

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SHALEN STOLTZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	2
OPINION BELOW	3
JURISDICTION	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
REASON FOR GRANTING THE WRIT	5
CONCLUSION	15
APPENDIX A	
Unpublished Order from the United States Court	
Of Appeals for the Ninth Circuit dated April 22, 2021	

TABLE OF AUTHORITIES

CASES

PAGE

<u>Alleyne v. United States</u> 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed 2 nd 314 (2013).....	10
<u>Burns v. United States</u> 501 U.S. 129, 111 S. Ct. 2182, 115 L. Ed 2d 123 (1991)	9
<u>Edwards v. Arizona</u> 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed 2d 378 (1981)	6
<u>Dean v. United States</u> 127 S. Ct. 1170, 197 L. Ed 2d 490 (2017).....	10
<u>Gardner v. Florida</u> 530 U.S. 349, 97 S. Ct. 1197, 51 L. Ed 2d 393 (1977)	9
<u>Garza v. Idaho</u> 139 S. Ct. 738, 203 L. Ed 2d 77 (2019).....	6
<u>In re Williams</u> 83 Cal. App. 4 th 936 (2000)	9
<u>Newton v. Rumery</u> 480 U.S. 386, 107 S. Ct. 1187, 94 L. Ed 2d 405 (1987)	11
<u>Shutte v. Thompson</u> 82 U.S. 151, 21 L. Ed 123 (1873).....	12
<u>United States v. Blitz</u> 151 F.3d 1002 (9 th Cir, 1998)	5-6
<u>United States v. Bownes</u> 405 F. 3d 634 (7 th Cir. 2005)	9
<u>United States v. Bradley</u> 381 F. 3d 641 (7 th Cir. 2004)	7

<u>United States v. Hahn</u> 359 F. 3d 1315 (10 th Cir. 2004)	14
<u>United States v. Han</u> 181 F. Supp. 2d 1039 (N.D. Cal. 2002).....	8, 10, 14
<u>United States v. Khattak</u> 273 F. 3d 557 (3 rd Cir. 2001)	14
<u>United States v. Melancon</u> 972 F.2d 566 (5 th Cir. 1992)	9-13
<u>United States v. Raynor</u> 989 F. Supp. 43 (Dist. of Columbia 1997)	11, 12, 14
<u>United States v. Riley</u> 335 F. 3d 919 (9 th Cir. 2003)	6
<u>United States v. Teeter</u> 257 F. 3d 14 (1 st Cir. 2001).....	14
<u>United States v. Vega</u> 241 F. 3d 910 (7 th Cir. 2001)	8, 9

FEDERAL STATUTES

18 U.S.C. § 1029(a)(3).....	3
18 U.S.C. § 3553	7
18 U.S.C. § 3742	8
28 U.S.C. § 1254(1)	3
42 U.S.C. § 1983	11

QUESTION PRESENTED

The Ninth Circuit dismissed Ms. Stoltz' criminal appeal due to an appellate waiver in the plea agreement. Ms. Stoltz argues that the appellate waiver in her case was unknowing and involuntary (and therefore unenforceable) because though one may knowingly and voluntarily waive an unknown future sentence authorized by law, one can not waive the constitutionally guaranteed right for the district court to follow the law when it applies the United States Sentencing Guidelines. The sentencing process must satisfy the requirements of the Due Process Clause.

The question presented is:

Is an appellate waiver knowing and voluntary when the waiver's scope includes a sentence contrary to law and unauthorized by the United States Sentencing Guidelines when a criminal defendant enjoys a constitutionally-protected liberty interest in being sentenced according to law?

OPINION BELOW

On April 22, 2021, the United States Court of Appeals for the Ninth Circuit filed dismissed Ms. Stoltz' appeal in United States v. Shalen Stoltz, No. 20-10191, due to an appellate waiver. A copy of this Order is attached hereto as Appendix "A".

JURISDICTION

On April 22, 2021, the United States Court of Appeals for the Ninth Circuit dismissed Ms. Stoltz' appeal. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On February 22, 2018, Ms. Stoltz was charged by Information in count one with knowingly and with intent to defraud, possessed fifteen or more unauthorized access devices in a manner affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 1029(a)(3). (ER 131-132.)¹

Ms. Stoltz and the government entered into a plea agreement on January 17, 2019. (ER 117) On the same date, Ms. Stoltz entered a guilty plea to count one of the Information.

¹ "ER" refers to the Excerpts of Record filed in United States Court of Appeals, for the Ninth Circuit in U.S. v. Stoltz, 20-10191.

On March 19, 2020, the district court sentenced Ms. Stoltz to time served and imposed restitution in the amount of \$14,838.15. (ER 95-96.) On May 28, 2020, the district court ordered that Ms. Stoltz pay \$2,000 restitution to victim Amy Righter. (ER 27.)

Ms. Stoltz filed her timely Notice of Appeal on June 9, 2020. (ER 133.) On April 22, 2021, the Ninth Circuit dismissed her appeal. (Appendix “A”.)

STATEMENT OF FACTS

“Beginning in or about September 2016, Shalen Stoltz and others agreed to obtain unauthorized access devices using stolen personal identifying information of victims, including their names, social security numbers, addresses, and mothers’ maiden names. Stoltz and her co-conspirators used the stolen personal identifying information to open new credit card accounts in the names of the victims or to request new credit cards be mailed from existing accounts in the victims’ names. Stoltz and her co-conspirators then filed fraudulent changes of address with the United States Postal Service, diverting delivery of the credit cards from the victims’ true address to an address Stoltz and her co-conspirators controlled in Sacramento, California. Stoltz and her co-conspirators then used the stolen credit cards to obtain merchandise and cash advances. (ER 128-130.)

REASONS FOR GRANTING THE WRIT

This petition raises the question: Can a criminal defendant, who has a constitutionally-protected liberty interest to being sentenced according to the law, knowingly and voluntarily waive her right to appeal a sentence that is unlawful and is contrary to the law established by Congress in exchange for a plea of guilty?

In this case, Ms. Stoltz and the government entered into a plea agreement. (ER 117.) The plea agreement contained a waiver of appeal provision. (ER 125-126.) It states: “The defendant agrees as part of her plea(s), however, to give up the right to appeal the guilty plea, conviction, and the sentence imposed in this case as long as the sentence does not exceed [the statutory maximum(s) for the offenses(s) to which she is pleading guilty] [or][-months]. The defendant specifically gives up the right to appeal any order of restitution the Court may impose”. (ER 125.) The government filed a motion to dismiss this appeal due to this appellate waiver. The Ninth Circuit granted the government’s motion and dismissed the appeal. (App. A)

Normally, an express waiver of the right to appeal is valid as long as it is knowingly and voluntarily made. United States v. Blitz,

151 F. 3d 1002, 1006 (9th Cir. 1998). The touchstone in considering the validity of a waiver is whether the waiver was voluntary, intelligent, and knowing. Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed 2d 378 (1981). A criminal defendant retains “the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary”. Garza v. Idaho, 139 S. Ct. 738, 745, 203 L. Ed. 2d 77 (2019).

Ms. Stoltz argues that the waiver of the appeal of her restitution order was not knowingly and voluntarily made because she expected the district court to adhere to the law as it relates to the \$2,000 restitution loss amount as to Ms. Amy Righter. United States v. Riley, 335 F. 3d 919, 932 (9th Cir. 2003). In Riley, the law provides that a defendant is only vicariously liable for reasonably foreseeable substantive crimes committed by a coconspirator in furtherance of the conspiracy. Id. at 932. The district court in this case did not follow the law when it determined Ms. Stoltz was responsible for Ms. Righter’s \$2,000 loss because the determination was not supported by the record. No one could knowingly and voluntarily waive an appeal

of a restitution order that will be imposed in violation of law.

At a minimum, when Ms. Stoltz agreed to the appellate waiver, she expected the district court to adhere to the law when determining restitution. “When the government proposes a plea agreement, when the defendant accepts it and when the district court enforces it, there must be a meeting of minds on all of its essential terms.” United States v. Bradley, 381 F. 3d 641, 648 (7th Cir. 2004). Here, an essential term is that the district court imposes restitution in conformance with the law. There was no meeting of the minds on a restitution amount that was not based on established law. Indeed, the question of whether Ms. Stoltz was liable for Ms. Righter’s the loss amount became the subject of briefing on both sides. (ER 30-49, 50-55.)

Congress mandates that absent an upward or downward departure, “the court shall impose a sentence of the kind, and within the range” set forth in the guidelines issued by the United States Sentencing Commission. 18 U.S.C. § 3553 (b). This congressional mandate anticipates that the sentence will reflect the *correct* application of the guidelines. To assure sentencing accuracy, Congress

expressly afforded a right to appeal where sentence “was imposed as a result of an incorrect application of the sentencing guidelines.” 18 U.S.C. § 3742 (a)(2). Congress also expressly afforded a right to appeal where the sentence was imposed in violation of law. 18 U.S.C. § 3742 (a)(1).

Here, Ms. Stoltz argues that the restitution order was imposed in violation of law. “The question of whether a waiver is made ‘knowingly’ and ‘voluntarily’ thus involves inquiring into whether the defendant would plead guilty and unilaterally give up his right to appeal *if* he understood that the court might impose a legally erroneous sentence....from which the defendant cannot appeal.” (Emphasis in original) United States v. Han, 181 F. Supp. 2d 1039, 1042 (N.D. Cal. 2002).

Here, Ms. Stoltz did not understand that the appellate waiver’s scope included an unauthorized and unlawful restitution order that she could not appeal. A plea bargain that purports to authorize the court to exercise a power it does not have is unlawful and may not be enforced.

For an appellate waiver to be enforceable, the disputed appeal must fall within its scope. United States v. Vega, 241 F. 3d 910, 912

(7th Cir. 2001). An appellate waiver provision that permits an unauthorized act by the district court in exchange for a guilty plea is not enforceable. *See In re Williams*, 83 Cal. App. 4th 936, 945 (2000); United States v. Melancon, 972 F. 2d 566, 577 (5th Cir. 1992)(Parker, J., concurring), citing to Gardner v. Florida, 530 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed 2d 393 (1977)(“the sentencing process must satisfy requirements of the Due Process Clause”)

A plea agreement is a type of contract subject to contract law principles, but is limited by constitutional considerations. United States v. Bownes, 405 F. 3d 634, 636 (7th Cir. 2005). A criminal defendant enjoys a constitutionally-protected liberty interest in being sentenced according to the Guidelines. United States v. Melancon, *supra*, 972 F.2d at 577, citing to Burns v. United States, 501 U.S. 129, 111 S. Ct. 2182, 2186-2188, 115 L. Ed 2d 123 (1991). The sentencing process must satisfy the requirements of the due process clause. *Id.*, at 2190-2192, 2196-2197 (Souter, J, dissenting.) “Every erroneous application of the Guidelines frustrates the complex policy goals that Congress and the United States Sentencing Commission intended for the Guidelines to further.” United States v. Melancon, *supra*, 972 F.2d

at 575. In this case, appellate review of the restitution order is essential to assure that restitution law is applied properly and to provide case law development of the appropriate reasons to impose restitution.

The determination of the amount of restitution and the actual sentence imposed is solely in the discretion of the sentencing court. Dean v. United States, 137 S. Ct. 1170, 1175, 197 L. Ed 2d 490 (2017); Alleyne v. United States, 570 U.S. 99, 100, 133 S. Ct. 2151, 186 L. Ed 2nd 314 (2013). If the district court follows the law and imposes a sentence or restitution order that the defendant does not like, the defendant may not appeal that sentence if there is an appellate waiver. However, an appellate waiver should never prevent a defendant to appeal an unauthorized or illegal sentence. United States v. Han, supra, 181 F. Supp. 2d at 1041. This is true because due process requires that the district court follow the law when sentencing and thus a criminal defendant has a constitutionally-protected liberty interest in being sentenced according to law. United States v. Melancon, supra 972 F.2d at 577.

It is true that a criminal defendant may waive a constitutional

right as part of a plea bargaining agreement. However, these rights involve a known quantity. For example in Newton v. Rumery, 480 U.S. 386, 392-398, 107 S. Ct. 1187, 94 L. Ed 2d 405 (1987), the right waived was the right to sue under 42 U.S.C. § 1983. Thus, the waiver was of a known quantity: a lawsuit—of which the one waiving had full knowledge, and over which the one waiving exercised control. United States v. Melancon, *supra*, 972 F. 2d at 572.

The waiver of any sentencing issue in this case, “contrasts with every other waiver provision typically included in a plea agreement. Every other right that normally is relinquished is a known, well-defined right, and the quid pro quo is understandable. For example, when a defendant gives up the right to trial in favor of a plea, he or she knows that there will no longer be twelve jurors setting in judgment, that there will no longer be live testimony and the right to confront witnesses, and that there will be no speedy and public trial.” United States v. Raynor, 989 F. Supp. 43, 44 (Dist. of Columbia 1997).

“Moreover when a defendant waives the right to a trial by jury in exchange for a plea to few counts or lesser offense, the defendant not only gives up any advantages that may come with a jury trial but also

is relieved of the uncertainties that may result from exercising the right to trial. United States v. Raynor, supra, 989 F. Supp. at 44.

“When a defendant waives the right to appeal a sentence, however, he or she is freed of none of the uncertainties that surround the sentencing process in exchange for giving up the right to later challenge a possibly erroneous application or interpretation of the Sentencing Guidelines or a sentencing statute.” United States v. Raynor, supra, 989 F. Supp. at 44. “Under the plea agreement proffered by the government, the defendants would have no right to ask the court of appeals to correct the illegal or unconstitutional ramifications of such sentencing errors.” United States v. Raynor, supra, 989 F. Supp. at 44.

In an appellate waiver, ‘what is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence.’ United States v. Melancon, supra, 972 F. 2d at 572. This Court has held that a party may waive any provision either of a contract or of a statute intended for his benefit. Shutte v. Thompson, 82 U.S. 151, 159, 21 L. Ed. 123 (1873). Waiver of the constitutional right to be sentenced

according to law cannot be to a defendant's benefit...because a criminal defendant enjoys the right to be sentenced according to the law. United States v. Melancon, *supra* 972 F.2d at 577.

The government argued and the Ninth Circuit agreed that Ms. Stoltz waived the right to appeal any order of restitution the Court may impose as stated in the plea agreement. (App. "A") However, Ms. Stoltz could never knowingly or intentionally waive an appeal of a restitution order that was imposed in violation of law. Allowing a waiver of an appellate right of an improper restitution order would drastically curtail the role of appellate review in assuring the correct and uniform application of restitution orders by the district courts. Appellate review allows the correction of aberrant, illegal, or biased sentencing [or restitution] determination and furthers the purpose of legislative sentencing reform by promoting uniformity and fairness with the system as a whole. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. , 127, 200, 200-211 (1995).

The government's waiver theory would require that courts find that Ms. Stoltz "knowingly and voluntarily" waived any objection to a restitution order imposed in violation of established Ninth Circuit law.

Here, Ms. Stoltz argues that restitution was not imposed within

the law. At the time of the plea agreement, Ms. Stoltz could not anticipate that the district court would impose a sentence not in conformance with the law. Therefore, her waiver of appeal could not have been knowingly and voluntarily made. No one could knowingly and voluntarily waive an appeal of a restitution order that was imposed in violation of the law.

There is not a circuit split on whether an appellate waiver is knowing and voluntary when the waiver's scope includes a sentence contrary to law and unauthorized by the United States Sentencing Guidelines. However, there are some district courts that take the position that a waiver of appeal of an illegal or unauthorized sentence can never be enforced. United States v. Han, *supra*, 181 F. Supp. 2d at 1040-1044; United States v. Raynor, *supra*, 989 F. Supp. at 44-48. And, there are circuit courts that have held that appellate waivers of sentencing issues should be enforced. United States v. Hahn, 359 F.3d 1315, 1325-1327 (10th Cir. 2004); United States v. Khattak, 273 F. 3d 557, 559-563 (3rd Cir. 2001); United States v. Teeter, 257 F. 3d 14, 21 (1st Cir. 2001).

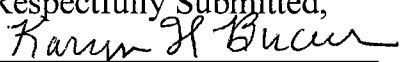
Based on the foregoing, Ms. Stoltz requests that this Court grant

certiorari in this case to answer the question of whether an appellate waiver is knowing and voluntary when its scope includes a sentence contrary to the United States Guidelines when a criminal defendant enjoys a constitutionally-protected liberty interest in being sentence according to the law. If this Court finds that Ms. Stoltz' waiver of appeal was unknowing and involuntary, then Ms. Stoltz may test the lawfulness of the district court's decision to impose the \$2,000 restitution order on appeal. This petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Ms. Stoltz respectfully submits that the petition for writ of certiorari should be granted.

Dated: July 19, 2021

Respectfully Submitted,

Karyn H. Bucur
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 22 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHALEN STOLTZ,

Defendant-Appellant.

No. 20-10191

D.C. No. 2:18-cr-00031-TLN-1
Eastern District of California,
Sacramento

ORDER

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 24) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Contrary to appellant's argument, the record reflects that she knowingly and intelligently waived the right to appeal. That appellant may not have foreseen the district court's alleged restitution error when she entered into the plea agreement does not render the waiver unenforceable. *See United States v. Lo*, 839 F.3d 777, 783-84, 787-88 (9th Cir. 2016).

DISMISSED.

App A