

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 23, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEFFREY KESTEN,

Defendant - Appellant.

No. 22-1066
(D.C. No. 1:20-CR-00291-DDD-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before MATHESON, PHILLIPS, and CARSON, Circuit Judges.

Dr. Jeffrey Kesten pleaded guilty to one count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371. The object of the conspiracy was the solicitation or receipt of kickbacks in violation of 42 U.S.C. § 1320a-7b(b), and the charge was based on Dr. Kesten's conduct in prescribing a particular brand of pain medication in exchange for speaking fees. He was sentenced to twenty-four months in prison. He filed an appeal despite the appeal waiver in his plea agreement. The government now moves to enforce Dr. Kesten's appeal waiver

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

and to dismiss this appeal. *See United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam).

In determining whether to enforce an appeal waiver, we consider: “(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice[.]” *Id.* at 1325. Dr. Kesten argues his appeal waiver was not knowing and voluntary because his plea was not knowing and voluntary.

“[I]n determining whether an appellate waiver is knowing and voluntary under *Hahn*, we may consider whether the entire plea agreement, including the plea, was entered knowingly and voluntarily.” *United States v. Rollings*, 751 F.3d 1183, 1186 (10th Cir. 2014). Dr. Kesten contends his guilty plea was not knowing and voluntary because he “did not understand the nature of the charges against him before entering his plea.” Resp. at 1. “Specifically, he did not know that in order to convict him of conspiracy under 18 U.S.C. 371, the government was required to prove that he *willfully* joined the alleged conspiracy.” *Id.* (*citing United States v. Nall*, 949 F.2d 301, 305 (10th Cir. 1991)).

As in *Rollings*, because defense counsel did not object to the validity of the plea at any point in the proceedings, we review Dr. Kesten’s argument solely for plain error. 751 F.3d at 1191. Under the “demanding” plain-error standard, “he must demonstrate: (1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights.” *United States v. Rosales-*

Miranda, 755 F.3d 1253, 1258 (10th Cir. 2014) (internal quotation marks omitted).

“If he satisfies these criteria, this Court *may* exercise discretion to correct the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation marks omitted).

Dr. Kesten asserts that his counsel, the district court, and the prosecution “all operated under the mistaken belief that the conspiracy offense required only proof that [he] knowingly participated in the conspiracy.” Resp. at 3. He now contends “it is well established this kind of conspiracy offense requires proof that the defendant ‘entered the conspiracy *willfully*.’” *Id.* (quoting *Nall*, 949 F.2d at 305). He explains that “Federal Rule of Criminal Procedure 11 requires the district court to inform the defendant of and ensure he understands the nature of the offenses to which he is pleading.” *Id.* at 4 (brackets and internal quotation marks omitted). He therefore argues, “[b]ecause [he] did not know the elements of the conspiracy offense with which he was charged, his plea was not knowing and voluntary.” *Id.*

Dr. Kesten has not shown district court error. But even if we assume error, we agree with the government that Dr. Kesten has not shown plain error. It was not “clear or obvious under current law,” *Rosales-Miranda*, 755 F.3d at 1258 (internal quotation marks omitted), that the word “willfully” must be used instead of the phrase “knowingly and voluntarily” when describing the necessary intent for participating in a conspiracy.

The plea agreement used the phrase “knowingly and voluntarily” for the element regarding participating in the conspiracy when listing the elements for

conspiracy, citing Tenth Circuit Criminal Pattern Jury Instruction § 2.19 (2021). Mot. to Enf., Att. 1 at 7. And the elements were also read in open court during the plea colloquy using that same language. *Id.*, Att. 2 at 8-9. As the government explains, “[i]dentical language for the elements of conspiracy can be found in numerous Tenth Circuit cases.” Gov’t Reply at 5 (citing cases). In contrast, the only authority Dr. Kesten offers for his argument that the correct language is “willfully” is our decision in *Nall* from thirty years ago. But since that decision, we have repeatedly used the “knowingly and voluntarily” or “knowing and voluntary” language. *See, e.g., United States v. Murry*, 31 F.4th 1274, 1297 (10th Cir. 2022); *United States v. Hammers*, 942 F.3d 1001, 1013 (10th Cir. 2019); *United States v. Cooper*, 654 F.3d 1104, 1115 (10th Cir. 2011); *United States v. Bedford*, 536 F.3d 1148, 1156 (10th Cir. 2008); *United States v. Hanzlicek*, 187 F.3d 1228, 1232 (10th Cir. 1999). And he cites no authority suggesting that the later cases and the criminal pattern jury instruction are somehow substantively inconsistent with *Nall*. In fact, Dr. Kesten does not acknowledge the cases cited above, or the many others like them, that use the phrase “knowingly and voluntarily,” rather than “willfully.” Finally, he cites no case holding that use of the phrase “knowingly and voluntarily” is error in this context. Instead, it appears that “willfully” and “knowingly and voluntarily” may be used interchangeably in this context. *See Cooper*, 654 F.3d at 1115 (reciting the conspiracy elements, including that “the defendant knowingly and voluntarily participated in the conspiracy,” and citing *Nall* as in “accord” with that statement of the elements).

We conclude that Dr. Kesten has not shown error, let alone plain error, in the district court's advisement of the charge against him or approval of the plea agreement. As a result, he cannot show his plea was not knowing and voluntary or that his appeal waiver was not knowing and voluntary. Accordingly, we grant the government's motion to enforce the appeal waiver and dismiss this appeal.

Entered for the Court
Per Curiam

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

August 23, 2022

Kathleen Shen
Office of the Federal Public Defender
Districts of Colorado and Wyoming
633 17th Street, Suite 1000
Denver, CO 80202

RE: 22-1066, United States v. Kesten
Dist/Ag docket: 1:20-CR-00291-DDD-1

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. See Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of Court

cc: Marissa Rose Miller

CMW/jjh

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA

v.

JEFFREY KESTEN

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:20-cr-00291-DDD-1

USM Number: 08159-509

Mary Virginia Butterton

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to Violate 42 U.S.C. § 1320a-7b(b), Paying/Offering and Soliciting/Receiving Illegal Kickbacks and Bribes	11/30/2015	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

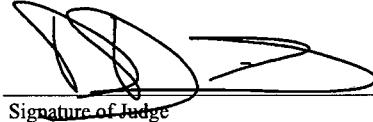
The defendant has been found not guilty on count(s) _____

Count(s) 2 through 64 is are dismissed on the motion of the United States.

It is ordered that the defendant must 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.

February 24, 2022

Date of Imposition of Judgment



Signature of Judge

Daniel D. Domenico, United States District Judge

Name and Title of Judge

February 28, 2022

Date

DEFENDANT: **JEFFREY KESTEN**
CASE NUMBER: **1:20-cr-00291-DDD-1**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **twenty-four (24) months.**

The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be designated to FCI Otisville or the closest facility commensurate with his security clearance.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:
 at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 before 2 p.m. on within 15 days of designation.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JEFFREY KESTEN**
CASE NUMBER: **1:20-cr-00291-DDD-1**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and a maximum of 20 tests per year of supervision thereafter.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JEFFREY KESTEN
CASE NUMBER: 1:20-cr-00291-DDD-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must 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. You must 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 you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, notify the person about the risk or require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: JEFFREY KESTEN
CASE NUMBER: 1:20-cr-00291-DDD-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of mental health treatment approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must pay for the cost of treatment based on your ability to pay.
2. If the judgment imposes restitution, you must pay the restitution in accordance with the Schedule of Payments sheet of this judgment. You must also notify the court of any changes in economic circumstances that might affect your ability to pay restitution.
3. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless you are in compliance with the periodic payment obligations imposed pursuant to the Court's judgment and sentence.
4. You must provide the probation officer access to any requested financial information and authorize the release of any financial information until all financial obligations imposed by the court are paid in full.
5. You must apply any monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation in this case.
6. If you have an outstanding financial obligation, the probation office may share any financial or employment documentation relevant to you with the Asset Recovery Division of the United States Attorney's Office to assist in the collection of the obligation.
7. Any business you operate during the term of supervision must be approved by the probation officer. You must operate under a formal, registered entity, and you must provide the probation officer with the name of the business entity and its registered agents. You must maintain business records and provide all business documentation and records as requested by the probation officer.

DEFENDANT: JEFFREY KESTEN
CASE NUMBER: 1:20-cr-00291-DDD-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

TOTALS	\$ 100.00	\$ 344,000.00	\$ 0.00	\$ 0.00	\$ 0.00
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The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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 below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Colorado Medicaid	\$29,543.00	\$29,543.00	
HCPF PICO P.O. Box 5143 Denver, CO 80217	(First priority payee)	(First priority payee)	
Centers for Medicare & Medicaid Services Division of Accounting Operations P.O. Box 7520 Baltimore, MD 21207-0520	\$314,457.00 (Second priority payee)	\$314,457.00 (Second priority payee)	

TOTALS \$ 344,000.00 \$ 344,000.00

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the following page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Publ. L. No. 115-299.

^{**} Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** 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.

DEFENDANT: **JEFFREY KESTEN**
 CASE NUMBER: **1:20-cr-00291-DDD-1**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The special assessment and restitution obligation are due immediately. Any unpaid monetary obligations upon release from incarceration shall be paid in monthly installment payments during the term of supervised release. The monthly installment payment will be calculated as at least 10 percent of the defendant's gross monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
 Money judgment in the amount of \$344,000

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

FILED

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Tenth Circuit

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FOR THE TENTH CIRCUIT

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Christopher M. Wolpert
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UNITED STATES OF AMERICA,

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Defendant - Appellant.

No. 22-1066
(D.C. No. 1:20-CR-00291-DDD-1)
(D. Colo.)

ORDER

Before **MATHESON, PHILLIPS, and CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk