No. _____

Supreme Court of the United States

OJIN KIM,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In cases where the methodology to calculate the guidelines range for sentencing mirrors the methodology to calculate the restitution amount, if a challenge to the restitution order is not barred from appellate review due to factually insufficient evidence, whether the sentence should also be reviewable on appeal.
2. When a Circuit court holds that the restitution order should be vacated due to flawed methodology in determining the amount of infringing items, whether a sentence based on the same arbitrary calculation must also be vacated because deprivation of liberty should receive higher scrutiny rather than criminal monetary sanctions.

PARTIES TO PROCEEDING AND RELATED CASES

Parties

- Petitioner, Ojin Kim, was the Appellant.
- Respondent, Unites States of America, was the Appellee.

Related Cases

- *United States v. Kim*, No. 18-51024, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 19, 2021.
- *United States v. Kim*, No. 7:17-cr-00183-DC-1, U.S. District Court for the Western District of Texas. Judgment entered November 19, 2018.

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The published Opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Kim*, 988 F.3d 803 (5th Cir. 2021), vacated the restitution order and affirmed the sentence on February 19, 2021, and is attached to this Petition as Appendix A.

The judgment of the United States District Court for the Western District of Texas, issued on November 19, 2018, is attached to this Petition as Appendix B. The district court did not issue a written opinion, but the relevant portion of the transcript for the court's rendition of sentence is attached as Exhibit C.

STATEMENT OF JURISDICTION

Ojin Kim pleaded guilty to the offense of copyright infringement in violation of 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1), and in doing so, signed an appeal waiver. He appealed to the Fifth Circuit, challenging his sentence and restitution order asserting the Government's evidence did not support the sentence or restitution amount, therefore invalidating his appeal waiver. February 19, 2021, the United States Court of Appeals for the Fifth Circuit vacated the restitution order, yet affirmed the sentence, holding it barred by the appeal waiver. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. Pursuant to this Court's Order issued on March 19, 2020, and Supreme Court Rule 13.1, Ojin Kim has 150 days to file his Petition for Writ of Certiorari after entry of the court of appeal's judgment. Accordingly, this Petition is timely filed.

Petitioner Kim respectfully prays that this Court issue a Writ of Certiorari to

review the judgment and opinion of the Fifth Circuit. In its published opinion, the Fifth Circuit agreed with Kim that his otherwise valid appeal waiver did not bar his challenge to the restitution amount because the mount of restitution exceeded the statutory maximum. The court concluded that the Government did not meet its evidentiary burden to support the restitution amount because the calculation was based on speculation and did not establish the actual number of infringing items. On the contrary, the Fifth Circuit concluded the opposite with respect to his sentence, upholding the appeal waiver, even though the Government relied on the same speculative facts to increase the base offense level from 8 to 23, resulting in a 46-month sentence—30 months in excess of the statutory maximum of the applicable guidelines range.[1] In doing so, the court held that in order for a sentence to exceed the statutory maximum, it must exceed the highest range of the guidelines for that particular statute rather than applicable guidelines range based on supporting evidence. Since some statutes carry a wide disparity between guideline ranges depending on the quantity or loss calculation, this conclusion warrants this Court's review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fifth Amendment, United States Constitution:

No person shall be... deprived of life, liberty, or property, without due process of law.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

[1] Based on the plea agreement's stipulation and the Government's evidence, the base offense level should have been increased by a maximum of 4 levels, resulting in a sentence range of 10-16 months. *See* U.S.S.G. § 2B1.1.

trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

17 U.S.C. § 506(a)(1)(a):

Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain.

18 U.S.C. § 2319(b)(1):

Any person who commits an offense under section 506(a)(1)(A) of title 17—

(1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense is a felony and is a second or subsequent offense under section.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

It is well-settled that the Sixth Amendment authorizes a defendant who pleaded guilty and signed a valid appeal waiver to nevertheless challenge a sentence that exceeds the statutory maximum. A defendant's Sixth Amendment right is implicated "whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant." *United States v. Booker*, 543 U.S. 220, 232 (2005).

The Circuits are split, however, with respect to whether *statutory maximum* means the highest sentence permitted by the statute of conviction or the highest

sentence permitted by the guidelines range pursuant to the established facts. As such, it is unclear whether that right should apply equally to sentences and restitution orders in cases where the applicable guideline range for the sentence is determined based on the calculation of loss, which mirrors the restitution amount. While the Circuits are mostly aligned that the restitution amount must be supported by factually sufficient evidence, and an otherwise valid appeal waiver does not bar a challenge to a restitution order where the government fails to meet its burden to prove the loss amount, the Circuits are split on how *Blakely* and *Booker* impact challenges on appeal when the Government fails to meet its burden of proof for a sentencing enhancement, resulting in a sentence in excess of the maximum prohibited by the guidelines range supported by the evidence.[2]

Even within the Fifth Circuit, there is disagreement on this question, with the panel's opinion in *Kim* reaching the opposite conclusion as a prior holding in *United States v. Antonucci*, 667 F. App'x 121 (5th Cir. 2016) (per curiam). Since a sentence in excess of the statutory maximum triggers Sixth Amendment protection, it is vitally important to resolve this open question.

Here, after Kim pleaded guilty to one count of criminal copyright infringement, the factual basis in his plea agreement indicated a financial loss in the amount of $30,000. *Kim*, 988 F.3d at 806. The methodology used to calculate the loss multiplied 24, the number of counterfeit motherboards purchased from Kim by a confidential source, by $1,250, the alleged retail value of the motherboard. *Id.* The plea agreement

[2] The Fourth Circuit has declined to consider the merits of a challenge to a restitution order on appeal, finding the appeal waiver bars the right to appeal a restitution order. *United States v. Cohen*, 459 F.3d 490, 497 (4th Cir. 2006).

also included a board waiver of appeal. *Id*.

Subsequently, the presentence investigation report ("PSR") held Kim accountable for the sale of 485 counterfeit motherboards for a total loss of $606,250. *Id.* To arrive at this drastically different loss amount, the PSR stated Kim was responsible for the sale of an additional 461 counterfeit motherboards, relying on a statement of the owner of the Best/Blue game room, that she owed Kim $200,000. *Id.* The PSR concluded that the $200,000 "could have bought 461 motherboards at an average cost of $434 each." *Id.* The PSR then multiplied the approximate retail value given to the motherboards of $1,250 by 461 to reach the additional amount adding up to $606,250. *Id*.

In Kim's objections to the PSR, he objected to the additional $576,250 loss amount, since it was based on speculation, and not actual loss. *Id*. at 807. Kim reiterated his objection at sentencing. *Id*. The district court denied Kim's objections to the loss calculation without explanation. *Id*. On appeal, Kim asserted that the loss calculation was based on speculation, and that the sentence and restitution should be reversed based on exceeding the statutory maximum. *Id*. at 807-08.

The Fifth Circuit held that "a defendant may appeal a restitution order in excess of the statutory maximum where he has broadly waived his right to appeal, and his appeal waiver contains no provision requiring his sentence to be within the statutory maximum." *Id.* at 809. Relying on *Leal*, the Fifth Circuit concluded that a defendant is not barred from challenging a restitution amount on appeal, despite a broad appeal waiver, when the factual basis for the restitution amount is insufficient to establish the loss was proximately caused by the defendant. *Id.* at 810 (citing *United States v.*

Leal, 933 F.3d 426, 431 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 628 (2019)).

