

No. 22-5111

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

**REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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PETITIONER'S REPLY

There is a clear circuit split on the question presented, and on the proper treatment of the appeal waiver on the particular facts of this case. Without question, the courts of appeals have divided as to the existence of an implied exception to appeal waivers for miscarriage of justice. *Compare 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. Shockley*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) *with United States v. Ligon*, 461 F. App'x 582, 583 (9th Cir. 2011)(unpublished). Further, the Tenth Circuit has suggested that a defendant's appeal waiver is ineffective to bar an appeal from a restitution sentence exceeding the statutory mandate. *See United States v. Gordon*, 480 F.3d 1205, 1208–10 (10th Cir. 2007). The opinion below, however, enforced the waiver against just such a challenge in this case. *See* [Appendix A].

The government does not challenge the issue's suitability for a grant of certiorari, instead raising two putative vehicle issues. First, it notes that Petitioner used the phrase “miscarriage of justice” in connection with his appellate challenge to a different financial penalty. *See* (Brief in Opposition, at 9). Without question, Petitioner sought to avoid the appeal waiver as to the restitution challenge. *See* Initial Brief in *United States v. Harper*, No. 21-11018, 2022 WL 268515, at *7-8 (5th Cir. Filed January 25, 2022)(“Initial Brief”). In doing so, he asserted that the

district court’s failure to properly apply the factors enumerated in *Paroline* caused it to impose a greater penalty than permitted by 18 U.S.C. §2259. *See* Initial Brief, at *7-14. The Initial Brief’s failure to use the term “miscarriage of justice” in connection with the restitution claim is not controlling. The court below had a chance to consider the essence of the question presented.

Second, the government contends that the issue presented is “fact-bound” and would not constitute a miscarriage of justice. (Brief in Opposition, at 10). Contrary to the government’s view, however, the Tenth Circuit found an appeal waiver unenforceable against a very similar claim. In *Gordon*, the district court awarded restitution to victims not named in the indictment. *See Gordon*, 480 F.3d at 1210–11 (10th Cir. 2007). The defendant appealed in spite of an appeal waiver, contending that the Mandatory Victim Restitution Act authorized restitution only for the charged offense, absent a plea agreement waiving the limitation. *See id.* at 1207.

The Tenth Circuit disregarded the waiver and reversed. *See id.* As the government correctly notes, the court did not think that the appeal waiver applied to the claim. *See id.* at 1209. But it also thought the waiver would be unenforceable in any event. It “question(ed) whether Ms. Gordon could have waived her right to appeal an unlawful restitution order, even if she wanted to do so.” *Id.* at 1209. And it reasoned that a “plea agreement permitting a court to impose a restitution order beyond that authorized by statute might well be unenforceable on grounds of public policy.” *Id.* After explicitly invoking a miscarriage of justice exception, *id.* at 1209-

1210 (“...an otherwise valid waiver of appellate rights may be invalidated if it results in a miscarriage of justice and an unlawful sentence or an unlawful restitution order results in a miscarriage of justice.”), the Tenth Circuit said that the waiver could not be enforced because it had to “construe the plea agreement against a general backdrop of legality,” *id.* at 1210, which entitled the parties to assume that the sentence would not be illegal, *see id.*

The present case is on all fours. In *Gordon*, the district court imposed an illegal restitution award because the statute does not permit restitution to victims of offenses outside the indictment, barring consent. Here, it imposed an illegal restitution award because the statute limits restitution awards to losses proximately caused by the defendant. The Tenth Circuit would have entertained the appeal pursuant to the implied exception it outlined.

At a minimum, if the Court views the vehicle problems outlined by the government as sufficient to preclude, it should grant another petition raising the same or a closely related issue, and hold the instant petition pending the outcome. *See Lawrence v. Chater*, 516 U.S. 163 (1996). *Jimenez v. United States*, 22-536 (Filed December 8, 2022), which presents a possible miscarriage of justice exception to collateral attack waivers, is one such Petition.

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 16th day of December, 2022.

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