

No. \_\_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2023

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERNEST LUTHER TAYLOR,

Defendant-Appellant.

---

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

---

PETITION FOR WRIT OF CERTIORARI

---

James F. Halley  
James F. Halley, P.C.  
300 Oswego Pointe Drive, Suite 101  
Lake Oswego, OR 97034  
(503) 295-0301  
Attorney for Defendant Ernest Luther Taylor

## QUESTIONS PRESENTED

1. Did the District Court err when it ordered defendant Taylor to pay interest on a \$7500.00 restitution obligation, where the evidence showed that he suffered from paranoid schizophrenia, had been on social security disability, qualified for court appointed counsel, and lacked income?
2. Did the Court of Appeals err when it granted the prosecution's motion to dismiss his appeal?

## TABLE OF CONTENTS

	Page
Question Presented .....	ii
Index to Appendix.. .....	iv
Table of Authorities .....	v
Statutes and Rules .....	vi
1. The Parties .....	1
2. Official and Unofficial Reports of Opinions and Orders Entered in the Case .....	1
3. Statement of the Basis for Jurisdiction.....	1
4. The Statutes and Constitutional Provisions Involved In the Case.....	2
5. Statement of the Case .....	4
6. Reasons for Granting The Writ .....	7
7. Conclusion.....	12

## INDEX TO APPENDIX

Order Granting Motion to Dismiss, CR 22 <i>United States v. Taylor</i> , USCOA 9 <sup>th</sup> Cir. docket no. 22-30032	1
Appellant’s Opposition to Motion to Dismiss Appeal, CR 21	3
Appellee’s Motion to Dismiss Appeal, CR 20	6
Appellant’s Opening Brief, CR 11	14
Notice of Appeal, CR 279 <i>United States v. Taylor</i> , USDC Oregon docket no.#1:15-cr-173	28
Judgment, CR 272	29
Sentencing Transcript, CR 283	37
Plea Agreement, CR 251	75
Information, CR 248	82
Indictment, CR 9	84

## TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Easley v. Cromartie</i> , 532 U.S. 234, 242 (2001)	8
<i>United States v. Walter-Eze</i> , 869 F.3d 891, 912 (9th Cir. 2017)	8
<i>Briseno v. Henderson</i> , 998 F.3d 1014, 1022 (9th Cir. 2021)	9
<i>United States v. Elliott</i> , 322 F.3d 710, 715 (9th Cir. 2003)	9
<u>Statutes and Rules</u>	
18 U.S.C. §3231	1
18 U.S.C. §3742	1
28 U.S.C. §1291	1
18 U.S.C. § 2259	2
18 U.S.C. § 3612	2
18 U.S.C. § 3553	2
18 U.S.C. § 1462	5
18 U.S.C. § 2252A	5
<u>Regulations</u>	
USSG 5E1.1	3

The petitioner, Ernest Luther Taylor, respectfully requests that this court issue a writ of certiorari to review the Ninth Circuit's order granting the prosecution's motion to dismiss entered on November 16, 2022, and the District Court's imposition of interest on an indigent defendant.

1. The Parties.

The parties to this case are Plaintiff-Appellee United States of America and Defendant-Appellant Ernest Luther Taylor.

2. Official and Unofficial Reports of Opinions and Orders Entered In the Case.

The District Court's judgment appears in the appendix at 29. The Ninth Circuit Court of Appeals order granting the prosecution's motion to dismiss Taylor's appeal appears in the appendix at 1.

3. Statement of the Basis for Jurisdiction.

The District Court had jurisdiction of this criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction to hear Taylor's appeal as the judgment of conviction was a final decision of the District Court and appealable pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The United States Supreme Court has jurisdiction over a petition for a writ of certiorari pursuant to 28 U.S.C. §1254(1).

#### 4. The Statutes and Constitutional Provisions Involved in the Case.

The statute requiring the trial courts to impose restitution in child pornography cases is 18 U.S.C. § 2259, which provides 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.

The statute giving the court discretionary authority to waive or limit interest on restitution is 18 U.S.C. § 3612(f), which provides:

(f) Interest on fines and restitution.

(1) In general. The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment....

...

(3) Modification of interest by court. If the court determines that the defendant does not have the ability to pay interest under this subsection, the court may—

(A) waive the requirement for interest;

(B) limit the total of interest payable to a specific dollar amount; or

(C) limit the length of the period during which interest accrues.

The general statutory directive when imposing a sentence, 18 U.S.C. § 3553, provides:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

...

- (7) the need to provide restitution to any victims of the offense.

The United States Sentencing Guidelines address restitution at USSG

5E1.1, which provides in part:

5E.1. Restitution.

- (a) In the case of an identifiable victim, the court shall—
  - (1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q);

...

- (c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

...

- (e) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. *See* 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. *See* 18 U.S.C. § 3664(f)(4).

## 5. Statement of the Case.

At sentencing on December 15, 2022, the court imposed a sentence of 144 months, \$7500 in restitution, and ordered that Taylor pay interest on the restitution. At the hearing, Taylor objected to the imposition of interest, pointing out to the court that he suffers from paranoid schizophrenia, had been on social security disability, qualified for court appointed counsel, and lacked income. Sentencing Hearing Transcript p. 35:2, Appendix at 71; Judgment, Appendix at 29.

Taylor appealed the interest on his restitution obligation, and the government filed a motion to dismiss the appeal, arguing that he had waived his appellate rights in his plea agreement. Appellee's Motion to Dismiss Appeal, Appendix at 6. Taylor argued the appeal waiver does not apply in this instance because 1) he did not knowingly and voluntarily waive his right to appeal an order of interest on restitution; and 2) because the waiver doesn't apply to an illegal sentence. Appellant Taylor's Opposition to Prosecution's Motion to Dismiss, Appendix at 3. The Ninth Circuit Court of Appeals granted the Motion to Dismiss the Appeal on November 16, 2022. Order, Appendix at 1.

A. The District Court's Decision to Impose Interest.

In May 2015, the government charged Ernest Luther Taylor (Taylor) with eight counts of using a minor to produce visual depictions of sexually explicit conduct. Indictment, *United States v. Taylor*, USDC Oregon docket no.#1:15-cr-173, Appendix at 84.

In June 2021, Taylor pled guilty to a two-count superseding Information charging him with one count of possession of child pornography in violation of 18 USC §2252A(a)(5)(B) and one count of transportation of obscene material in violation of 18 USC §1462. Superseding Information and Plea Agreement, Appendix at 82 and 75. His plea agreement called for a 144 month sentence and payment of restitution. Appendix at 75. In his objections to the draft presentence report, Taylor told the court that he has been on social security disability and has no assets, and asked that the court not impose any financial obligations. In regard to the defendant's financial condition and ability to pay, the revised final presentence report provided:

Financial Condition / Ability to Pay

68. The defendant is in custody. He qualifies for court-appointed counsel. His financial condition is unknown. Due to the defendant's custody status, his lack of income, and his anticipated imprisonment sentence, he does not appear to be able to pay a fine.

Revised Final PSR at 14.

Defendant's confidential sentencing letter to the court included a psychological evaluation that concluded he suffered from schizophrenia, paranoid type. Before sentencing, the parties agreed to jointly recommend \$7500.00 in restitution. Sentencing Transcript at 11:16 – 20; Appendix at 47.

At sentencing, the court imposed the jointly recommended \$7500.00 in restitution, but ordered that defendant Taylor pay interest on that amount:

There is an agreed-upon restitution figure of the amount of \$7,500. That will be included. But in fashioning this sentence -- interest will accrue on that obligation if it is not paid within the next 14 days. And the payments schedule will be set up both -- if you're working in prison, you'll make payments on the restitution. If you're not working, probation will evaluate your payment schedule and set up payments not less than \$100 with regard to the central sentence in this case.

