

No. _____

In the
Supreme Court of the United States

Robert Doyle Harper,

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

PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTION PRESENTED

Whether appellate waivers in federal criminal cases contain an implied exception for judgments that represent a miscarriage of justice?

PARTIES TO THE PROCEEDING

Petitioner is Robert Doyle Harper, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Doyle Harper seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix A. The unpublished order of the Court of Appeals dismissing the appeal is reprinted in Appendix B to this Petition.

JURISDICTION

The order dismissing the appeal was entered on April 14, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. §2259 reads in part:

(a) In General.—

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

(b) Scope and Nature of Order.—

(1) Directions.—

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

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

(A) Determining the full amount of a victim's losses.—

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

(B) Determining a restitution amount.—

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

(C) Termination of payment.—

A victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses. After the victim has received restitution in the full amount of the victim's losses as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section, the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated. The court may require the victim to provide information concerning the amount of restitution the victim has been paid in other cases for the same losses.

(c)

(2) Full amount of the victim's losses.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) reasonable attorneys' fees, as well as other costs incurred; and

(F) any other relevant losses incurred by the victim.

(4) Victim.—

For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or

representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the crime victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

STATEMENT OF THE CASE

A. Proceedings in District Court

On January 26, 2020, an FBI agent performed a search for images containing sexual abuse of minors on a peer-to-peer network. (ROA.218). Because he received such images from an IP address associated with Petitioner Robert Doyle Harper, he performed additional searches of peer-to-peer accounts associated with Petitioner throughout the year. (ROA.218-219). Ultimately, he secured permission to search Petitioner's phone and found criminal images thereon. (ROA.219).

Petitioner pleaded guilty to one count of possessing "prepubescent child pornography." (ROA.13, 203-210). The indictment and factual resume did not name any particular image, but simply said that his phone contained "one or more" illegal images. (ROA.13). His plea agreement contained a waiver of appeal, but reserved the right to appeal "a sentence exceeding the statutory maximum punishment." (ROA.208). This agreement spared Petitioner an additional charge for trafficking in child pornography. (ROA.203-210).

A Presentence Report (PSR) noted that most of the images obtained from Petitioner had been downloaded by law enforcement from his peer-to-peer network accounts. (ROA.219)(PSR, ¶22). A smaller number were downloaded straight from the phone after a consent search. (ROA.219)(PSR, ¶22). According to the Report, law enforcement found images from several known "series," including one from a series in which the victim's lawyer requested restitution. (ROA.219-220).

Probation attached to the PSR a submission from the victim's lawyer, detailing her losses, and arguing for a restitution assessment. (ROA.270-395). The government agreed with the victim and produced a table of persons who have been already been assessed restitution in connection with the same victim. (ROA.265-269). They number 301. (ROA.265-269).

The defense filed written objection to a possible restitution award, and to the special assessments. (ROA.254-258). Regarding restitution, he argued that the victim's losses were not proximately caused by his conduct. (ROA.255). In support he cited *United States v. Paroline*, 575 U.S. 434 (2014), and the seven factors set forth therein. (ROA.255).

The court overruled the objection. (ROA.171-173). It undertook an admirably thorough and transparent application of the *Paroline* factors, which it found to compel an award of \$3,000 to the victim. (ROA.144-147). The second and third factors under *Paroline* are “[r]easonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved...” 572 U.S. at 460. Applying this factor, the district court below said:

Neither Jenny's representative nor the Government could provide the Court with reasonably reliable estimates as to the number of future offenders or the broader number of offenders involved, so the Court considers that a nullity.

(ROA.144-145). And at the conclusion of the *Paroline* analysis, the court said that the vile nature of the images possessed represented “an aggravating factor” in the restitution analysis. (ROA.145-146).

B. Appellate Proceedings

On appeal, Petitioner maintained, *inter alia*, that the district court erred in its award of restitution, and that the award therefore exceeded its statutory authority. Specifically, he maintained that the inability of the court to estimate the total number of offenders does not mean that Petitioner is solely responsible for the victim’s losses. Further, he contended that the vileness of an image does not change his responsibility for the victim’s losses relative to others who view the same image. He thus contended that the court ordered restitution in excess of his proximately caused losses, which 18 U.S.C. §2259 does not authorize. Citing a Fifth Circuit case that waivers of appeal cannot prevent review of a sentence in excess of the statutory maximum, *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019), he urged the court of appeals to reach the merits and grant relief.

The government filed a 20-page motion to dismiss, contending that an error under *Paroline* does not exempt the sentence from an appeal waiver unless there is a total absence of proximate cause analysis. It cited a wealth of Fifth Circuit authority for the proposition that restitution error is subject to a waiver of appeal, including *United States v. Frazier*, 644 F. App’x 362, 363 (5th Cir. 2014)(unpublished), *United States v. Pena*, 683 F. App’x 307, 308 (5th Cir. 2017)(unpublished), *United States v. Miller*, 631 F. App’x 265, 266 (5th Cir. 2016)

(unpublished), and *United States v. Mire*, 619 F. App'x 330, 332 (5th Cir. 2015) (unpublished).

