

No. _____

IN THE
Supreme Court of the United States

CHRISTOPHER FAELLA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's waiver in his plea agreement of the right to appeal his sentence -- unless it exceeds the statutory maximum penalty or violated the Eight Amendment to the Constitution -- precludes him from appealing an order of restitution that exceeds the amount authorized by 18 U.S.C. § 2259.

PARTIES TO THE PROCEEDINGS

Petitioner is Christopher Faella, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Christopher Faella, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion was reported at *United States v. Faella*, 819 F. App'x 844 (11th Cir. 2020). (Appendix A).

Mr. Faella filed a motion for rehearing, which the Eleventh Circuit denied on October 16, 2020. (Appendix B).

JURISDICTION

The Eleventh Circuit issued its opinion on July 10, 2020, and a timely filed petition for rehearing was denied on October 16, 2020. (Appendix A, B). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Relevant portions of 18 U.S.C. § 2259, provide:

(a) In general.--Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.--Except as provided in paragraph (2), the order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses.

(2) Restitution for trafficking in child pornography.--If the defendant was convicted of trafficking in child pornography, the court shall order restitution under this section in an amount to be determined by the court as follows:

(A) Determining the full amount of a victim's losses.--The court shall determine the full amount of the victim's losses that were incurred or are reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim.

(B) Determining a restitution amount.--After completing the determination required under subparagraph (A), the court shall order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than \$3,000.

(C) Termination of payment.--A victim's total aggregate recovery pursuant to this section shall not exceed the full

amount of the victim's demonstrated losses. After the victim has received restitution in the full amount of the victim's losses as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section, the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated. The court may require the victim to provide information concerning the amount of restitution the victim has been paid in other cases for the same losses.

STATEMENT OF THE CASE

Mr. Faella was charged by indictment in the United States District Court for the Middle District of Florida with five counts of receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1); one count of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Appendix A). Mr. Faella entered into a plea agreement with the government and pled guilty to five counts of receipt of child pornography and one count of possession of child pornography. *Id.* In exchange for his guilty plea, the government agreed to dismiss the felon-in-possession charge. *Id.*

The terms of the plea agreement obligated Mr. Faella to pay restitution, but did not state the specific dollar amount. *Id.* See D.Ct.Doc. 28. One of the agreement's provisions provided, "Pursuant to 18 U.S.C. § 2259, defendant agrees to make restitution to known victims of the offense for the full amount of the victims' losses as determined by the Court." See D.Ct.Doc. 28. Another provision stated that Mr. Faella had agreed to waive his right to appeal his sentence barring the four following exceptions:

(a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution.

(Appendix A). At the change of plea hearing, the district court conducted a plea colloquy, highlighting the appeal waiver provision. *Id.* The court then accepted Faella's guilty plea and scheduled the matter for sentencing. *Id.*

The restitution proceedings in Mr. Faella's case were drawn out over several months. During this time Mr. Faella raised several objections to the restitution calculations and filed a memorandum opposing restitution. D.Ct.Doc. 66. Defense counsel argued that the government had not proved a loss amount attributable to Mr. Faella's conduct pursuant to *United States v. Paroline*, 572 U.S. 434 (2014), and *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012). *Id.* Specifically, defense counsel argued the losses were not attributable to Mr. Faella because: 1) all but one of the losses occurred prior to Mr. Faella's conduct, 2) several of the restitution requests were based on generalized expert testimony, 3) the government had not introduced evidence that the victims were aware of, and hence harmed by, Mr. Faella's conduct. *Id.* Mr. Faella further argued that most of the victims' losses stemmed from the original abuse, production, and posting of the child pornography. *Id.* Therefore, any restitution must be in an amount that "comports with the defendant's relative role in the causal process that underlies the victim's general losses." D.Ct.Doc. 66 at 6 (quoting *Paroline*, 572 U.S. at 458).

During the proceedings, the Eleventh Circuit issued an opinion in *United States v. Rothenberg*, 923 F.3d 1309 (11th Cir. 2019). Defense counsel then conceded that, under current law, the government has proved Mr. Faella had proximately caused harm to the victims. D.Ct.Doc. 146 at 9. But defense counsel continued to argue that *Rothenberg* urges the district court to desegregate the harm caused by a particular defendant from the harm caused by the original abuser. *Id.* at 20-21. While the government argued that, under *Rothenberg*, the district court need only consider the *Paroline* factors and that the district court need not apply desegregation. *Id.* at 17-18.

The district court ordered Mr. Faella to pay \$52,500 in restitution. D.Ct.Doc. 141. After recounting the background of the case, the district court commented, “quantifying damages is far from an exact science.” *Id.* at 2. The district court did not list any evidence that it considered in calculating these amounts. *Id.* It did not cite to any of the *Paroline* factors. *Id.* It did not give any indication as to how these restitution awards were determined. *Id.*

On appeal, *inter alia*, Mr. Faella argued that the district court abused its discretion by failing to consider the factors set forth in *Paroline v. United States*, 572 U.S. 434 (2014), in determining the proper amount of restitution. (Appendix A). However, the Eleventh Circuit held that the *Paroline* argument does not fall under any of the three appeal waiver exceptions in Mr. Faella’s plea agreement. *Id.* It then determined that the appeal waiver was not invalid or unenforceable, and

dismissed the *Paroline* argument portion of the appeal. A timely petition for panel rehearing was denied on October 16, 2020.

REASONS FOR GRANTING THE PETITION

There is a circuit split as to whether an appeal waiver provision, such as the one in Mr. Faella's plea agreement, precludes an argument on appeal that the restitution amount was incorrectly calculated under *Paroline*. The Eighth, Second, and Fifth Circuits have held that such an appeal waiver either does not apply to the appeal of a restitution order or, if it does apply, does not prohibit such an appeal. While here, the Eleventh Circuit has held that the waiver provision applies to the restitution order and mandated the dismissal of that portion of the appeal. Mr. Faella submits that this Court should grant certiorari in this case to resolve this conflict.

The Eighth Circuit 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."). The Second Circuit holds that waiver of right to appeal sentence and right to appeal district court's award of full restitution does not waive appeal of errors in determination of "what constitutes full restitution." *United States v. Pearson*, 570 F.3d 480, 485 (2d Cir. 2009). The Fifth Circuit has held that a plea agreement that waives the right to appeal the defendant's "sentence" so long as it

does not “exce[ed] the statutory maximum” permits the appeal of a restitution award that exceeds the actual loss amount. *United States v. Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012).

Additionally, Mr. Faella points out that the Eleventh Circuit Court failed to follow its own precedent in dismissing the *Paroline* portion of Mr. Faella’s appeal. In its opinion, the Eleventh Circuit cited *United States v. Johnson*, 541 F.3d 1064, 1067–09 (11th Cir. 2008) stating, “Restitution is part of a sentence and a challenge to a restitution amount can be waived by a valid appeal waiver.” (Appendix A). But the appeal waiver in Mr. Johnson’s case was not same as the one in Mr. Faella’s case.

Mr. Johnson’s plea agreement contained an appeal waiver that permitted him to appeal only if he received an upward departure sentence or restitution amount greater than \$30,000. *Johnson*, 541 F.3d at 1066. Three years after he was sentenced, the district court ordered Mr. Johnson to pay \$21,593.70 in restitution. *Id.* Mr. Johnson appealed the order solely on the ground that it was entered more than 90 days after his sentencing, but Eleventh Circuit held the appeal waiver precluded the appeal stating, “neither of the exceptions to the appeal waiver are at issue,” because “[t]he sentence was within the guidelines range and the order of restitution did not exceed \$30,000.00.” *Id.*, 541 F.3d at 1066.

Here, Mr. Faella’s appeal waiver contains an exception for sentences that violate the statutory maximum.(Appendix A). Mr. Faella argued on appeal that the district court imposed an order of restitution in violation of a statute, specifically 18

U.S.C. § 2259. *Id.* While it is true that there is no ‘monetary maximum’ under 18 U.S.C. § 2259, there are, however, several statutory limitations as to the amount of restitution that can be imposed. For example, restitution cannot be imposed to compensate anyone other than a victim. *See* 18 U.S.C. § 2259. Restitution cannot be imposed in an amount greater than the losses incurred by the victim. *Id.* Restitution cannot be imposed for costs other than medical services, therapy, lost income, attorney fees, etc. *Id.* And most relevant to this case, restitution cannot be imposed for any losses that are not the proximate result of the offense. *Id.* The proper application of the *Paroline* factors is required in order to ensure that the restitution imposed is within the limitations 18 U.S.C. § 2259.

The Fifth Amendment right to Due Process requires a defendant not be unjustly denied access to appellate proceedings. If Mr. Faella were to bring his appeal in the Second, Fifth, or Eight Circuits, then he would have the opportunity to argue that the district court imposed an amount of restitution in violation of 18 U.S.C. § 2259. But because his appeal was filed in the Eleventh Circuit he was denied that opportunity. Thus, Mr. Faella requests that this Court grant the petition for writ of certiorari.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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