The Fifth Circuit then determined that the Government failed to carry its burden of establishing by a preponderance of the evidence the number of infringing items that Kim was responsible for and that the loss amount waws proximately caused by Kim's offense. *Id*. at 812. In concluding as much, the court concluded the methodology to calculate the number of counterfeit motherboards was based on speculation and not supported by the record. *Id*. Thus, the court vacated the restitution order and remanded for resentencing.

Furthermore, contrary to its reasoning in vacating the restitution order, the Fifth Circuit held that the appeal waiver barred Kim from challenging the 14-level sentencing enhancement under U.S.S.G. § 2B1.1 based on the PSR's conclusion that the loss calculation exceeded $550,000. *Id*. at 808. Applying the plain meaning of the appeal waiver, the court found that Kim's claim that his sentence exceeds the statutory maximum is barred because the challenge is based on the application of the Guidelines provision that enhanced his sentence based on a calculated loss amount exceeding $550,000 and not the maximum allowable statutory term of imprisonment for the offense. *Id*.

REASONS FOR GRANTING THE PETITION

A "defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995). While this Court has defined the term *statutory maximum* as the maximum sentence imposed on the basis of the facts admitted by the defendant or facts the Government proves by the preponderance of the evidence, this

Court has not yet decided whether "statutory maximum" under *Blakely* and *Booker*, in the context of a broadly written appeal waiver, means the maximum sentence permitted by the statute of conviction or the maximum sentence within the advisory guideline range as supported by the factual basis in a plea agreement. In cases such as *Kim*, where the guideline range is determined by calculation of loss, the discrepancy between the two is rather significant. Copyright infringement, under 17 U.S.C. § 506(a)(1)(a) has a maximum penalty of 5 years' imprisonment, whereas the base offense level for a defendant with criminal history category I, such as Kim, is 0-6 months. Besides the drastic disparity in time served, defendants such as Kim, a permanent legal alien, who face deportation consequences if the sentence exceeds one-year, the outcome of this Court's determination is life-altering and raises significant Sixth Amendment implications.

While this narrow issue presents itself in limited cases such as those falling under U.S.S.G. § 2B1.1, the determination has significant national importance. Aside from the split among the Circuit courts, there is indisputable injustice in allowing an appeal waiver to bar a defendant from challenging a sentence based on an arbitrary calculation of monetary loss where the exact arbitrary calculation warrants vacating the restitution order in the same case. This slippery slope may potentially permit sentencing based on factors other than the factual basis of the offense, including racial and national origin discrimination, with the defendant having absolutely no recourse on appeal.

Regarding the Circuit split, the Eleventh Circuit currently holds that a valid appeal waiver does not bar a defendant's claim that there is an insufficient factual

basis to support enhancement to higher guideline range, concluding that such a claim "goes to the heart" of whether the guilty plea, including the waiver of appeal, is enforceable. *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1284-85 (11th Cir. 2015). The Fourth Circuit, on the other hand, broadly enforces appeal waivers, even if the factual basis is insufficient to support the monetary loss amount for purposes of calculating the advisory guideline range. *United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005). Moreover, the First Circuit remains silent on this particular issue, although it noted the claim of error is probably barred by the appeal waiver. *United States v. Torres-Vasquez*, 731 F.3d 41, 46 n.2 (1st Cir. 2013).

The Fifth Circuit is inconsistent, previously considering a defendant's challenge to his sentence based on the calculation of loss amount used to determine his offense level, despite a knowing and voluntary appeal waiver. *United States v. Hayat*, 371 Fed. Appx. 471, 472 (5th Cir. 2010) (per curiam). Conversely, in *Kim*, the panel found the appeal waiver barred such a challenge. *Kim*, 988 F.3d at 808. The Fifth Circuit, in *Kim*, did not expressly overrule, distinguish, or disagree with its analysis in *Hayat*, so it remains unclear what the Fifth Circuit's position is with respect to this question. This also presents an issue of *stare decisis*, and since the *Kim* opinion is published and *Hayat* is not, future panels at the Fifth Circuit will be bound by the *Kim* decision, which the panel may disagree with, yet is forced to adopt.

This Circuit split and inconsistent application within the Fifth Circuit leads to arbitrary and unjust results. The Fifth Circuit here found the factual basis did not support the loss calculation. If Kim were sentenced in the Eleventh Circuit, his issue on appeal would have been cognizable, his sentence would have been vacated, and he

would have been resentenced with a maximum sentence of 16 months. Yet, in the Fifth Circuit, he could have received as much as 60 months for the same offense, and he would be barred from challenging that sentence on appeal. Allowing significantly different sentencing ranges is not acceptable, and this case presents this Court with the ideal vehicle to address this Circuit split and inconsistency within the Fifth Circuit, determine the meaning of *statutory maximum* in the context of appeal waivers, therefore resolving a key issue of national importance.

ARGUMENT

I. In cases where the methodology to calculate the guidelines range for sentencing mirrors the methodology to calculate the restitution amount, if a challenge to the restitution order is not barred from appellate review due to factually insufficient evidence, the sentence should also be reviewable on appeal.

In a certain limited class of offenses related to intellectual property, the infringement amount, i.e., loss calculation, serves as the principal factor in determining the offense level. *See* U.S.S.G. § 2B5.3, *Historical Note*. This same loss calculation serves as the basis for the restitution amount granted to the victim under 18 U.S.C. § 2323(c). Restitution is mandatory for victims of certain crimes, including copyright infringement. *See* 18 U.S.C. § 3663A. In other words, the factual basis to determine the amount of restitution to the victim, which is based on net loss, also serves as the factual basis to determine the applicable guidelines range for the sentence found in the table in U.S.S.G. § 2B1.1.

Cases like *Kim*, where a defendant pleads guilty and admits in his plea agreement to certain facts and signs a broad appeal waiver, the district court still has broad discretion to order restitution and a sentence based on the facts proven by the

Government by a preponderance of the evidence. Therefore, defendants that plead guilty in such cases, often admit to a lower loss amount than is eventually used for sentencing purposes. *See* STATEMENT OF THE CASE, *supra*.

As the Fifth Circuit noted in *Kim*, the law in the Circuit allows a defendant to raise on appeal that the amount of his restitution order exceeded the statutory maximum, even if the appeal waiver lacked an express reservation to that effect. *Kim*, 988 F.3d at 809. This Court also generally recognizes that when a defendant signs an appeal waiver in the context of a guilty plea, a judge's imposition of a sentence in excess of the statutory maximum absent a supporting factual basis, violates the Sixth Amendment and must be vacated. *Blakely v. Washington*, 542 U.S. 296, 304 (2004). However, the Fifth Circuit, in *Kim*, concluded that Kim's claim that his sentence exceeded the statutory maximum did not entitle him to an exception to the plea waiver, because the court merely sentenced him based on the calculated loss amount exceeding $550,000, and was therefore barred by the appeal waiver because his sentence did not exceed "the maximum allowable statutory term of imprisonment." *Kim*, 988 F.3d at 808.

It is troubling that the Fifth Circuit later determined the loss amount relied on to sentence Kim was arbitrary and speculative. *Id.* at 811-12. The district court concluded that Kim owed $606,250 in restitution, despite the evidence and factual basis in the plea agreement only supporting the maximum amount of $30,000. *Id.* at 812. The court concluded the Government failed to carry its burden of properly establishing the number of infringing items placed into commerce that Kim was responsible for and the resulting net lost profit. *Id.* at 812. As such, the Fifth Circuit

properly vacated the restitution award, but should have also vacated the sentence based on the same calculation instead of affirming it. Based on the unique nature of intellectual property offenses, this offense carries a punishment range between zero and 60 months—a determination directly linked to the loss finding.

This Court, in *Blakely*, held that the "statutory maximum" for *Apprendi*/*Booker* purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) (emphasis in original). This Court clarified the application of term *statutory maximum* does not include the "maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original).

Circuits, however, are split on how the *Blakely* definition of statutory maximum applies to miscalculation of the guidelines when a defendant signs an appeal waiver. A recently decided case out of the Eleventh Circuit, *Pittman*, held that despite the appeal waiver, the evidence contained in the plea agreement did not support a finding that there was a sufficient factual basis for the offense level, which the court found was relevant for the defendant's understanding of the consequences of his plea. *United States v. Pittman*, 850 Fed. Appx. 703, 712-13 (11th Cir. 2021). The court concluded that although Pittman's ultimate sentence falls within the guidelines range, due to a downward departure, the district court's acceptance of the plea without a sufficient factual basis required vacating the sentence. *Id.* at 714. In support of its decision, the Eleventh Circuit relied on this Court's decisions in *Alleyne* and *Booker*, for the

proposition that facts that increase the mandatory minimum sentence in a guilty plea must be supported by the record or admitted to by the defendant. *Id.* at 710-11 (citing *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Booker*, 543 U.S. at 224.

The Fifth Circuit, in *Hayat*, also reached a similar conclusion, finding three of the defendant's claims barred by the appeal waiver, but considering his claim regarding the calculation of the loss amount used to determine his offense level as not barred by his appeal waiver. *Hayat*, 371 Fed. Appx. at 472 (per curiam). The defendant in *Hayat* pleaded guilty to two counts of making a false statement to a bank and aiding and abetting and four counts of wire fraud and aiding and abetting. *Id.* The Fifth Circuit held that despite a valid appeal waiver, "the district court must still properly calculate the guideline sentencing range for use in deciding on the sentence to impose." *Id.* (citing *United States v. Goss*, 549 F.3d 1013, 1015 (5th Cir. 2008)).

Reaching an opposite holding, the Fourth Circuit has held that erroneous calculation of the loss amount under U.S.S.G. § 2B1.1 does not fall into an exception to a valid appeal waiver, and the challenge is barred. *Cohen*, 459 F.3d at 495-96; *Blick*, 408 F.3d at 169. Similarly, the Sixth Circuit barred a defendant's challenge to his sentence based on an appeal waiver, despite the Government admitting it miscalculated the offense level. *United States v. Carter*, 814 Fed. Appx. 1000, 1006 (6th Cir. 2020).

Moreover, the Second Circuit is unclear whether an appeal waiver barred the defendant's claims but concluded generally that a sentence is procedurally unreasonable when "the district court fails to calculate (or improperly calculates) the Sentencing Guidelines range. . . . selects a sentence on clearly erroneous facts, or fails

adequately to explain the chosen sentence." *United States v. Cedeno-Martinez*, 791 Fed. Appx. 272, 275 (2d Cir. 2019).

The point of contention falls upon this Court's definition of "statutory maximum" in *Blakely* and *Booker* and how it applies to sentencing guidelines when the defendant signs a valid appeal waiver. As such, this Court's guidance is needed to clarify this definition and prevent the miscarriage of justice.

II. When a Circuit court holds that the restitution order should be vacated due to flawed methodology in determining the amount of infringing items, a sentence based on the same arbitrary calculation must also be vacated because deprivation of liberty should receive higher scrutiny rather than criminal monetary sanctions.

As recognized in *Kim*, the Government has the burden to prove by a preponderance that the amount of loss suffered by a victim results directly from the defendant's offense of conviction. *Kim*, 988 F.3d at 811 (citing *United States v. Beydoun*, 469 F.3d 102, 107 (5th Cir. 2006). The court further notes that it is *possible* that the Government's proof be sufficient to establish a violation of the statute and support an enhancement, but insufficient to establish the actual loss amount for purposes of restitution. *Id*. The court cites *Beydoun* for this proposition, however, the Government in *Beydoun* adduced sufficient proof as to the number of infringing items. *Id*. at 106.

On the contrary, the Fifth Circuit clearly found that not only was the loss amount not proximately caused by Kim's offense, but the methodology in the PSR "was based on speculation regarding the number of counterfeit motherboards. . . ." *Kim*, 988 F.3d at 812. If the methodology is flawed, the sentencing guidelines range is arbitrary and unconstitutional. If the factual basis for the methodology is found arbitrary and

not supported by the factual basis for the plea, a challenge to the sentence should not be barred by an appeal waiver because it is analogous to the Government failing to establish an element of the offense of conviction. *See United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001) (holding that "notwithstanding an unconditional plea of guilty, we will reverse on direct appeal where the factual basis for the plea as shown of record fails to establish an element of the offense of conviction."). "[A]ny proceeding that increases the authorized range of punishment to which a defendant may be subjected is, in substance, a criminal prosecution to which the protections of the Sixth Amendment apply in full." *Booker*, 543 U.S. at 231.

Furthermore, deprivation of liberty resulting from miscalculated guidelines range should receive a higher level of scrutiny on appeal than a monetary sanction, rather than less. Permitting the *Kim* opinion to remain good law risks a severe deprivation of liberty for future defendants. Looking at the chart in U.S.S.G. § 2B1.1, depending on the calculated loss amount, for some offenses the range of offense level can be as low as 6 and as high as 30. The difference in the resulting sentence for a defendant who has no prior criminal history could be as varied as 0 to 20 years. *See* U.S.S.G. § 2B1.1. To find that a sentence does not exceed the statutory maximum when the factual basis in the plea agreement supports the sentencing range of 0-6 months, but the defendant is sentenced to 20 years because the statute of conviction maxes out at 20 years, is a violation of Due Process under the Fifth Amendment and imposition of an unjust sentence under the Sixth Amendment, and a severe miscarriage of justice. *See Apprendi*, 530 U.S. at 495 ("But it can hardly be said that the potential doubling of one's sentence-from 10 years to 20-has no more than a nominal effect."); *see also*

Blakely, 542 U.S. at 309 ("In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.").

The Due Process Clause forbids "arbitrary deprivations of liberty." *Goss v. Lopez*, 419 U.S. 565, 575 (1975). When a court finds the methodology flawed, arbitrary, and not supported by the record, it necessitates a finding that the sentence based on that same methodology exceeds the statutory maximum as well. It follows that arbitrary application of the Sentencing Guidelines violates due process and should not be waivable. Especially when the factual basis for supporting a restitution order is found arbitrary and unsupported by the record, a sentence resulting from the same calculation must be vacated. When a published opinion endorses an increase in a defendant's sentence based on nothing more than pure speculation, at best, that opinion is erroneous, and, at worst, that opinion is unconstitutional.

Mr. Kim respectfully requests that this Court grant certiorari to resolve this important question and its constitutional implications.

CONCLUSION

The Courts of Appeals are divided in how to apply this Court's definition of "statutory maximum" when determining whether a challenge to a defendant's sentence is barred by a valid appeal waiver. Especially in cases involving intellectual property offenses where the loss amount controls the applicable sentencing range, the factual

basis for the plea must support the range in which the defendant is sentenced. Furthermore, deprivation of liberty should receive a higher level of scrutiny than restitution orders, otherwise the district courts may adopt completely arbitrary methodology which, in turn, increases the offense level and resulting sentence.

In consideration of the foregoing Petition, Ojin Kim urges the Court to grant certiorari review in order to resolve these important questions of law. Petitioner respectfully requests that the Petition for Writ of Certiorari should be granted, the judgment of the Fifth Circuit affirming Petitioner's sentence be vacated, and the case remanded for further consideration.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-51024

United States Court of Appeals
Fifth Circuit
FILED
February 19, 2021
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

OJIN KIM,

Defendant - Appellant

Appeal from the United States Court of Appeals
for the Western District of Texas

Before DENNIS, SOUTHWICK, and HO, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

Defendant Ojin Kim pleaded guilty, pursuant to a plea agreement, to one count of criminal copyright infringement, 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1). The district court sentenced Kim to 46 months' imprisonment and ordered him to pay $606,250 in restitution to the copyright owner, Scientific Games Corporation. On appeal, Kim seeks to vacate the order of restitution, contending that it is in excess of the statutory maximum because it exceeds the amount of the victim's actual loss. We agree, and therefore we VACATE the restitution order and REMAND to the district court for redetermination of restitution. On the other hand, we DISMISS Kim's

challenge to the imposition of a sentencing enhancement because it is barred by his appeal waiver.

I. Facts and Procedural Background

The Odessa Police Department and the Ector County Sheriff's Office, in conjunction with the FBI, investigated illegal game rooms in Odessa, Texas that were the source of numerous complaints of crime and violence in the area. The FBI's investigation focused on the distributors of counterfeit gaming software. Pursuant to this investigation, Odessa officers and FBI agents executed a search warrant at OK Marketing Game Room in Odessa in February 2016. The game room contained several "Life of Luxury" ("LOL") video slot machine games. The LOL game machines contained motherboards, which include memory chips that hold the software for the games. Scientific Games Corporation is a legitimate business that produces and sells LOL game machines and owns the copyright to LOL software stored on the motherboard of each LOL machine. The computer motherboards seized from OK Marketing Game Room were found to contain memory chips with counterfeit Scientific Games labels, which indicated infringing copies of the gaming software in violation of federal copyright laws.

During the search, officers also located an empty box with a return address from Ozz Microsystem—located on Kinghurst Street in Houston, Texas—a company eventually connected to Ojin Kim. A Confidential Human Source (CHS) knowledgeable in game room operations and gaming equipment purchased 24 counterfeit LOL motherboards from Ojin Kim and his co-defendant, Hans Kim.

In July 2016, the Ector County Sheriff's Office executed a search warrant at a different game room in Odessa, the Best/Blue, and seized the motherboard from each gaming machine at that location, many of which were LOL motherboards. The owner of Best/Blue, Ok Cha Muraki, told the deputies that

she purchased motherboards from Kim. Muraki said that Kim told her that the motherboards had been made in China, which explained why they were sold cheaply for only $300–$400 each. Muraki further reportedly stated that she owed Kim more than $200,000 for prior purchases of gaming equipment, including motherboards. On November 21, 2016, the FBI seized ten LOL motherboards from the Ozz offices in Houston. On the same day, the FBI interviewed Kim, who admitted that he knowingly sold counterfeit copies of LOL software.

Kim pleaded guilty to one count of criminal copyright infringement. In the factual basis of his plea agreement, Kim agreed that he caused a financial loss to Scientific Games of $30,000, which was calculated by multiplying 24, the number of counterfeit LOL motherboards that the CHS purchased from Kim, by the retail value of $1,250 per motherboard. Kim also agreed to pay restitution to "include all amounts discovered through investigation into his criminal activity as described and set out in the Indictment." Additionally, Kim's plea agreement stated:

> The Defendant waives the right to appeal any aspect of the conviction and sentence, and waives the right to seek collateral relief in post-conviction proceedings, including proceedings under 28 U.S.C. § 2255. This waiver does not apply to ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension of which the Defendant did not have knowledge at the time of sentencing.

The presentence report (PSR) stated that Kim was accountable for the sale of 485 counterfeit motherboards for a total loss of $606,250. The probation office arrived at this figure through two separate calculations. First, mirroring the plea agreement, the PSR stated that Kim was accountable for a loss of $30,000 based on the counterfeit motherboards he sold to the CHS. This calculation multiplied the approximate retail value of a LOL motherboard, $1,250, by 24, the number of motherboards purchased by the CHS from Kim

and his co-defendant. Second, the PSR stated that Kim was responsible for the sale of an additional 461 counterfeit motherboards for a loss of $576,250. To arrive at this number, the probation office relied on the statement by Muraki, owner of the Best/Blue game room, that she owed Kim $200,000. The PSR stated that this $200,000 "could have bought 461 motherboards at an average cost of $434 each." The PSR then multiplied the approximate retail value of a LOL motherboard, $1,250, by 461 to arrive at the alleged loss to Scientific Games of $576,250. It is this calculation that Kim challenged in the district court and on appeal.

These calculations impacted facets of both Kim's recommended sentence of imprisonment and the amount he owed in restitution. First, because the loss amount exceeded $550,000, the PSR applied a 14-level sentencing enhancement pursuant to U.S.S.G. § 2B1.1(b)(1)(H), resulting in a Guideline range of 46 to 57 months. Second, the PSR concluded that Kim owed Scientific Games restitution of $606,250. Because Scientific Games owns the copyright to LOL, the PSR identified it as the "victim" of Kim's criminal copyright infringement for purposes of restitution.

While Kim agreed he owed restitution of $30,000 to Scientific Games based on the 24 motherboards that the CHS purchased from Kim and his co-defendant, he objected to the additional $576,250 in calculated loss based on the statements of Best/Blue game room owner Muraki. In his objections to the PSR, Kim argued that Muraki did not purchase the gaming boards from him, but instead that Muraki purchased the Best/Blue game room with the gaming machines already in place. He also stated that the sales he made to the Best/Blue "were for bill acceptors, monitors, power supplies, wiring, and spare parts, not motherboards." Finally, Kim argued that Muraki did not owe him $200,000—for motherboards or anything else—because Kim had required cash on delivery.

At sentencing, Kim reiterated his objection to the total loss and restitution calculations, again asserting that Muraki did not owe him $200,000 and that he did not sell her counterfeit motherboards; rather, he insisted that he only sold her other equipment and cabinets. In support of these assertions, Kim submitted an affidavit from Muraki in which she stated that because she purchased the game room from another individual, it was already stocked with games and their motherboards. She further stated she did not purchase motherboards from Kim and did not owe him $200,000 because she always paid in cash on delivery. Kim also submitted the affidavit of Ju Kim, a technician who worked for Muraki, that confirmed Muraki's statements that she did not purchase motherboards from Kim and did not owe him any money.

The Government called FBI special agent Rick Drebenstedt to testify at sentencing. Drebenstedt testified that he had interviewed Muraki about a month after he searched her game room and that during the interview Muraki told him that "she had gotten equipment or supplies from Ojin Kim in Houston, Texas" and "[t]hat during the course of transactions with [Kim], that [Muraki] had received equipment and motherboards, and that [Muraki] owed an outstanding debt of $200,000 to [Kim]." Drebenstedt further testified that the motherboards from the 103 gaming machines that were seized from the Best/Blue game room "were purchased from Ojin Kim in Houston, Texas," and that the large majority of those were Life of Luxury machines. On cross examination, Drebenstedt admitted that he did not know how many of the 103 confiscated motherboards were LOL motherboards, and that he had no documentation to indicate that Muraki owed Kim $200,000 for prior purchases. He also stated that Muraki never specified how many motherboards she purchased from Kim or what portion of the $200,000 she owed was for motherboards or for other equipment.