After the defendant's reply, the court dismissed the appeal in a single sentence form order that provided no reasoning for its decision. [Appendix B].

REASONS FOR GRANTING THE PETITION

The courts of appeals have divided as to whether a defendant may avoid a waiver of appeal on the grounds that its enforcement would work a miscarriage of justice.

Federal courts of appeals will enforce a knowing and intelligent waiver of appeal to the extent of its scope. *See United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994); *United States v. Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States v. Rutan*, 956 F.2d 827, 829-830 (8th Cir. 1992); *United States v. DeSantiago-Martinez*, 980 F.2d 582, 583 (9th Cir. 1992), *amended*, 38 F.3d 394 (1994); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). But this Court has recognized that “no appeal waiver serves as an absolute bar to all appellate claims.” *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) .

Thus, many federal courts of appeals have recognized an exception to appellate waivers for cases involving a miscarriage of justice. *See United States v. Teeter*, 257 F.3d 14, 21–27 (1st Cir.2001); *United States v. Khattak*, 273 F.3d 557, 559–63 (3d Cir.2001); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Shockey*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009). These courts have reasoned that “[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant

sentencing court.” *Guillen*, 561 F.3d at 530. And they have reasoned that because courts “construe the agreement against a general background understanding of legality ... [it] presume(s) that both parties to the plea agreements contemplated that all promises made were legal, and that the non-contracting ‘party’ who implements the agreement (the district judge) will act legally in executing the agreement,” *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

The Ninth Circuit, however, has declined to adopt this exception, criticizing it as “nebulous.” *United States v. Ligon*, 461 F. App'x 582, 583 (9th Cir. 2011)(unpublished)(“Ligon asks the court to recognize a ‘miscarriage of justice’ exception to otherwise valid waivers of appellate rights. The court declines the invitation. This court does recognize certain exceptions to valid appellate waivers, but a nebulous ‘miscarriage of justice’ exception is not among them.”)(internal citation omitted)(citing *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996)). The court below has likewise “decline(d) to adopt the miscarriage of justice exception to appellate waivers.” *United States v. Fairley*, 735 F. App'x 153, 154 (5th Cir. 2018)(unpublished); *see also United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020)(“Finally, Barnes spends two paragraphs suggesting that we can refuse to enforce his waiver by applying a ‘miscarriage of justice’ exception. Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it.”)(citing *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (unpublished)).

This conflict between the courts of appeals pertains to an issue of great significance, meriting this Court intervention. The miscarriage of justice exception to appeal waivers is trained precisely on those cases that carry the greatest potential for grave injustice, such as:

(1) a sentence based on “constitutionally impermissible criteria, such as race”; (2) a sentence that exceeds the statutory maximum for the defendant's particular crime; (3) deprivation of “some minimum of civilized procedure” (such as if the parties stipulated to trial by twelve orangutans); and (4) ineffective assistance of counsel in negotiating the plea agreement.

Adkins, 743 F.3d at 192–93. These issues lie at the core of procedural due process in the criminal realm. The absence of a failsafe protection against errors of this consequence is no small matter.

Uncertainty in this area, moreover, has tangible impact on the administration of justice. Defendants who forego the right of appellate review should enjoy certainty about the scope of that waiver. And as appellate waivers are frequently appended to plea agreements, such uncertainty may result in the surrender of the precious right to trial by jury based on a misconception as to the real terms of the agreement.

Finally, the uncertainty surrounding the scope of appellate waivers has caused the Department of Justice to advise its lawyers to avoid relying on them. It said that because a “reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice ... in a case involving an egregiously incorrect sentence, the prosecutor should consider electing to disregard the waiver and to argue the merits of the appeal. That would avoid

confronting the court of appeals with the difficult decision of enforcing a sentencing appeal waiver that might result in a miscarriage of justice.” DOJ Criminal Resource Manual, *Plea Agreements and Sentencing Appeal Waivers -- Discussion of the Law*, §626(2) (Updated January 22, 2020), available at <https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law>, last visited July 12, 2022. Certainty would benefit all parties; recognition of an exception for miscarriages of justice would protect against the most serious errors in the criminal process.

The present case well presents the issue that has divided the court of appeals. Though the parties below exchange 34 pages on the scope of the appeal waiver, the court below did not explain its decision; rather, it dismissed the appeal in a single sentence order. *See* [Appendix B]. We may infer from its decision to dismiss the appeal, however, that it relied on the waiver of appeal rather than some implied conclusion as to the merits.

Further, there is good reason to think that at least one substantive issue presented below would be cognizable under an exception for miscarriages of justice. At least one court has declined to enforce an appeal waiver against a claim that the defendant’s restitution exceeds statutory limits, reasoning that such a sentence may constitute a miscarriage of justice. *See United States v. Gordon*, 480 F.3d 1205, 1208–10 (10th Cir. 2007). A misapplication of proximate cause standards set forth under *Paroline v. United States*, 572 U.S. 434 (2014), causes the restitution award

to diverge from the statutory mandate. The case would thus be an appropriate one to help define the contours of the miscarriage exception, should the Court adopt one.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 13th day of July, 2022.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner