reach restitution (or forfeiture) is enforceable with respect to claims that the amount exceeds statutory limits. As a result of these conflicts, plea agreements that contain exactly the same waiver language have divergent effects depending on the circuit in which a defendant was prosecuted. This Court should grant certiorari to resolve these splits of authority and provide much-needed clarity for criminal defendants, the Government, and courts alike.

STATEMENT OF THE CASE

1. In June 2017, petitioner Philip A. Mearing pleaded guilty to one count of a criminal information charging conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371. App. 9a.

a. The conspiracy arose from Mearing's role at Global Services Corporation, a company that provided professional technical support and warehousing services under subcontract to various Department of Defense (DoD) entities. D. Ct. Doc. 9 at 1. Mearing began working for Global in 2002 and eventually became the company's president, chief executive officer, and sole owner. *Id.*

Between 2004 and 2014, Global received and paid over $13.6 million worth of invoices from two companies owned by Kenneth Bricker. D. Ct. Doc. 9 at 2. Global entered the invoices into its accounting records

and "billed or allocated [them to United States government] contracts, either as direct or indirect costs." *Id.* According to the Statement of Facts accompanying the plea agreement, however, the invoices charged at least in part for services that were not actually performed. *Id.* Bricker thus transferred millions of dollars back to Mearing or entities he controlled, less a 5% "commission." *Id.* at 4-5.

b. Mearing's plea agreement explained that among the "penalties" to which his offense of conviction subjected him were "a maximum term of five years of imprisonment" and "a fine of $250,000." App. 18a-19a. The agreement also provided that "the forfeiture of assets is part of the sentence that must be imposed in this case" and that Mearing would pay an amount to be "determined by the court at sentencing." *Id.* 23a-24a; *see also* 18 U.S.C. § 981(a)(1)(C).

In a separate provision, the agreement noted that "restitution is mandatory pursuant to 18 U.S.C. § 3663A." App. 22a. Mearing, therefore, expressly agreed that he would pay "the full amount of the victims' losses." *Id.* But the agreement did not establish that amount. To the contrary, "[t]he parties stipulate[d] and agree[d] to litigate the loss amount and [that] nothing in th[e] agreement foreclose[d] any party from presenting evidence on and arguing any theory regarding loss amount." *Id.* 21a. In other words, the parties agreed that the dollar amounts referenced above had in fact been exchanged between the co-conspirators, but Mearing did not agree that those amounts constituted the Government's "loss."

c. Mearing's plea agreement contains two appeal waiver provisions. In section 5 of the plea agreement,

Mearing "knowingly waive[d] the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatsoever other than an ineffective assistance of counsel claim that is cognizable on direct appeal." App. 21a. In section 11, titled "Waiver of Further Review of Forfeiture," Mearing also "agree[d] to waive all constitutional and statutory challenges to forfeiture in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds." *Id.* 25a. There is no waiver anywhere in the plea agreement that mentions "restitution."

d. At a plea hearing held in June 2017, the magistrate judge confirmed Mearing's understanding that he was waiving his right "to appeal [his] conviction and any sentence imposed upon any ground whatsoever so long as that sentence is within the statutory maximum." D. Ct. Doc. 20 at 19. As a result, the judge explained, Mearing would not be able to "appeal . . . any lawful sentence imposed by the Court." *Id.* The plea colloquy, like the plea agreement, never discussed Mearing's right to appeal an order of "restitution." After satisfying himself that Mearing's plea was knowing and voluntary, the magistrate judge accepted the plea. *Id.* at 23-24; *see* D. Ct. Doc. 11.

2. Several months later, the district court sentenced Mearing to five years in prison. D. Ct. Doc. 41 at 1. The parties also litigated, and the district court determined, the amounts of restitution and forfeiture.

a. The Mandatory Victims Restitution Act (MVRA) requires a defendant to pay the victim the amount of its "loss." 18 U.S.C. § 3663A(b)(1). The concept of "loss" is different from—and often less than—the total "proceeds," or the amount the defendant obtained, in an unlawful scheme. *See United States v. Fair*, 699 F.3d 508, 512-13 (D.C. Cir. 2012). Consequently, in detailed written and oral submissions, Mearing maintained that the Government's losses in the conspiracy (i) should be calculated according only to the amount of the fraudulent invoices that resulted in inflated bills actually being sent to, and paid by, the DoD and (ii) should be offset by the fair market value of the warehousing services Mearing provided in relation to the government contracts at issue. *See id.*; *United States v. Mahmood*, 820 F.3d 177, 195 (5th Cir. 2016) (MVRA requires restitution to be "offset by the value of the services" provided); *United States v. Bane*, 720 F.3d 818, 827-29 (11th Cir. 2013) (same). Mearing submitted expert testimony demonstrating that calculating the loss in that manner would result in an award of $870,304.20. *See* D. Ct. Doc. 40 at 64-65, 80.

The Government argued in response that its loss constituted the amount that the Statement of Facts accompanying the plea agreement established was exchanged between the co-conspirators. According to the Government, Mearing was not entitled to any offset for invoices not resulting in inflated bills nor for the value of services he provided. *See* D. Ct. Doc. 40 at 59.

The district court sided with the Government. It ordered "restitution in the amount" referenced in the Statement of Facts: $13,614,648.56 for the primary

conspiracy, plus $1.8 million for a secondary one, for a total of $15,413,029.76. App. 16a.[1] The district court's order did not explain why it declined to exclude amounts that were never passed on to, or paid by, the Government through inflated bills. Nor did it say why it declined to offset the restitution award by the value of the services Mearing provided.

b. The forfeiture statute the Government invoked, 18 U.S.C. § 981(a)(1)(C), allows forfeiture of any monetary "proceeds" the defendant obtained as a result of wire fraud. *See* D. Ct. Doc. 23 at 3-4, 6-7; App. 23a (plea agreement noting that Mearing must forfeit "property that constitutes the *proceeds* of his offense") (emphasis added). Mearing therefore maintained that forfeiture could not exceed his net gain from his fraud, which was $3,874,635. *See* D. Ct. Doc. 35 at 2. That amount represented the money that Mearing received from the DoD as a result of the fraud, less his "direct costs incurred" in leasing the warehouse space and the 5% commission Bricker retained for himself. *See id.* at 2, 5. The Government responded—in accord with its position regarding restitution—that Mearing should have to forfeit the entire $13.6 million that Global paid to Bricker in relation to the primary conspiracy.

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[1] In the second scheme, Global obtained $1,798,381.20 from a prime contractor, under a prior contract with the Government, for work that had not actually been performed. D. Ct. Doc. 9 at 5-6. Mearing has never disputed that that amount should figure into the restitution calculation. The Government did not seek, and the district court did not order, forfeiture of that sum.

The district court awarded the Government the amount it sought, but based on reasoning the Government never advanced. Citing 21 U.S.C. § 853(a)—which governs forfeitures in drug cases—the court reasoned that a defendant may be required to forfeit not just "proceeds obtained" from criminal activity but also all money used to "facilitate" the offense. App. 14a. The court then observed that this facilitation standard was met because the $13,614,648.56 the Government sought "was transferred and exchanged between the co-conspirators." *Id.*

3. Mearing appealed, and the Fourth Circuit dismissed the appeal.

a. Mearing challenged both the restitution and forfeiture orders as impermissibly high. In particular, Mearing contended that the restitution order exceeded the district court's legal authority because (i) it was based on the amount exchanged between Mearing and Bricker, not how much the victim actually lost; and (ii) it neglected to offset the value of the services Mearing provided. *See* Def. C.A. Br. 16-29.

Mearing also identified legal errors that rendered the forfeiture amount far greater than the "proceeds" Mearing acquired from the fraudulent scheme. *See* Def. C.A. Br. 35-39. Most notably, the district court wrongly based its forfeiture order on the amount of money exchanged between Mearing and Bricker (including money Bricker simply kept), instead of the money obtained from the Government. While the district court suggested *sua sponte* that the full amount exchanged between Mearing and Bricker was forfeitable because it "facilitate[d]" the crime, App. 14a, the

drug-forfeiture statute the court cited for that proposition does not apply to wire fraud cases. *See, e.g.*, *United States v. Carlyle*, 712 F. App'x 862, 864 (11th Cir. 2017).[2] Second, the district court disregarded the directive in 18 U.S.C. § 981(a)(2)(B) to subtract the defendant's "direct costs incurred in providing the goods or services."

b. Without responding to any of Mearing's substantive arguments, the Government filed a motion to dismiss the appeal. The court of appeals granted the motion.

The court of appeals acknowledged that "the appeal waiver [in Mearing's plea agreement] does not specifically mention restitution." App. 2a. But, quoting its prior opinion in *United States v. Cohen*, 459 F.3d 490, 496-97 (4th Cir. 2006), *cert. denied*, 549 U.S. 1182 (2007)—in which the court had chosen sides in a circuit split on the issue—the Fourth Circuit reasoned that a waiver of the right to appeal a "sentence" covers the restitution order because "restitution is part of the criminal defendant's sentence." App. 2a (alterations omitted); *see also Cohen*, 459 F.3d at 497 (laying out then-emerging circuit conflict).

The court of appeals also held that Mearing's appeal waiver was enforceable against his claims that the district court "imposed a restitution amount larger than . . . the victim's actual loss" and a forfeiture amount greater than applicable statutes allow.

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[2] The *procedures* set forth in the drug forfeiture statute, 21 U.S.C. § 853, apply to wire fraud forfeiture proceedings under 18 U.S.C. § 981(a)(1)(C). But the *substantive* provisions of Section 853 do not carry over to non-drug cases.

App. 4a-5a, 6a-7a. The court acknowledged that Mearing's claims sounded in "legal error," as opposed to factual disputes. *Id.* 4a; *see id.* 6a. And it recognized that appeal waivers are unenforceable against "'illegal' sentences." *Id.* 4a-5a. But even though the court had earlier characterized the restitution and forfeiture orders as part of Mearing's sentence, *id.* 2a, 5a, it held that Mearing's claims did not—under Fourth Circuit precedent—allege an illegal sentence, *id.* 4a-5a (citing *Cohen*, 459 F.3d at 500, and *United States v. Thornsbury*, 670 F.3d 532, 539 (4th Cir. 2012)); *see id.* 6a-7a. It was enough to bar Mearing's appeal, the Fourth Circuit declared, that the MVRA and forfeiture statutes authorized the district court to order restitution and forfeiture—even if they did not authorize the *amounts* the district court ordered. *See id.* 4a, 6a-7a.

4. This petition follows.

REASONS FOR GRANTING THE WRIT

Roughly ninety-seven percent of federal criminal defendants plead guilty, and more often than not, the resulting plea agreements contain some form of appellate waiver. Yet the courts of appeals are deeply divided over two frequently recurring questions concerning how such waivers apply to restitution and forfeiture orders. The courts of appeals disagree not only about whether and when a waiver of the right to challenge the defendant's "sentence" encompasses restitution, but also about whether an appellate waiver is unenforceable against claims that an order of restitution or forfeiture exceeds the amount authorized by statute.

This Court should use this case—which cleanly presents both issues in the context of eight-figure, and highly suspect, restitution and forfeiture orders—to resolve these conflicts. All the more so because the Fourth Circuit's overall position cannot possibly be correct. It cannot be, as the Fourth Circuit holds, that restitution is part of a defendant's sentence *and* that the established bar against enforcing appeal waivers against sentences that are higher than statutes allow does not apply to restitution (or forfeiture) orders. Heads I win, tails you lose may be an amusing ploy in backyard games. But it is not an acceptable principle in the criminal justice system.

I. The courts of appeals are deeply divided over the questions presented.

A. The issue regarding the scope of appellate waivers

As numerous courts of appeals (including the Fourth Circuit) have acknowledged, "the circuits are divided" over whether a defendant's waiver in a plea agreement of the right to appeal his "sentence" extends to a restitution appeal. *United States v. Salas-Fernandez*, 620 F.3d 45, 47-48 (1st Cir. 2010); *see also In re Sealed Case*, 702 F.3d 59, 65 (D.C. Cir. 2012); *United States v. Worden*, 646 F.3d 499, 503-04 (7th Cir. 2011); *United States v. Perez*, 514 F.3d 296, 299 & n.2 (3d Cir. 2007); *United States v. Cooper*, 498 F.3d 1156, 1159 (10th Cir. 2007); *United States v. Cohen*, 459 F.3d 490, 497 (4th Cir. 2006), *cert. denied*, 549 U.S. 1182 (2007).

1. Five courts of appeals hold that a defendant's waiver of the right to appeal his "sentence" does not reach restitution, at least in the circumstances here.

a. The Eighth Circuit categorically holds that when a defendant waives the right to appeal his "sentence," an "appeal from [a] restitution order is beyond the scope of the waiver." *United States v. Sistrunk*, 432 F.3d 917, 918 (8th Cir. 2006); *see also United States v. Schulte*, 436 F.3d 849, 850 (8th Cir. 2006) ("A waiver limited to 'whatever sentence is imposed' does not foreclose an appeal of a restitution order under our precedent."). In the Eighth Circuit's view, the word "sentence" in a plea agreement does not encompass restitution. *See Sistrunk*, 432 F.3d at 918.

b. The Second, Fifth, Ninth, and D.C. Circuits hold that, at least under the circumstances here, a waiver of the right to appeal a sentence does not apply to a restitution order.

The Second Circuit holds that where a defendant waives the right to appeal his "sentence" in the event the district court imposes a prison term less than a certain length, a restitution order "is not covered by the applicable appeal-waiver provision." *United States v. Oladimeji,* 463 F.3d 152, 156-57 (2d Cir. 2006). The word "sentence" is "at least ambiguous," the court has reasoned, and when a plea agreement uses it in reference to a "term[] of imprisonment," this usage indicates that it does not also apply to restitution. *Id.* at 157; *see also United States v. Pearson*, 570 F.3d 480, 485 (2d Cir. 2009) (waiver of right to appeal sentence does not cover challenge to legality of restitution amount); *United States v. Ready*, 82 F.3d 551,

554, 560 (2d Cir. 1996) (same). This reasoning applies here: Mearing waived his right to appeal "any sentence within the statutory maximum described above," which was "five years of imprisonment." App. 18a-19a, 21a.

The Fifth and Ninth Circuits have likewise determined that a defendant's waiver of the right to appeal any "sentence" "within the statutory maximum specified above" does not cover the right to appeal restitution. *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *see also United States v. Heslop*, 694 F. App'x 485, 488 (9th Cir. 2017) (allowing appeal of restitution under these circumstances because *Zink* holds that "restitution is separate from the sentence"); *United States v. Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012) (plea agreement that waives the right to appeal the defendant's "sentence" so long as it does not "exce[ed] the statutory maximum" does not cover a claim that restitution order exceeds the actual loss amount); *United States v. Gunselman*, 643 F. App'x 348, 355 n.24 (5th Cir. 2016) (same); *United States v. Sharma*, 703 F.3d 318, 321 n.1 (5th Cir. 2012) (Government concession that such a waiver did not bar appeal raising such claims).

The D.C. Circuit has similarly rejected the Government's argument, respecting a plea agreement materially identical to the one here, that a "waiver of the right to appeal the 'sentence' waives the right to appeal restitution because 'restitution' is necessarily part of a 'sentence.'" *In re Sealed Case*, 702 F.3d at 64-65. Declining to follow "out-of-circuit authority" to the contrary, the D.C. Circuit held that at least where the plea agreement uses the word "sentence" to refer

only to a term of imprisonment and "cites to a defendant's right to appeal a sentence under 18 U.S.C. § 3742," the appeal waiver does not apply to a restitution award. *Id.* at 63-65. Both of those conditions exist here. *See* App. 20a-21a.[3]

2. In direct conflict with the decisions just described, the Fourth Circuit and three others hold that a defendant's waiver of the right to appeal his "sentence" *does* cover restitution.

In *Cohen*—the precedent the Fourth Circuit applied to bar Mearing's appeal, *see* App. 2a-5a—the court of appeals held that "a defendant who has agreed '[t]o 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." 459 F.3d at 497 (citations omitted). In the Fourth Circuit's view, "restitution is . . . part of the criminal defendant's sentence." *Id.* at 496. That being so, the court refused to follow decisions from other circuits "finding no waiver of [the] right to appeal" under these circumstances. *Id.* at 497.

The Third, Sixth, and Seventh Circuits have adopted the same approach as the Fourth Circuit, holding that where a defendant waives his right to appeal any sentence within statutory limits, a defendant "waive[s] his right to appeal the restitution order." *Perez*, 514 F.3d at 299 (Third Circuit); *see also United*

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[3] The D.C. Circuit also noted in *In re Sealed Case* that "[t]he fact that the plea agreement expressly eliminates an appeal right for forfeiture but not for restitution suggests that an appeal of restitution has not been waived." 702 F.3d at 64. The same is true here as well. *See* App. 25a.

States v. Rafidi, 730 F. App'x 338, 340 (6th Cir. 2018) (explaining that court has "repeatedly" held that such a waiver "extinguish[es] a defendant's right to appeal a restitution order"); *United States v. Grundy*, 844 F.3d 613, 616 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 63 (2017); *United States v. Winans*, 748 F.3d 268, 271 (6th Cir. 2014); *United States v. Gibney*, 519 F.3d 301, 306 (6th Cir. 2008); *United States v. Perillo*, 897 F.3d 878, 882-83 (7th Cir. 2018); *United States v. Worden*, 646 F.3d 499, 502 (7th Cir. 2011). Indeed, the Seventh Circuit recently reaffirmed that under this line of authority—and unlike the law in the Second, Fifth, Eighth, Ninth, and D.C. Circuits—a waiver "d[oes] not need to refer specifically to restitution," and it does not matter whether the word "sentence" is used elsewhere in the waiver provision to refer specifically to the term of imprisonment. *Perillo*, 897 F.3d at 883; *accord Perez*, 514 F.3d at 299 n.2.

B. The issue regarding the enforceability of appellate waivers

In addition to the threshold conflict over the scope of appellate waivers, the courts of appeals are also divided over the circumstances in which such waivers can be enforced. The courts of appeals "have uniformly taken the position that an appellate waiver may not bar an appeal asserting that the [term of imprisonment] exceeds the statutory maximum." *United States v. Caruthers*, 458 F.3d 459, 471 (6th Cir. 2006), *overruled on other grounds by Cradler v. United States*, 891 F.3d 659 (6th Cir. 2018). If, for example, the defendant's offense of conviction carries a maximum of ten years in prison but the district

court sentences him to twenty, he may ask an appellate court to remedy that error, notwithstanding any waiver of appellate rights in his plea agreement. But the circuits disagree over how this principle translates to the context of restitution and forfeiture—where the U.S. Code provides no fixed, numerical statutory maxima, but instead limits any order (as most pertinent here) to the victim's "loss," 18 U.S.C. § 3663A(b)(1), or the defendant's "proceeds," 18 U.S.C. § 981(a)(1)(C).[4]

1. Three circuits have applied the "statutory maximum" principle to appeals of restitution orders, holding that an otherwise valid appeal waiver is unenforceable against claims that the amount of restitution (or forfeiture) is too high.

The Ninth Circuit was the first to take this position. It explained that a restitution order that exceeds the victim's losses "is equivalent to an illegal sentence" because it "is in excess of the maximum penalty provided by statute." *United States v. Gordon*, 393 F.3d 1044, 1050-51 (9th Cir. 2004) (internal quotation marks and alterations omitted). As such, a waiver of appeal is unenforceable against claims that a restitution award improperly includes money the victim did not lose, misapplies causation principles, or fails to offset certain amounts. *Id.*; *see also United States v.*

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[4] Although the precedential decisions discussed below concern restitution orders, courts on both sides of the divide have recognized that forfeiture orders are subject to the same rules. *See* App. 6a-7a (decision below); *United States v. Lo*, 839 F.3d 777, 785-86, 792 (9th Cir. 2016).

Johnston, 199 F.3d 1015, 1022-23 (9th Cir. 1999) (same).[5]

Precedent from the Seventh and Tenth Circuits is in accord. In *United States v. Litos*, 847 F.3d 906 (7th Cir. 2017), the Seventh Circuit refused to enforce an appeal waiver as to restitution, reasoning that a certain entity "was not a proper victim for the purposes of restitution under 18 U.S.C. § 3663A, and so the order of restitution was contrary to the applicable statute and therefore illegal—just as a prison term that exceeded a statutory maximum would be illegal." *Id.* at 911; *see also United States v. Webber*, 536 F.3d 584, 602 (7th Cir. 2008) ("[A]n order of restitution that exceeds the victim's actual losses or damages is an illegal sentence.") (internal quotation marks and alterations omitted); *United States v. Wolf*, 90 F.3d 191, 194 n.2 (7th Cir. 1996) ("restitution for the wrong amount and restitution to the wrong party . . . both are illegal sentences"). In *United States v. Gordon*, 480 F.3d 1205 (10th Cir. 2007), the Tenth Circuit likewise held that an appeal waiver does not prevent a defendant

[5] The Ninth Circuit also holds that an appeal waiver is not knowing and voluntary—and thus is unenforceable—as to restitution if the defendant was not "given a reasonably accurate estimate" of the amount of restitution to be imposed before entering the guilty plea. *See Lo*, 839 F.3d at 785 (describing this "special notice requirement for appeal waivers relating to restitution orders") (citing *United States v. Tsosie*, 639 F.3d 1213, 1217 (9th Cir. 2011)); *see also Gordon*, 393 F.3d at 1050; *United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999). That reasoning applies here as well. Indeed, the parties specifically agreed in the plea agreement that they would "litigate the loss amount." App. 21a.

from raising legal challenges to a restitution order because "the MVRA *does* set a statutory maximum on the amount of restitution"—namely, the amount of loss caused by the offense of conviction. *Id.* at 1209-10.[6]

2. On the other side of the divide, three other courts of appeals—including the Fourth Circuit—hold that appeal waivers are enforceable even against claims that the district court committed legal error in setting the amount of restitution too high.

In the Fourth Circuit's view, "there is no prescribed statutory maximum in the restitution context." *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2013). Consequently, the Fourth Circuit holds that so long as there is a "statutory source" that supports the district court's restitution order—that is, so long as the MVRA allows restitution in *some* amount—an appellate waiver precludes any appeal regarding "the amount of the restitution order." *Cohen*, 459 F.3d at 500. The Fourth Circuit applied that rule here to bar Mearing's claim that the restitution award was erroneously based on the amount of money exchanged between co-conspirators but never paid by the victim and failed to offset the value of services provided to the Government. App. 4a-5a; *supra* at 8-9.

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[6] Two other courts of appeals that have not directly considered the question in the context of the enforceability of an appeal waiver have held that a restitution order that exceeds the victim's losses exceeds the MVRA's statutory authorization. *See United States v. Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012) (The MVRA's authorization is "limited to the actual, provable loss suffered by the victim and caused by the offense conduct."); *accord United States v. Bane*, 720 F.3d 818, 828 (11th Cir. 2013).

The Fourth Circuit has similarly applied the rule to bar claims that an award erroneously "includ[ed] losses outside the offense of conviction," *United States v. Brandveen*, 492 F. App'x 424, 427 (4th Cir. 2012), and that "the loss amount calculations were improperly inflated," *United States v. Thrasher*, 301 F. App'x 241, 242-43 & n.* (4th Cir. 2008).

The Sixth and Eighth Circuits have likewise "rejected [the argument] that there is a statutory maximum for restitution" and accordingly held that an appeal waiver extending to restitution precludes any claim challenging the amount of restitution imposed. *Grundy*, 844 F.3d at 617; *see also United States v. Sharp*, 442 F.3d 946, 952 (6th Cir. 2006) ("Because the restitution statutes do not contain a maximum penalty, Sharp cannot be heard to complain that the restitution order violates the statutory maximum for his offense."); *United States v. Schulte*, 436 F.3d 849, 850-51 (8th Cir. 2006) ("Restitution orders are not subject to any prescribed statutory maximum," so a challenge to a restitution order on the ground that it exceeds the victim's proximately caused losses "does not implicate the sort of 'illegality' that . . . might justify voiding a voluntary agreement between the parties."). As the Sixth Circuit has put it, once a defendant waives his right to appeal a restitution award, he subjects himself to any restitution amount whatsoever, "entirely at the whim of the district court." *Grundy*, 844 F.3d at 617 (internal quotation marks and citation omitted).

II. The questions presented are important and recurring, and this case presents an ideal vehicle for resolving them.

1. The disarray concerning when appellate waivers apply to restitution and forfeiture orders undermines the effective administration of criminal justice.

Ninety-seven percent of criminal cases are resolved by plea agreements, *Missouri v. Frye*, 566 U.S. 134, 144 (2012), and such agreements typically include appeal waivers concerning at least some aspects of the cases' outcomes, *see* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122-26 (2015). A recent analysis, for example, of "114 different boilerplate plea agreements, including at least one plea agreement from each of the ninety-four federal districts," revealed that 88 included appellate waivers. *Id.*; *see also* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005) ("In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to [appellate] review.").

The Government also increasingly seeks restitution and forfeiture in criminal cases, and such sanctions can run well into the millions of dollars. To take one measure: Over the past ten years, the federal courts ordered restitution against more than 10,000 offenders per year, totaling over $12 billion per year. U.S. Gov't Accountability Office, *Federal Criminal Restitution*, GAO-18-115, at 33-34 (2017). Forfeiture orders, for their part, are "often harsher than the pun-

ishment for felonies"—and are sometimes more important than even convictions themselves. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

Given these realities, "it is critically important that defendants, prosecutors, and judges understand the consequences of [guilty] pleas." *Class v. United States*, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting). Furthermore, it is vital that waiver language in one jurisdiction mean the same thing it does in another. When two defendants have identical plea agreements, one should not be barred from appealing a restitution or forfeiture order, while another is allowed to do so. Given the stakes, there should be uniform rules governing when such orders are walled off from appellate scrutiny.[7]

2. For three reasons, this case presents an ideal vehicle for the Court to resolve the conflicts over the questions presented.

First, the appellate waiver language in Mearing's plea agreement—which waives the right to appeal any "sentence" within the "statutory maximum" and does not mention restitution—is typical of that used

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[7] The Court has granted certiorari in *Garza v. Idaho*, No. 17-1026, to consider whether a presumption of prejudice arises under *Strickland v. Washington*, 466 U.S. 668 (1984), when a defendant instructs his lawyer to take an appeal but the lawyer declines to do so because the plea agreement contains an appeal waiver. The petitioner in *Garza* argues that such a presumption should apply because appeal waivers are unenforceable in certain circumstances. *See* Br. for Pet'r 19-20 & n.9, *Garza v. Idaho* (No. 17-1026) (2018). Resolving the questions presented here may assist the Court in assessing the strength of that argument.

across the country in the federal system. *See* Klein et al., 52 Am. Crim. L. Rev. at 122-26; *supra* at 11-13 (discussing cases from numerous circuits involving same or equivalent language).

Second, the facts of this case place in stark relief the consequences of barring challenges to the amount of restitution and forfeiture orders. The district court ordered Mearing to pay $15.4 million in restitution and to forfeit $13.6 million—a total of over $29 million. Mearing claims on appeal that the district court committed legal errors in both orders, such that the proper total should have been less than $5 million. Yet the Fourth Circuit held that even if Mearing is entirely correct—even if the district court blatantly misconstrued the MVRA and applicable forfeiture statutes—it does not matter; he must still pay the extra $24 million that has no basis in law. Such a result should not stand without this Court's review.

Third, both questions presented are outcome-determinative here. In previous cases raising questions about the scope of appeal waivers, the Government has opposed review on the ground that the particular language in the plea agreements did not squarely implicate the conflict over whether waiving the right to appeal a "sentence" covers a restitution award. *See* Br. in Opp. 13-14, *Grundy v. United States*, 138 S. Ct. 63 (2017) (No. 16-8487); Br. in Opp. 15-16, *Staples v. United States*, 565 U.S. 1042 (2011) (No. 10-1132). No such argument is available here. Mearing's waiver of his right to appeal any "sentence within the statutory maximum described above," App. 21a, would have been construed in the Second, Fifth, Eighth, Ninth,

and D.C. Circuits to allow him to challenge the restitution order on appeal. *See supra* at 11-13.

The second question presented (not raised in either of the two cases mentioned just above) is equally pivotal here. No waiver of the right to appeal would have been enforceable in the Seventh, Ninth, or Tenth Circuits against Mearing's appellate challenges to his restitution order. As the Fourth Circuit acknowledged, Mearing contends that the district court committed "legal error" in setting the restitution amount too high. App. 4a-5a. Such claims—which take the form here of arguments that the district court erroneously included money exchanged between co-conspirators but never paid by the victim and neglected to offset the victim's loss amount to account for the value of the services it received—are viable in those other circuits even in the face of an otherwise valid waiver. *See supra* at 15-17.

Furthermore, the existence of a separate waiver provision that expressly covers Mearing's forfeiture order guarantees that even if Mearing prevails on the first question presented, the Court will still be able to resolve the second question through the lens of the forfeiture order. That is, Mearing claims that the district court committed legal error regarding not just the restitution order, but the forfeiture order as well. Most obviously, the court *sua sponte* applied a "facilitation" theory from the *drug* forfeiture statute that the Government did not argue, and that the statute governing wire fraud does not recognize. *See supra* at 6-7. That lawless act would have been subject to appellate correction, notwithstanding Mearing's appellate waiver, in the Seventh, Ninth, or Tenth Circuits.

III. The Fourth Circuit's decision is incorrect.

A. A waiver of the right to appeal the "sentence" does not apply to restitution.

Contrary to the Fourth Circuit's holding, a provision in a plea agreement waiving the defendant's right to appeal his "sentence" does not apply to a restitution order—especially where, as here, the plea agreement uses the word "sentence" elsewhere to refer only to a term of imprisonment.

1. As the Fourth Circuit has recognized (in concert with every other court of appeals), an appeal waiver bars a defendant's claims only if the waiver is "clearly and unambiguously applicable to the issues raised by the defendant on appeal." *United States v. Yooho Weon*, 722 F.3d 583, 588 (4th Cir. 2013); *see also, e.g.*, *United States v. Burden*, 860 F.3d 45, 55 (2d Cir. 2017); *United States v. Gordon*, 480 F.3d 1205, 1207 (10th Cir. 2007). "Demanding such specificity helps to ensure that a defendant understands precisely what it is that he is waiving and the consequences of his waiver." *Burden*, 860 F.3d at 55. Furthermore, "plea bargains are essentially contracts," *Puckett v. United States*, 556 U.S. 129, 137 (2009), and therefore must be construed according to contract law principles. One such principle is that "ambiguity in a plea agreement is construed against the drafting party; in this case the government." *In re Sealed Case*, 702 F.3d 59, 63 n.2 (D.C. Cir. 2012); *see also United States v. Jordan*, 509 F.3d 191, 199-200 (4th Cir. 2007).

A defendant's waiver of the right to appeal his "sentence" does not unambiguously cover a restitution order. In legal parlance, the ordinary meaning of

"sentence" is "the *punishment* imposed on a criminal wrongdoer." Black's Law Dictionary (10th ed. 2014) (emphasis added). And courts have held across a variety of contexts—including when reviewing the amount of restitution imposed—that "restitution is *not* criminal punishment." *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) (emphasis added) (Sixth Amendment); *see United States v. Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009) (amount of restitution); *United States v. Newman*, 144 F.3d 531, 538-39 (7th Cir. 1998) (Ex Post Facto Clause). Instead, it is a form of compensation—"a civil remedy administered for convenience by courts that have entered criminal convictions." *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005).

To be sure, in some other settings, including certain procedural provisions of the MVRA, restitution is treated as a component of a criminal sentence. *See United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006). But this at most creates ambiguity concerning whether waiving the right to appeal one's "sentence" encompasses a restitution order. And any ambiguity must be resolved in the defendant's favor.

2. Even if the term "sentence" could sometimes be clear enough to encompass restitution when used in an appeal waiver, it could not be read that way in the circumstances of this case. Like a great many plea agreements, the appeal waiver here applies to "any sentence *within the statutory maximum described above*." App. 21a (emphasis added). And up above, Mearing's plea agreement notes that the offense carries a "maximum term of five years imprisonment." *Id.* 18a-19a. The agreement also repeatedly uses the

word "sentence" (as well as the phrase "any sentence within the statutory maximum described above") in the section immediately preceding the waiver section to refer only to Mearing's term of imprisonment. *Id.* 20a-21a (section 4). Restitution is discussed in a separate section that never uses the word "sentence." *Id.* 22a-23a.

If the Fourth Circuit is right that "there is no prescribed statutory maximum in the restitution context," *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2013), then it is nonsensical to hold—as the Fourth Circuit did here—that a reference to a "sentence within the statutory maximum" includes a restitution order. And even if—as Mearing maintains—there *is* effectively a statutory maximum in this context, a waiver of the right to appeal a "sentence within the statutory maximum" does not unambiguously cover restitution where, as here, the plea agreement speaks elsewhere of the "sentence" as comprised only of "the period of incarceration." App. 20a-21a; *see In re Sealed Case*, 702 F.3d at 64.

B. An appellate waiver is unenforceable against claims that the district court committed legal error in setting the amount of restitution or forfeiture too high.

The Fourth Circuit is also incorrect that an appellate waiver is enforceable with respect to an order of restitution or forfeiture so long as there is a statutory basis for imposing such penalties in *some* amount.

1. As with the first question presented, the analysis begins on common ground: "It is well settled in the

federal courts . . . that an appellate waiver may not bar an appeal asserting that the sentence exceeds the statutory maximum." *United States v. Caruthers*, 458 F.3d 459, 471 (6th Cir. 2006) (quotation marks omitted), *overruled on other grounds by Cradler v. United States*, 891 F.3d 659 (6th Cir. 2018). Such a sentence—say, a twenty-year term of imprisonment for an offense that carries a maximum of ten years—is "illegal" and thus cannot be immunized by a defendant's prior agreement not to challenge it. *Id.*

The same logic holds with respect to restitution and forfeiture orders. "Federal courts cannot order restitution in a criminal case without a statutory basis." *United States v. Pawlinski*, 374 F.3d 536, 540 (7th Cir. 2004); *accord United States v. Follet,* 269 F.3d 996, 998 (9th Cir. 2001). And the MVRA limits the amount of any restitution order to the victim's actual loss proximately caused by the crime. *E.g.*, *United States v. Ferdman*, 779 F.3d 1129, 1132 (10th Cir. 2015); *United States v. Sharma*, 703 F.3d 318, 323 (5th Cir. 2012). The forfeiture statute applicable here similarly allows forfeiture of no more than the amount of the "proceeds" of the offense, as defined by statute. 18 U.S.C. § 981(a)(1)(C). Consequently, any restitution or forfeiture order that exceeds those statutory limits "is equivalent to an illegal sentence"—and thus subject to appellate correction irrespective of any appeal waiver. *United States v. Gordon*, 393 F.3d 1044, 1050 (9th Cir. 2004).

Any other outcome would be unconscionable. As the Second Circuit has put it: "[C]onsider the hypothetical case of a defendant who stole $100, pled guilty to theft, and agreed not to appeal his conviction

or sentence if he received less than 3 months in jail. The court sentenced him to one month imprisonment but also imposed a restitution order, altogether without basis, in the amount of $5 million." *United States v. Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006). It cannot be that the defendant would be barred from challenging such a restitution order on appeal.

Yet that is exactly the result the Fourth Circuit's rule requires. So long as *some* amount of restitution would be permissible (in the Second Circuit's hypothetical, $100), the Fourth Circuit bars a defendant who has waived his right to appeal from making any argument that "the district court committed legal error in determining the restitution amount." App. 4a-5a. This Court should not allow a rule that tolerates such outcomes to stand.

2. The court of appeals below worried about a different problem: "Under [Mearing's] reasoning," it declared, "a defendant could *always* challenge the district court's determination of the restitution [or forfeiture] amount even if he had waived the right to appeal his sentence." App. 4a (emphasis added). The choice, however, is not between allowing all appeals or none. As the Tenth and Seventh Circuits have recognized, an appellate court may allow defendants to challenge *legal* errors in restitution or forfeiture orders, while still barring them from contesting "*factual* calculations" relating to such orders on appeal. *Gordon*, 480 F.3d at 1209 n.4 (emphasis added); *see also United States v. Worden*, 646 F.3d 499, 503-04 (7th Cir. 2011).

Such a dichotomy makes sense. Factual issues fall within the primacy of district courts and generally

raise no questions concerning the legal authority of the federal courts to impose any given penalty. Legal issues, by contrast, go to the heart of whether Congress has authorized a court to require the defendant to pay a certain sum of money. If such authority is lacking, an appeal waiver should not shield a court's lawless action from review—just as it cannot shield the imposition of more time in prison than the applicable federal statute allows.

3. If nothing else, the Fourth Circuit's positions on the two questions presented cannot *both* be right. If there is no "statutory maximum" with respect to a restitution or forfeiture order, then an appeal waiver covering any "sentence within the statutory maximum" cannot apply to such an order. If, on the other hand, restitution and forfeiture orders are part of a sentence that must stay within statutory limits, then the right to appeal any sentence in excess of the statutory maximum must apply here. Either way, the decision below is incorrect, and Mearing's claims should be allowed to proceed.

CONCLUSION

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

Respectfully submitted,

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