The district court denied Kim's objections to the total loss and restitution amounts without explanation. Kim requested a downward variance based on the nature and circumstances of the offense, arguing that the guidelines overstated the seriousness of the offense. The district court denied Kim's variance motion and stated that, based on the 18 U.S.C. § 3553(a) factors, the guidelines range was reasonable. The court sentenced Kim to 46 months in prison and three years of supervised release. The court further found that Kim owed restitution of $606,250.

On appeal, Kim challenges the district court's conclusion that he was responsible for the additional $576,250 in losses, asserting that this calculation was based on speculation—i.e., the supposed amount of counterfeit LOL motherboards that Muraki *could have* purchased from Kim at a discounted price, based on Muraki's statement that she owed Kim $200,000, if it was assumed that the entire amount was spent on counterfeit LOL motherboards. Kim argues that the deficient loss calculation warrants reversal on two points of prejudice to him: First, he argues that the district court erred in imposing a 14-level sentencing enhancement under § 2B1.1(b)(1)(H) based on its conclusion that the loss calculation exceeded $550,000. Second, he argues that his restitution order exceeds the statutory maximum because the Government failed to prove the requisite proximate cause between the victim's losses and the restitution amount. We discuss each in turn.

II. Appeal Waiver & Sentencing Enhancement

First, Kim argues that the district court erred in imposing a 14-level sentencing enhancement under § 2B1.1(b)(1)(H) based on its conclusion that the loss calculation exceeded $550,000. The Government responds that Kim's appeal waiver bars this challenge. We agree.

"[A] defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *United States v. Melancon*, 972 F.2d

566, 568 (5th Cir. 1992). "This court reviews de novo whether an appeal waiver bars an appeal." *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). We conduct a two-step inquiry in determining whether an appeal waiver bars an appeal: First, we evaluate "whether the waiver was knowing and voluntary," and second, we determine "whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). "In determining whether a waiver applies, this court employs ordinary principles of contract interpretation, construing waivers narrowly and against the Government." *Keele,* 755 F.3d at 754 (citing *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006)).

Because Kim does not contend that his appeal waiver was not knowing and voluntary, we must determine whether the appeal waiver applies to the circumstances at hand. *See Bond*, 414 F.3d at 544. Kim's plea agreement contained a broad waiver-of-appeal provision, expressly excepting only ineffective assistance of counsel claims and certain prosecutorial misconduct claims. Kim does not invoke either of these exceptions, instead arguing that his sentence exceeds the statutory maximum because the loss amount was based on speculation regarding the number of motherboards that Muraki could have purchased with the $200,000 that she initially said she owed Kim but later denied owing him. Kim contends that an argument that a sentence exceeds the statutory maximum is unwaiveable and therefore survives the appeal waiver.

Affording the language of the appeal waiver its plain meaning, it applies to the circumstances of this claim. Even if a claim that the sentence exceeds the statutory maximum is not barred by the appeal waiver, that particular claim is not implicated here: Kim's claim is a challenge to the application of the Guidelines provision that enhanced his sentence based on a calculated loss amount exceeding $550,000, which is barred by the waiver provision, not a

claim that his sentence exceeds the maximum allowable statutory term of imprisonment. *See Bond*, 414 F.3d at 545–46; *see also United States v. Minano*, 872 F.3d 636, 636–37 (5th Cir. 2017) (determining that a challenge to the loss amount was barred by an appeal waiver because the challenge pertained to the application of a specific guideline).

III. Appeal Waiver & Restitution Order

Kim next challenges the amount of restitution awarded to Scientific Games. He argues that because the restitution amount was based on speculation as to the number of motherboards that Muraki might have purchased from Ozz, the Government failed to prove the requisite proximate cause and that therefore his restitution order exceeds the statutory maximum. The Government again argues that this appeal is barred by Kim's appeal waiver. Kim responds that he is permitted to appeal the restitution order regardless of whether he expressly reserved the right to bring such an appeal because the restitution amount exceeds the maximum authorized by statute.

The Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A, requires the payment of restitution to victims of certain offenses, including offenses committed by fraud or deceit, "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." § 3663A(a)(1), (c)(1)(A)(ii), (c)(1)(B). Under the MVRA, a victim is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(a)(2). "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." § 3664(e). "[I]f a court orders a defendant to pay restitution . . . without determining that the defendant's conduct proximately caused the victim's claimed losses, the amount of restitution necessarily

exceeds the statutory maximum." *United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018).

This court has held that a defendant may bring a challenge to a restitution order in excess of that which is authorized by statute where his appeal waiver expressly reserves the right to appeal a sentence in excess of the statutory maximum. *See United States v. Chem. & Metal Indus., Inc. (C&MI)*, 677 F.3d 750, 752 (5th Cir. 2012). Kim's plea agreement contains no such express reservation. The precise question before us, then, is whether a defendant may appeal a restitution order in excess of the statutory maximum where he has broadly waived his right to appeal and his appeal waiver contains no provision requiring his sentence to be within the statutory maximum. In accordance with our prior case law, he can.

In *United States v. Barnes,* 953 F.3d 383 (5th Cir. 2020), we stated that our case law recognizes "two exceptions to the general rule that knowing and voluntary appellate and collateral-review waivers are enforceable: first, ineffective assistance of counsel, and second, a sentence exceeding the statutory maximum." 953 F.3d at 389–90 (internal citation omitted). *Barnes* cited *United States v. Leal*, 933 F.3d 426 (5th Cir.), *cert. denied*, 140 S. Ct. 628 (2019) as the "first published case, in this circuit, specifically to adopt that [second] exception," though a prior unpublished opinion had purported to adopt it as well. *Id.* at 390 n.10 (citing *Leal*, 933 F.3d at 431, and *United States v. Hollins*, 97 Fed. App'x 477, 479 (5th Cir. 2004) (per curium)).

In *Leal,* we held that a defendant could argue on appeal that the amount in his restitution order exceeded the statutory maximum notwithstanding a valid appeal waiver that lacked an express reservation to that effect. 933 F.3d at 431–32. We explained that it was "of no moment" whether Leal expressly reserved the right to appeal such a claim because, as we previously stated in dicta in *United States v. Keele,* an argument that the restitution amount

exceeded the statutory maximum "would not be barred by an appeal waiver." *Leal,* 933 F.3d at 430 (internal quotation marks and citation omitted).

Leal also relied on the "instructive and apposite" reasoning of *United States v. White,* 258 F.3d 374, 380 (5th Cir. 2001), which set forth the principle that a plea agreement cannot waive an argument raised on appeal that the factual basis is insufficient to support a defendant's guilty plea. *Leal,* 933 F.3d at 430. *Leal* stated that the reasoning in *White* applied "with considerable force to the right to be free of a sentence exceeding the statutory maximum[.]" *Id.* at 431. This was "particularly so in Leal's case because his plea agreement stated that any sentence imposed would be 'solely in the discretion of the Court,' '*so long as it is within the statutory maximum*.'" *Id.* (emphasis in original). Importantly, *Leal* explained that this language was significant because it was reflective of defendants' and the Government's shared understanding that promises in plea agreements must be in accord with the law and that the district court will act legally in implementing the agreement and imposing the sentence, including ordering restitution.[1] *Id.*

Lastly, the *Leal* court noted its holding was consistent with at least seven other circuits that recognized an exception to enforcement of an appeal waiver

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[1] Although the appeal waiver provisions of Leal's and Kim's plea agreements are materially similar, *see Leal*, 933 F.3d at 428, we take note that Kim's plea agreement lacks certain language that appeared elsewhere in Leal's plea agreement. Specifically, Leal's plea agreement noted that "[t]he defendant fully understands that the actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the Court." *Id.* However, we need not be concerned with this difference. In *Barnes*, we recognized that *Leal's* holding was not contingent on the language in the plea agreement. *See* 953 F.3d at 389–90 (recognizing the *Leal* exception without qualification). In doing so, we implicitly acknowledged that the language in Leal's plea agreement stating that the district court had discretion to impose a sentence "so long as it is within the statutory maximum" merely provided additional support for *Leal's* holding because it reflected the parties' acknowledgment of the legal truism that a court must not impose a sentence, including an order of restitution, that is unauthorized by law. *See Bond*, 414 F.3d at 545 ("Everyone knows that a judge must not impose a sentence in excess of the maximum that is statutorily specified for the crime.").

when the sentence exceeds the statutory maximum, and further noted that the Supreme Court, in *Garza v. Idaho*, had acknowledged that "no appeal waiver serves as an absolute bar to all appellate claims, and all jurisdictions appear to treat at least some claims as unwaiveable, including, in some jurisdictions, claims that a sentence . . . exceeds the statutory maximum authorized." *Id.* (quoting *Garza,* 139 S. Ct. 738, 744–45 & n.6 (2019) (internal quotation marks omitted).

We conclude that *Leal's* holding controls the outcome in the present case.[2] According to *Leal*, "a district court imposes a sentence expressly foreclosed by statute when it orders restitution . . . for losses not proximately caused by the defendant," 933 F.3d at 431 (citing *Winchel*, 896 F.3d at 389; *CM&I*, 677 F.3d at 752), and a plea agreement's failure to expressly reserve the right to raise a statutory maximum challenge is "of no moment" because "an 'in excess of the statutory maximum' challenge, if properly raised on appeal, would not be barred by an appeal waiver." *Id.* at 430 (quoting *Keele*, 755 F.3d at 756). While the Government argues that Kim "waived any right to challenge any potential illegality of his sentence," *Leal* states that "even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law." *Id.* at 430–31 (alteration omitted).

In sum, based on our prior case law it is clear that an otherwise valid appeal waiver is not enforceable to bar a defendant's challenge on appeal that his sentence, including the amount of a restitution order, exceeds the statutory maximum, notwithstanding the lack of an express reservation to bring such a

[2] In *Leal*, restitution was ordered pursuant to 18 U.S.C. § 2259, which mandates restitution for certain child pornography offenses, rather than pursuant to 18 U.S.C. § 3663A. However, this difference is not relevant to the appeal waiver issue.

challenge. Accordingly, Kim's challenge to the legality of his restitution order is not barred, and we can consider the merits of his argument.

IV. Calculation of Restitution Amount

The district court ordered Kim to pay $606,250 in restitution pursuant to the MVRA. While Kim does not dispute that he owes $30,000 in restitution based on the 24 counterfeit LOL motherboards that he sold to the CHS, he challenges the remainder of the restitution amount, $576,250, arguing that it is based on the probation officer's speculation that Muraki owed Kim an outstanding debt of $200,000 that represented 461 counterfeit motherboards.

The MVRA authorizes restitution to a victim "directly and proximately harmed by the defendant's offense of conviction." *United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012) (internal quotation marks and citation omitted). The MVRA is meant to reimburse the victim's actual loss and should not be used to penalize defendants. *Id.*; *see also United States v. Beydoun*, 469 F.3d 102, 107 (5th Cir. 2006) ("The MVRA does not permit restitution awards to exceed a victim's loss."). Thus, "excessive restitution awards cannot be excused by harmless error; every dollar must be supported by record evidence." *Sharma*, 703 F.3d at 323. The Government has the burden to prove by a preponderance of the evidence the amount of loss suffered by a victim that results directly from the defendant's offense of conviction. *Beydoun*, 469 F.3d at 107 (citing § 3664(a), (e)). Because of the MVRA's proximate cause requirement, it is possible that the "government's proof was sufficient to establish a violation of the [criminal infringement] statute and support a sentence enhancement, but it was insufficient to establish that the actions caused the victims an actual loss" for purposes of ordering restitution. *Id.*

We review de novo whether a restitution award exceeds the statutory maximum, *C&MI,* 677 F.3d at 752, and review for abuse of discretion a district court's determination of a legally permissible restitution amount, *United*

States v. Mahmood, 820 F.3d 177, 196 (5th Cir. 2016). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Crawley*, 533 F.3d 349, 358 (5th Cir. 2008) (internal quotations marks and citation omitted). The district court's calculation of the restitution amount is a factual finding that is reviewed for clear error. *See United States v. Read,* 710 F.3d 219, 231 (5th Cir. 2012).

In concluding that Kim owed $606,250 in restitution,[3] the district court implicitly credited FBI agent Drebenstedt's testimony that Muraki told him that she owed Kim $200,000 for the purchase of equipment, supplies, and motherboards and implicitly rejected Muraki's affidavit, executed two years later, in which she contradicted these earlier statements. The district court also adopted the methodology utilized in the PSR to convert the alleged amount owed into a quantifiable number of counterfeit motherboards for restitution purposes—i.e., that the outstanding $200,000 represented 461 counterfeit LOL motherboards at an average cost of $434 each, which, when multiped by the retail value of $1,250, equaled restitution of $576,250.[4] In accepting this calculation, the district court erred because the Government failed to carry its burden of properly establishing the number of infringing items placed into commerce that Kim was responsible for and the resulting harm to Scientific Games in terms of lost net profit.

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[3] The court noted that "[r]estitution owed shall be paid jointly and severally" between Kim and his co-defendant.

[4] Under the "Victim Impact" heading, the PSR states that the probation office provided Scientific Games (the "victim" under the MVRA) with information required by statute, see § 3664(d)(2)(A), and that "[r]eceipt of the Declaration of Losses remains pending." Neither Kim nor the Government reference any declaration in their briefs, and we have not located any declaration in the record.

First, regarding the number of infringing items, we have previously held that there is no loss for restitution purposes for counterfeit items not placed in commerce. In *United States v. Beydoun*, the defendant conspired "to import cigarette rolling papers falsely trademarked as 'Zig–Zags' for resale in the United States" by purchasing low-quality papers and repackaging them using Zig–Zag booklet covers, and created more than one million counterfeit booklets. 469 F.3d at 104. On appeal, Beydoun argued that the district court erred in ordering a restitution amount based on the one million booklets because only 32,640 booklets were "conclusively proven to have been shipped for distribution." *Id.* at 105, 107. We agreed, noting that "the government did not contend that all one million booklets were distributed or sold" and its evidence was therefore "insufficient to establish that the actions caused the victims an actual loss." *Id.* at 107. We explained that "there was no actual loss to the legitimate sellers if the booklets were never placed into commerce and sold," and remanded for the district court "to re-analyze the government's evidence and determine the number of items actually . . . put into the market to compete with legitimate Zig–Zag papers." *Id.* at 108.

The same result follows here. Based on the current record, the Government has not proven by a preponderance of the evidence that Scientific Games' purported loss was proximately caused by Kim's offense, *see Beydoun*, 469 F.3d at 107, in part because the PSR's methodology was based on speculation regarding the number of counterfeit motherboards that $200,000 could have purchased. This conclusion is not supported by the record. Drebenstedt testified that Muraki told him that she owed Kim $200,000 for the purchase of equipment or supplies *and* motherboards, thus clearly contradicting a conclusion that the entire amount was used to purchase motherboards, let alone counterfeit LOL motherboards. Moreover, though agents seized motherboards from 103 gaming machines from Muraki's game

room, not all of the motherboards were LOL motherboards. Finally, the record indicates that at some point before September 2015 Kim sold authentic LOL motherboards, which suggests that he could have sold authentic motherboards to Muraki.

Second, regarding the amount of actual harm to Scientific Games, we have previously stated that a restitution amount in a case involving infringing or counterfeit goods should be calculated using the "lost net profit" suffered by the victim of the infringement, rather than the retail value of the goods. *Beydoun*, 469 F.3d at 108 ("Because the purpose of the MVRA is to compensate a victim for its losses, the appropriate measure in this commercial setting is lost net profit."). Calculating the restitution amount based on lost net profit ensures that the victim will be compensated for the actual loss suffered. Basing restitution on the retail value of the goods disregards the costs incurred in manufacturing and selling legitimate goods and could therefore result in the victim receiving a windfall amount that exceeds the actual loss caused by the infringement. The MVRA does not authorize such an excess penalty. *Id.* at 107. Here, the district court—copying from the PSR—used the $1,250 retail value of a LOL motherboard to calculate the restitution order, rather than determining the net profits that Scientific Games lost due to Kim's actions. This was error.

Because it is unclear how much, if any, of the alleged outstanding $200,000 was spent specifically on counterfeit LOL motherboards, and also unclear what the resulting loss in net profit was to Scientific Games, we conclude that the district court erred in ordering restitution based on the speculative loss amount contained in the PSR. *See Beydoun,* 469 F.3d at 108; *accord United States v. Jones,* 616 Fed. App'x 726, 728 (5th Cir. 2015) (stating that counterfeit pills that were not placed in commerce may not be included in the restitution calculation); *Sharma*, 703 F.3d at 324 (rejecting a restitution

award where the adopted PSR did not indicate a meaningful scrutiny of the sizeable, "obvious mistakes" in the loss calculations submitted by the victims and where the defendant submitted rebuttal evidence). On remand, the district court should "re-analyze the government's evidence" and determine the number of counterfeit LOL motherboards actually sold "and put into the market to compete with legitimate [LOL games]" and the net profit lost by Scientific Games as a result. *Beydoun,* 469 F.3d at 108.

* * *

For the foregoing reasons, the district court's restitution order is VACATED and this case is REMANDED for redetermination of restitution.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 7:17-CR-00183-DC(1)
USM Number: 30806-479

OJIN KIM

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, OJIN KIM, was represented by Chris Flood, Esq.

On motion of the United States, the Court has dismissed all remaining courts pending with prejudice.

The defendant pled guilty to Count(s) One of the Indictment on April 23, 2018. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
17 U.S.C. § 506(a)(1)(A) 18 U.S.C. § 2319(b)(1)	Copyright Infringement	11/21/2016	One

As pronounced on November 13, 2018, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 19th day of November, 2018.

David Counts
United States District Judge

DEFENDANT: OJIN KIM
CASE NUMBER: 7:17-CR-00183-DC(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years.**

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.

The defendant shall provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation officer may share financial information with the U.S. Attorney's Office.

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CONDITIONS OF PROBATION AND SUPERVISED RELEASE
(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

[1] The defendant shall not commit another federal, state, or local crime during the term of supervision.

[2] The defendant shall not unlawfully possess a controlled substance.

[3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

[4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

[5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

[6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

[7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

[8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.

[9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. fines or special assessments.

Standard Conditions:

[1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

[2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

[3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

[4] The defendant shall answer truthfully the questions asked by the probation officer.

[5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change

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[6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

[7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

[8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

[9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

[10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

[11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

[12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

[13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

[14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

[15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

[16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

[17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

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CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 E. Wall St. Room 222, Midland, TX 79701. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTALS	$100.00	$20,000.00	$606,250.00

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

FINE

The defendant shall pay a fine of $ 20,000.00

SCHEDULE OF PAYMENTS

Payment at a rate approved by the court shall be made by the third day of each month beginning 60 days after release from imprisonment. The Court imposed payment schedule shall not prevent statutorily authorized collection efforts by the U.S. Attorney. The defendant shall cooperate fully with the U.S. Attorney and the U.S. Probation Office to make payment in full as soon as possible.

RESTITUTION – JOINTLY AND SEVERALLY

The defendant shall pay restitution in the amount of $606,250.00 through the Clerk, U.S. District Court, for distribution to the payee(s). Payment of this sum shall begin upon commencement of the term of supervision. Defendant Ojin Kim will owe the victim(s) jointly and severally with (2) Hans Kim. No further payment shall be required after the sum of the amounts actually paid by the defendant(s) has fully covered all compensable injuries.

The Court directs the United States Probation Office to provide personal identifier information of victims by submitting a "reference list" under seal Pursuant to E-Government Act of 2002" to the District Clerk within ten (10) days after the criminal Judgment has been entered.

Name of Payee	Amount of Restitution
Scientific Games	$606,250.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA,	) Case No. 7:17-CR-183
Plaintiff,	) COA No. 18-51024
vs.	) Midland, Texas
OJIN KIM,	) November 13, 2018
Defendant.	) 12:07 p.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE DAVID COUNTS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:
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FOR THE DEFENDANT:
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Proceedings reported by machine shorthand reporter.
Transcript produced by Computer-Aided Transcription.

it, what the defendant agreed to in terms of his plea agreement, what he agreed to under the terms of the factual basis, and the testimony that the Court has heard, the government believes the objections should be denied.

THE COURT: Thank you.

All right. Let's talk about -- let me rule on the objections. As to Ojin Kim, Objection 1 is granted.

Objections 2 and 3 are denied.

Objection 4 is granted in part as to where it states that Ozz Microsystems is the largest vendor of gaming machines and gaming boards in Houston but denied as to the portion dealing with manufacturing, importing, uploading chips. The Court for the reasons stated here today by the parties as well as by Officer Cordero.

As to all the objections -- denied as to the remaining objections for Ojin Kim.

The Court as to the objection by Hans Kim, grants that objection and finds that Hans Kim is responsible for 12 motherboards as opposed to the 127 that are listed.

With that as to --

Mr. Lewis, are there objections from the government to the reports?

MR. LEWIS: No, Your Honor.

THE COURT: As to Mr. Ojin Kim, the Court finds a total base offense level 23.

Criminal history category I.

Guideline range is 46 to 57 months.

The supervised release term, one to three years.

Ineligible for probation.

$20,000 to $200,000 fine.

A restitution amount of $606,250.

And a $100 mandatory special assessment.

I believe there is a written motion of variance that has been filed.

MR. FLOOD: Your Honor, I titled it a Sentencing Memorandum.

THE COURT: Yes, sir. That's a motion for variance.

MR. FLOOD: Yes, sir.

THE COURT: Thank you, Mr. Flood. So, Mr. Flood, what would you have the Court consider, including your motion for variance?

MR. FLOOD: Well, under 3553(a), Your Honor, as you well know, there's the nature and circumstances of the offense and things like that, this truly is kind of an odd duck in the way that we're complaining about somebody knocking off gambling machines that are actually kind of more of a menace than anything else.

And when you take that fact and the fact that really the only thing that allows law enforcement officers, I think, the ability to take down these game rooms is the fact that I

guess these machines are counterfeit, some of them. I don't know what the large majority is or whatever, but some of them are.

When you take that and couple it with the history of Mr. Kim, I think the guidelines overstate the seriousness of the offense.

You know, he fought in the Army on behalf of South Korea, Your Honor. He immigrated here to the United States and has raised two adult children that are in college, and he is their sole provider. He has no prior criminal history whatsoever. Never been arrested for anything in his life.

He should not have gotten into this practice of selling these counterfeit machines, and he regrets that tremendously. Not just because of the opportunities this country has given him but because of the jeopardy that has placed both he and his family in because they are here without their mother. He's their sole provider.

As you know, the Court -- no matter what happens here today, he's going to be deported back to South Korea. And so I just think that under 3553(a), the guideline calculations that you just quoted way overstate the seriousness of the offense, and he should be sentenced to something that will allow him to provide for his children before being deported and pay restitution, I guess, back to Scientific Games. If they're out money, he wants to pay them.

We had a stipulation of $30,000 in our factual basis, but it's -- based on the nature and circumstances of the offense and the history and characteristics of the defendant, we would ask for a variance, Your Honor, down to I think a prohibited sentence would be appropriate in this case. But I'll have Mr. Ojin Kim speak to that, Your Honor.

THE COURT: Mr. Lewis, what do you say to the motion for variance?

MR. LEWIS: Your Honor, the government believes, based upon the facts and circumstances of this case, this is a situation that involved the counterfeiting of copyrighted material to allow illegal games to operate in both the Midland and Odessa areas, and the thrust was that these games were operating, creating a problem in the community.

And to address this problem, let's go to not just the operators of the game room, but let's see if we can attack the distributors as a way to dismantle and disrupt and take out these game rooms that are operating, causing a problem in the community. And that became the focus of the investigation, and it focused on very quickly Ozz Microsystems controlled by Mr. Ojin Kim.

The investigation reflects that Ozz Microsystems was responsible for a lot of these games, a lot of these the software -- the counterfeit software that was being used in these games in this area. And based upon that and the facts

that are set out in the Presentence Investigation Report and what the Court has heard today, the government believes that under 3553(a), to promote respect for the law and to protect the community, that the guideline sentence in this case is reasonable, and the Court should consider a guideline sentence in this matter.

THE COURT: Thank you.

Mr. Ojin Kim, what would you like to say, sir? Anything you would like to say?

THE DEFENDANT: Even though I am not fluent in English, I have prepared for the judge something that I can tell the Court. Can I continue in English?

THE COURT: Yes, sir. Thank you.

THE DEFENDANT: Your Honor, thank you very much for your kindness in allowing me the opportunity to address the court.

Firstly, I would like to express my deepest apology and regret and the mistake I have made. More important, I have cost to the U.S. government, the Scientific Game Corporation, and the U.S. court system due to my mistakes.

I bow in shame to my Lord Jesus Christ; to you, Your Honor, Judge Counts; to this court; to my community; my family and my friends and ask for your kind compassion and forgiveness.

I came to the United States nine years ago, one thing

to give my children the opportunity for a better life in this great nation. I have worked very hard to provide for my family, but somehow along the way became blind by the pressure of setting my duties and made mistakes that caused great shame to my community and my family.

I am whole humbly coming to redeeming the mistake I have made and ask for your kindness in asking for the opportunity to ready my wrong by committing myself to the course that will benefit my community and those who are affected by my mistakes.

Thank you very much, Your Honor, for your kind consideration of my plea and, again, I ask for compassion. I ask for your compassion and mercy in your sentencing. Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Kim.

Mr. Lewis, anything the government would like to add to what you've already stated? You were only speaking to the variance, but I believe I got kind of the full meal deal. I got the whole argument but --

MR. LEWIS: You did, Your Honor. The government has nothing further to add.

THE COURT: All right. Very well.

The defense motion for variance is denied.

The Court in reviewing the Presentence Investigation Report prepared by U.S. Probation Officer Miriam Cordero does

find as stated that the total base offense level and criminal history category apply, especially Category I on the criminal history category for Mr. Kim.

The Court does not depart from the recommended sentence.

Pursuant to the Sentencing Reform Act of 1984, which I have considered in an advisory capacity, and the sentencing factors set forth in 18 U.S.C., Section 3553(a), which I have considered in arriving at a reasonable sentence, I find the guideline range in this case to be fair and reasonable.

The defendant is placed in the custody of the United States Bureau of Prisons to serve a term of imprisonment of 46 months, which is the low-end of the guidelines, which would be appropriate for a criminal history category I.

Upon release from the Bureau of Prisons, you are placed on supervised release to serve a term of three years.

The standard and mandatory conditions of supervised release are imposed.

Additionally, the defendant shall submit to the search condition of supervised release.

The defendant shall also provide the probation officer with access to any financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

Finally, the defendant shall pay any unpaid balance of restitution upon commencement of the term of supervision on a schedule to be approved by the Court. Restitution owed shall be paid jointly and severally and be made to Scientific Games, and we have the address. I just won't state it on the record. We have the address -- well, I think it is 2718 West Roscoe, Chicago, Illinois 60618. We'll make sure that that's right. I have actually had it incorrect, but I believe it to be accurate. The restitution amount is $606,250.

The Court imposes a fine of $20,000.

And there is a special assessment that's $100. That's mandatory. You're required to pay to the Crime Victims Fund. That's applicable to all felonies in the federal system.

The Presentence Report will be sealed.

You have the right to appeal your conviction and your sentence, assuming you've not given up that right. You must file a Notice of Appeal in writing within 14 days of this judgment. If you cannot afford a lawyer or the transcript of the record of the case on appeal, those will be provided at to expense to you.

Mr. Lewis, has the government received the -- a copy of the status report, release report from Pretrial Services as to Mr. Kim?

MR. LEWIS: The government has received the report, Your Honor.

THE COURT: Your position?

MR. LEWIS: Your Honor, with the sentence the Court has imposed, as defense counsel has indicated, the defendant is likely facing deportation. The defendant is not a citizen of the United States. He's here as a resident alien at the present time. The government has concerns now, based upon the sentence, that the defendant will become a flight risk. The government asks that the defendant be remanded into custody.

MR. FLOOD: Your Honor, and he's not been a flight risk before today, even though he's looking at this potential sentence, and he is currently in good standing in the United States. There hadn't been any issue with his immigration status yet. So we would ask that he be allowed to voluntarily surrender, Your Honor.

THE COURT: I appreciate the request, however, will agree with the government that now he has been sentenced and the dynamic has changed. I do believe that, as you stated earlier -- and whether you had said it or not, you and I and Mr. Lewis know that he is almost certainly to be deported. The Court will remand Mr. Ojin Kim to the custody of the United States Marshals to begin execution of that sentence.

MR. FLOOD: Your Honor, if we could also have a recommendation to the Bastrop facility of the Bureau of Prisons, Your Honor.

THE COURT: Absolutely you will. Mr. Flood, anything

further from the defense?

MR. FLOOD: Nothing further, Your Honor.

THE COURT: Mr. Lewis?

MR. LEWIS: No, Your Honor.

THE COURT: Thank you.

Mr. Kim, if you'll have a seat, please. We'll have a marshal come up for you.

(Proceedings concluded at 1:42 p.m.)

* * * * * *

C E R T I F I C A T E

I, ANN M. RECORD, United States Court Reporter for the United States District Court in and for the Western District of Texas, hereby certify that the above and foregoing contains a true and correct transcript of the proceedings in the above-entitled and numbered cause.

WITNESS MY HAND on this 12th day of June, 2019.

/s/Ann M. Record

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