Sentencing Transcript at 32:12-20; Appendix at 68.

The defense objected, noting the defendant's inability to pay and the court responded that it was going to leave interest on as an incentive to pay:

MR. HALLEY: And, Your Honor, not something that you missed. You ordered interest on the restitution. I just would like to ask that the Court consider not imposing interest, because Mr. Taylor has very limited resources.

THE COURT: I'm going to leave the interest on, because I believe that, over time, he'll be able to make this payment. And I want him to be incentivized to get it paid off sooner rather than later. I often waive –

MR. HALLEY: Thank you for hearing me, Your Honor.

THE COURT: Yeah, I appreciate it. Is there anything else we can take up at this point? Anything else I need to take up?

MR. HALLEY: No, Your Honor.

Sentencing Transcript at 36:21 – 37:7; Appendix at 72-73.

B. The Court of Appeal's Dismissal Order.

Taylor appealed the imposition of interest on his restitution obligation. Taylor's Opening Brief, Appendix at 14. The prosecution moved to dismiss Taylor's appeal, arguing that the waiver of appeal in Taylor's plea agreement applied to his challenge to the interest. Appendix at 6. Taylor opposed the motion to dismiss, arguing that (1) he did not knowingly and voluntarily waive his right to appeal imposition of interest on restitution; and (2) the District Court imposed an illegal sentence claim. Appendix at 3.

6. Reasons for Granting The Writ.

The court should grant the writ here because: (1) the imposition of interest on restitution owed by an indigent defendant turns a mechanism designed to more fully compensate the victim into a disproportionate punishment on the indigent defendant; and (2) the Court of Appeals dismissal of the appeal unfairly expanded the application of appeal waivers.

A. Imposition of Interest Here Turned A Mechanism Designed To More Fully Compensate The Victim Into A Disproportionate Punishment On The Indigent Defendant.

A decision to impose interest on restitution ordered pursuant to 18 U.S.C. § 3162(f), when considered in light of the requirement under 18 U.S.C. § 3553(a) that a court impose a reasonable sentence that is sufficient, but not greater than necessary, to achieve the purposes of sentencing, requires a finding that the defendant has the ability to pay. Here, there was no evidence that defendant Taylor has, or ever will have, the ability to pay interest on the \$7500.00 in restitution ordered. The evidence before the court showed that he had been on social security disability and suffered from paranoid schizophrenia. The Revised Presentence Report concluded that he lacked the ability to pay. In these circumstances, there was simply no evidence to support the conclusion that Taylor has, or ever will have, the ability to pay interest. It was not reasonable to order that he do so.

A district court's findings of fact are clearly erroneous when the reviewing court is left with a "definite and firm conviction that a mistake has been committed" (*Easley v. Cromartie*, 532 U.S. 234, 242 (2001); and *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017)). While

courts won't disturb a district court's determination when there are two views of the evidence (*United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003)), the evidence here supports only one conclusion – defendant Taylor doesn't have the ability to pay.

Even if reviewed for an abuse of discretion, the District Court erred. A district court abuses its discretion when it does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. See *Briseno v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021) (“A district court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact.” (alteration, quotation marks, and citation omitted)). Here, there was no evidence that Taylor had the ability to pay, and so it was an abuse of discretion to order that he pay interest.

The purpose of interest on restitution is to compensate the victim for the time the victim must wait for payment. When the defendant who owes the obligation has no means to pay, though, the interest becomes a form of punishment which falls disproportionately on the poor.

#### B. Appeal Waiver.

(i). Taylor's Did Not Knowingly and Voluntarily Waive His Right to Appeal Interest on Restitution.

The rule that appeal waivers are enforceable is subject to several exceptions. In *United States v. Tsosie*, 639 F.3d 1213 (9th Cir. 2011) the court outlined those exceptions:

We have explained that "[a]n appeal waiver will not apply if: (1) a defendant's guilty plea failed to comply with Fed. R. Crim. P. 11; (2) the sentencing judge informs a defendant that she retains the right to appeal; (3) the sentence does not comport with the terms of the plea agreement; or (4) the sentence violates the law." *United States v. Watson*, 582 F.3d 974, 987 (9th Cir. 2009) (quoting *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007)). We have also stated that we will not give effect to an appeal waiver if it is not "made knowingly and voluntarily." *United States v. Gordon*, 393 F.3d 1044, 1050 (9th Cir. 2004) (quotation omitted).

*Tsosie*, 639 F.3d at 1217.

When an appeal challenges a restitution order, the knowing and voluntary standard requires that the defendant be given a reasonably accurate estimate of the amount of the restitution order to which he is exposed at the time of the waiver. *United States v. Phillips*, 174 F.3d 1074 (9<sup>th</sup> Cir. 1999) (plea agreement unclear on amount of restitution and so appeal waiver did not apply); and *United States v. Gordon*, 393 F.3d 1044 (9th Cir. 2004) (same).

There are several reasons for the additional limitation on appeal waivers in the restitution order context: a defendant generally does not have notice at the time of waiver of the full amount of restitution; there is no statutory or guideline limit on the amount; and the amount may depend on a claim by a third party which the defendant may be unable to predict. As a consequence, a defendant may plead guilty believing that he will not owe restitution when in fact “the sky is the only limit to his potential exposure”. *United States v. Tsosie*, 639 F.3d 1213, 1219 (9<sup>th</sup> Cir. 2011).

Here, the plea agreement contemplated restitution but not the amount, and was silent on the question of interest. While the plea petition did recite that the court had the authority to impose interest on restitution over \$2500.00, it was not reasonable to expect it to do so since it was undisputed that Taylor is disabled and indigent. The defense and prosecution agreed to restitution in the amount of \$7500 shortly before sentencing, but did not agree on interest. In short, defendant Taylor could not knowingly and voluntarily waive his right to appeal the unforeseeable imposition of interest.

(ii). Appeal Waivers Don’t Apply To Illegal Sentence.

An illegal restitution order is an illegal sentence. *Phillips*, 174 F.3d 1074, 1076 (9<sup>th</sup> Cir. 1999) (citing with approval *United States v. Broughton-*

*Jones*, 71 F.3d 1143 (4<sup>th</sup> Cir. 1995) for the proposition that “a restitution order which exceeded its authority under the VWPA is equivalent to an illegal sentence”). A restitution order is illegal if it is not authorized for the offense or is in excess of the amount authorized by statute. *United States v. Lo*, 839 F.3d 777, 788-89 (9<sup>th</sup> Cir. 2016).

Here, Taylor claims that the District Court imposed an illegal sentence when it imposed interest on his restitution pursuant to 18 U.S.C. §3612(f) without any evidence he had, or would ever have, the ability to pay.

#### 7. CONCLUSION.

This Court should grant certiorari and reverse the Ninth Circuit’s order dismissing Taylor’s appeal, and should reverse the District Court’s imposition of interest on the restitution Taylor owes.

DATED THIS February 14, 2023      JAMES F. HALLEY, P.C.

/s/ James F. Halley  
James F. Halley  
Attorney for Defendant-Appellant  
Ernest Luther Taylor

## CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2023, I served the attached  
Petition for a Writ of Certiorari on:

Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., NW  
Washington D.C. 20530-0001

Amy Potter  
Judith Harper  
Assistant United States Attorney  
405 E. Eighth Avenue, Suite 2400  
Eugene, OR 97401

by xxx depositing in the United States Mail at Portland, Oregon two  
full, true and correct copies in a sealed envelope with postage prepaid,  
addressed as shown above, the last known address for the addressees listed;

by     hand delivering to the attorneys shown above a full, true, and  
correct copy of the original.

by xxx efilng.

/s/ James F. Halley  
James F. Halley, OSB #911757

The foregoing is a true, correct and complete copy of the original.

James F. Halley, OSB #911757