

NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

DEBORAH M. WAGNER

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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RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

QUESTION PRESENTED

I. Whether the United States Court of Appeals erred in granting the Government's Motion to Dismiss the Petitioner's Appeal?

NO.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I. The Motion to Dismiss the Appeal filed by the Government with the Fourth Circuit is attached hereto as Appendix II.

JURISDICTION

The Judgment of the United States Court of Appeals for the

Fourth Circuit was entered on August 30, 2018. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

I. STATEMENT OF THE CASE.

On October 15, 2015, an Indictment was filed charging Ms. Wagner with: (Count 1) Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. Sec. 1349; (Counts 2-5) Mail Fraud, in violation of 18 U.S.C. Secs. 1341 and 1342; and (Counts 9-11) Aggravated Identity Theft, in violation of 18 U.S.C. Secs. 1028A and 1028(2). Forfeiture of assets was also sought, pursuant to 18 U.S.C. Secs. 981 and 982, and 21 U.S.C. Sec. 853(p).

On September 9, 2016, Ms. Wagner entered a guilty plea before the Honorable Robert G. Doumar of the United States District Court for the Eastern District of Virginia, in Criminal Case No. 4:15cr28. Ms. Wagner pled guilty to Count 1 of the Indictment, Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. Sec. 1349, pursuant to a written Plea Agreement and Statement of Facts. All other counts in the Indictment were dismissed at sentencing.

On July 20, 2017, the District Court sentenced Ms. Wagner to Fifty (50) Months of incarceration, and placed her on one year of supervised release, and other conditions. The District Court also entered an Order of Forfeiture.

The District Court reserved for later adjudication the issue of restitution. The parties filed extensive briefs and exhibits on

restitution. The District Court held a Hearing on Restitution on November 15, 2017. Following the Hearing, the District Court entered an Order directing Ms. Wagner to pay restitution in the amount of \$1,845,665.36.

Ms. Wagner appealed to the Fourth Circuit only the District Court's findings and conclusions about the *amount* of restitution. Ms. Wagner's appeal was based upon the *unlawfulness* of the District Court's Restitution Order, which falls outside of the statutory authority of 18 U.S.C. Sec. 3663A. As Ms. Wagner argued in her Opening Brief to the Fourth Circuit, "[a]ccordingly, the District Court's restitution Order is unlawful." *See Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (restitution order that exceeds the authority of the statutory source "is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum")."

II. THE PLEA AND SENTENCING.

On September 9, 2016, Ms. Wagner entered a guilty plea before the District Court. Ms. Wagner pled guilty to Count 1 of the Indictment, Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. Sec. 1349, pursuant to a written Plea Agreement and Statement of Facts. All other counts in the Indictment were dismissed at sentencing.

A. The Waiver Of Appeal.

The Plea Agreement contained the following language related to Ms. Wagner's waiver of appeal rights.

The defendant also understands that 18 U.S.C. Sec. 3742 affords a defendant the right to appeal the sentence imposed. Nonetheless, the defendant knowingly waives the right to appeal the conviction and any sentence *within the statutory maximum described above* (or the manner in which the sentence was determined) on the grounds set forth in 18 U.S.C. Sec. 3742 or on any grounds whatsoever....

(Emphasis added.)

B. Restitution.

Later in the Plea Agreement, it contained the following language as to restitution.

Defendant agrees that restitution is mandatory pursuant 18 U.S.C. Sec. 3663A. Defendant agrees to the entry of a Restitution Order for the full amount of the victims' losses ... The parties agree that restitution will be determined at the time of sentencing.

C. The Statement Of Facts.

The Statement of Facts attached to the Plea Agreement did not contain any agreed to restitution amount, and did not address any restitution amounts.

III. THE APPLICABLE LEGAL STANDARD.

The Government conceded in its Motion to Dismiss the Appeal that "the Court in [*United States v. Cohen*, 459 F.3d 490, 497-500 (4th Cir. 2006)] noted that an appeal of a restitution order that is not authorized by a statutory source may fall outside the scope of a defendant's otherwise valid waiver of appeal...." (Government Motion, p. 9.) On this point of law, the Government is correct.

Indeed, the Fourth Circuit expressly stated in *Cohen* that 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].'" *Cohen*, 459 F.3d at 498 (quoting *Broughton-Jones*, 71 F.3d at 1146).

The Fourth Circuit continued. "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 of the scope of a defendant's otherwise valid appeal waiver.'" *Cohen*, 459 F.3d at 498 (quoting *Broughton-Jones*, 71 F.3d at 1147) (emphasis added)).

See also United States v. Davenport, 445 F.3d 336, 373 (4th Cir. 2006) (court cannot order restitution under MVRA to persons who are not victims of the offenses for which the defendant was convicted); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) ("[a] defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. For example, 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 or based on a constitutionally impermissible factor such as race") (emphasis in original); *United States v. Attar*, 38 F.3d 727, 732-33 (4th Cir.

1994) (valid appeal waiver does not bar review of 6th Amendment challenge to plea proceedings).

Furthermore, it is not disputed that Ms. Wagner's Plea Agreement and Statement of Facts *did not contain any cap or financial projection* of any restitution amount. *See United States v. Phillips*, 174 F.3d 1074, 1075-76 (9th Cir. 1999) (no waiver of right to appeal restitution where plea agreement contained no cap on restitution and the plea agreement was ambiguous as to the amount of damages the defendant might incur); *United States v. Ready*, 82 F.3d 551, 559-60 (2nd Cir. 1996) (despite broad waiver of appeal, terms of plea agreement were ambiguous as to whether sentence included restitution).

IV. MS. WAGNER'S APPEAL CHALLENGED A RESTITUTION ORDER OUTSIDE OF THE STATUTORY AUTHORITY OF THE MVRA.

The Government argued that the waiver of appeal in the Plea Agreement barred the Fourth Circuit's consideration of Ms. Wagner's appeal. This is incorrect, based on the lack of clarity and ambiguities in the Plea Agreement and Statement of Facts *the Government authored*, the authority cited by the Government which *undermines the Government's argument*, and the failure of the District Court to issue a Restitution Order within the scope of the MVRA, 18 U.S.C. Sec. 3663A. For any or all of these reasons, the Government's Motion should have been denied, and the Fourth Circuit should adjudicate Ms. Wagner's appeal on the merits.

A. The Plea Agreement Itself Does Not Clearly And Unambiguously Waive The Right Of Appeal Of Restitution.

A plea agreement between the Government and a defendant is an enforceable contract between the parties. *See generally Santobello v. New York*, 404 U.S. 257, 262 (1971) (the government breaches a plea agreement when a promise it made to induce the plea goes unfulfilled).

When interpreting plea agreements, "we draw upon contract law as a guide to ensure that each party receives the benefit of the bargain" and, to that end, we "enforce a plea agreement's plain language in its ordinary sense." *United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2014). While the Fourth Circuit employs traditional principles of contract law as a guide, the Court gives plea agreements "greater scrutiny than we would apply to a commercial contract ... [b]ecause a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement." *Id.* at 195-196 (internal quotation marks and citations omitted).

However, any ambiguities in a plea agreement are construed against the Government as its drafter. *See United States v. Barefoot*, 754 F.3d 226, 246 (4th Cir. 2014). Whether a plea agreement is ambiguous on its face is a question of law to be resolved by the Court. *See Jordan*, 509 F.3d at 195.

1. *United States v. Mearing Contains Differing Salient Information In Mearing's Plea Agreement.*

The Government glibly argued to the Fourth Circuit that “[t]he Court recently confronted this very same issue in the case of *United States v. Philip A. Mearing....*” (Government Motion, pp. 9-10.) The Government argues that the Court held that Mearing waived his right to appeal his restitution determination, via the appeal waiver in his plea agreement. The Government’s comparison of the facts and law in *Mearing* to Ms. Wagner’s case is wrong, in several respects.

There are salient differences in the plea agreements/statements of facts between Mearing’s plea agreement and Ms. Wagner’s plea/statement of facts. The appeal waiver language in Mearing’s plea agreement is virtually the same as the Ms. Wagner’s, except that Mearing’s agreement preserved his right to direct appeal of ineffective assistance of counsel.

However, there are two significant differences between the two plea agreements. First, Ms. Wagner’s Plea Agreement, under Para. 8, Restitution, contains the following language. “The parties agree that restitution will be determined by the Court at the time of sentencing.” Mearing’s plea agreement section on restitution contained no such language. For good reason. *Mearing’s Statement of*

Facts contained specific numeric information about damages/restitution amounts. (United States v. Mearing, 17CR00094, EDVA (Norfolk Division), Document 9, pp. 1-6.)

As the Fourth Circuit observed in its Order dismissing Mearing's appeal on restitution, "[t]he Government argued at sentencing that the statement of facts attached to the plea agreement conclusively established a loss amount of \$15,413,029.76." (*United States v. Mearing*, 18-4026, Fourth Circuit Order, May 29, 2018, p. 3.) In other words, Mearing's restitution amount was set forth and agreed to in his Statements of Facts, which is part of his Plea Agreement.

By contrast, Ms. Wagner's Plea Agreement's Restitution Section (Para. 8): (1) followed her appeal waiver in the Plea Agreement, and arguably was not covered by the waiver; (2) expressly stated that restitution was a separate issue to be "determined by the Court at the time of sentencing", but did not state that restitution was part of sentencing subject to the appeal waiver, and in fact, restitution was adjudicated by the District Court after sentencing; and (3) most significantly, there was no restitution amount agreed to, alleged or even suggested in Ms. Wagner's Plea Agreement and Statement of Facts.

Accordingly, applying contract principles, and construing any ambiguities against the Government, this Court must wonder how Ms.

Wagner could agree to a restitution amount, and to waive appeal of restitution, where unlike *Mearing*, there was no restitution amount proposed and agreed to in Ms. Wagner's Plea/Statement of Facts? In other words, Ms. Wagner had no notice via her plea agreement/statement of facts that she was waiving her right to appeal restitution, or even the amount of restitution.

While Ms. Wagner agreed to a general waiver of appeal, she did not agree to a waiver of appeal on the issue of restitution. Unlike *Mearing*, there was no restitution amount set forth in the plea/statement of facts. Further, there was no language in Ms. Wagner's Plea Agreement, whether in the section on waiver of appeal (Para. 5), or in the section on restitution (Para. 8), expressly stating that the waiver of appeal applied to restitution, or that restitution was part of sentencing and therefore was subject to the appeal waiver.

The Fourth Circuit "enforce[s] a plea agreement's plain language in its ordinary sense." See *Jordan*, 509 F.3d at 195. Once again, while the Court employs traditional principles of contract law as a guide, the Court gives plea agreements "greater scrutiny than we would apply to a commercial contract ... [b]ecause a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement." *Id.* at 195-196. Furthermore, it is not disputed that Ms. Wagner's

Plea Agreement and Statement of Facts *did not contain* any cap or *financial projection* of any restitution amount. *See Phillips*, 174 F.3d at 1075-76 (no waiver of right to appeal restitution where plea agreement contained no cap on restitution and the plea agreement was ambiguous as to the amount of damages the defendant might incur); *Ready*, 82 F.3d at 559-60 (despite broad waiver of appeal, terms of plea agreement were ambiguous as to whether sentence included restitution).

Moreover, neither the written Plea Agreement, nor the District Court's explanation of the appeal waiver to Ms. Wagner at the Plea Hearing, stated or informed Ms. Wagner that restitution was part of sentencing, and therefore subject to the appeal waiver. The Government, the author of the Plea Agreement, did not expressly state that in the Plea Agreement; indeed, the Government-authored Plea Agreement separated the appeal waiver and restitution paragraphs. Accordingly, Ms. Wagner had *no notice* that the appeal waiver applied to restitution. There was no contractual "meeting of the minds" regarding this alleged provision that the Government now asserts. *See Jordan*, 509 F.3d at 195 (Fourth Circuit "enforce[s] a plea agreement's plain language in its ordinary sense").

B. The District Court's Restitution Order Was Outside Of The Statutory Authority Of The MVRA.

The District Court's order of restitution was based upon the

MVRA, 18 U.S.C. Sec. 3663A. Sec. 3663(a)(1)(A) provides that a district court "shall order ... that the defendant make restitution to [the] victim of [an applicable] offense." The statute defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution" is authorized. Sec. 3663A(a)(1)(2).

Any award of restitution that includes any amounts beyond the harm resulting from the commission of the offense exceeds both the authority of MVRA, and the authority of any district court. "[F]ederal courts do not have the inherent authority to order restitution, but must rely on a statutory source" to do so. *Cohen*, 459 F.3d at 498. 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." *United States v. Broughton-Jones*, 71 F.3d at 1147. The Government concedes that, even at the Plea Hearing, the Court advised Ms. Wagner that "[y]our plea agreement includes a provision whereby you waive your right to appeal your conviction and any sentence imposed upon any ground whatsoever so long as that sentence is within the statutory maximum." (Government Motion, p. 4.) (Emphasis added.)

The MVRA requires the return of lost property. If such a return of property is impossible, then a defendant must pay the value of the property, less the value of any part of the property

that is returned. *See Sec. 3663A(b)(1)(B)(ii).* Giving value for returned property avoids double recovery.

The Government conceded that "some of the units that were transferred to straw grantees in this case went through the foreclosure process and were deeded back to the respective homeowners associations." However, the associations placed liens on the foreclosed upon properties *for the maintenance fees at issue*, and upon later sale of the units, the maintenance fees that had accrued while units were empty were in fact paid.

Therefore, the District Court ordered the double recovery which the statute expressly precludes. *See Sec. 3663A(b)(1)(B)(ii).* *See Robers v. United States*, 572 U.S. 310 (2014) (when real property is recovered by a victim by virtue of foreclosure of a lien interest, the property the victim lost is returned when the real property is sold and the victim receives money from the sale).

In the instant case, the property lost by the victims were the maintenance fees not paid by the straw buyers. The associations reduced these lost fees to liens on the various units. The closing documents for subsequent sales show that the fees for the vacant units were in fact paid. The District Court acted outside of the statutory authority of Sec. 3663A by failing to calculate this recovery as an offset to Ms. Wagner's restitution. *See Sec. 3663A(b)(1)(B)(ii).*

Accordingly, the District Court's Restitution Order is unlawful. *See Broughton-Jones*, 71 F.3d at 1147 (restitution order that exceeds the authority of the statutory source "is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum"). *See also Davenport*, 445 F.3d at 373 (court cannot order restitution under MVRA to persons who are not victims of the offenses for which the defendant was convicted); *United States v. Marin*, 961 F.2d at 496 ("[a] defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. For example, 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* or based on a constitutionally impermissible factor such as race") (emphasis in original); *Attar*, 38 F.3d at 732-33 (valid appeal waiver does not bar review of 6th Amendment challenge to plea proceedings).

C. The District Court's Restitution Order Was Outside Of MVRA-The Court Awarded Restitution To Resorts, Not Persons.

Under 18 U.S.C. Sec. 3663A(a) (2), restitution must be awarded to "person[s]". The Government's presentation sought restitution for about "fifteen victim resorts". The District Court awarded restitution to resorts, not "person[s]" as required under See Sec. 3663A(a) (2).

Of course, what is never explained by either the Government or

the District Court is who *actually suffered the loss - the resort or an individual buyer or seller of a timeshare unit*. Absent that information, the District Court adopted the Government's position of, well, we have letters from the resorts, so let's give restitution to the resorts.

Indeed, at a Hearing about restitution, the District Court remarked that "[t]he question is the individual who lost their money. The questions get down to this, that what we have in relation to what were lost by the individuals, because there are individual time shares."

Accordingly, the District Court's Restitution Order is unlawful. See *Davenport*, 445 F.3d at 373 (court cannot order restitution under MVRA to persons who are not victims of the offenses for which the defendant was convicted); *Broughton-Jones*, 71 F.3d at 1147 (restitution order that exceeds the authority of the statutory source "is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum").

V. CONCLUSION.

Ms. Wagner's appeal is substantially based on the District Court's Restitution Order falling outside of the statutory authority granted under the MVRA. Accordingly, this Court should Grant Certiorari to review and reverse the Fourth Circuit's granting of the Government's Motion to Dismiss the Appeal, with instructions that the Fourth Circuit should adjudicate Ms. Wagner's

appeal on its merits.

Respectfully submitted,

/s/

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