No. 22-7286

In the
Supreme Court of the United States

Vonteak Alexander, Real Party in Interest,

Petitioner,

v.

Jane Doe,

Respondent.

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

Reply Brief of Vonteak Alexander

Rene Valladares
Federal Public Defender, District of Nevada
*Amy B. Cleary
Assistant Federal Public Defender
Wendi L. Overmyer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577
Amy_Cleary@fd.org

*Lead counsel for Petitioner,
Real Party in Interest, Vonteak Alexander

Table of Contents

Table of Authorities

Federal Cases

Federal Statutes

State Cases

Federal Rules

Secondary Sources

Introduction

Respondents do not deny this Court has yet to provide guidance to federal courts concerning the principles to be applied for resolving federal plea agreement disputes. Respondents instead erroneously suggest this case is not ripe for review, expend efforts discussing unproved allegations irrelevant to the Ninth Circuit's reformation of the underlying plea agreement in issuing a writ of mandamus, and fail to acknowledge the entrenched circuit split concerning reformation of valid, accepted, plea agreements containing a mutual mistake of law.

Contrary to Respondents' claims, whether a court may court reform an accepted, valid, federal plea agreement containing a mutual mistake of law to circumvent the mistake to the defendant's prejudice is squarely before the Court and ripe for review. And it is the only issue the Court need resolve. That Petitioner Vonteak Alexander's plea agreement is a *binding* agreement that limited the district court's restitution authority to the agreement's explicit terms renders this case ideal for the Court's review. This Court should grant a writ of certiorari to resolve the longstanding split among federal circuit courts concerning the principles courts must apply to adjudicate plea agreement disputes involving a mutual mistake of law.

A. The writ of mandamus is a merits decision ripe for Supreme Court review.

This Court's review of the Ninth Circuit's writ of mandamus is both appropriate and necessary. There is no question this Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254. *See* Doe Br. in Opp., 20 (conceding jurisdiction). Respondents allege, however, the writ of mandamus places this case in an "interlocutory posture." Gov. Br. in Opp., 12–15; *see also* Doe Br. in Opp., 20–21. Respondents are incorrect. Respondents ignore that Alexander seeks review of the Ninth Circuit's merits decision concerning the district court's authority to order restitution, fail to recognize deferred restitution judgments like Alexander's are immediately appealable, and mischaracterize the question presented.

First, Respondent Doe pursued a mandamus action in the federal court of appeals to challenge the district court's restitution decision, the only mechanism available to alleged crime victims to raise such challenges. 18 U.S.C. § 3771(d)(3); *United States v. Kovall*, 857 F.3d 1060, 1070 (9th Cir. 2017) (Congress only provided "victims a limited right to seek a writ of mandamus in the courts of appeals and omitted any reference to their right to appeal"). Congress could have provided victims "'immediate appellate review' or 'interlocutory appellate review.'" *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008). Congress instead authorized mandamus as the exclusive remedy. *Id.* Indeed, in *Paroline v. United States,* this Court granted certiorari and reversed the Fifth Circuit's mandamus grant to crime victims. 572 U.S. 434 (2014). Absent Supreme Court review, mandamus decisions

issued by federal appellate courts under § 3771(d)(3) cannot be scrutinized, depriving both defendants and crime victims any judicial recourse to challenge those decisions.

Second, the Ninth Circuit issued a merits decision when it held the district court has authority to issue restitution and remanded for adjudication of the restitution amount. Pet. App. 5a–9a. Unless this Court grants certiorari, the Ninth Circuit's writ of mandamus will be a final order binding the district court, the parties, and Respondent Doe, whether through the law of the case doctrine or *res judicata*. *See Visciotti v. Martel*, 862 F.3d 749, 763 (9th Cir. 2016) ("According to the law of the case doctrine, on remand a lower court is bound to follow the appellate court's decision as to issues decided explicitly or by necessary implication.") (internal quotation marks omitted); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (*res judicata* "bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action" where "there is '(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties'") (citation omitted). The Ninth Circuit's writ of mandamus is thus not an interlocutory decision as to the district court's authority to impose restitution.

Third, the deferred restitution judgment underlying the writ of mandamus is an immediately appealable final judgment. In *Dolan v. United States*, this Court recognized "strong arguments" support the conclusion that both "the initial judgment" imposing "a sentence of imprisonment and supervised release" and the subsequent sentence imposing restitution are each final and immediately

appealable. 560 U.S. 605, 616–17 (2010) (citing 18 U.S.C. §§ 3582(b) (imprisonment), 3583(a) (supervised release), and 3664(o) (restitution)). Subsequently, in *Manrique v. United States*, this Court concluded the "analysis in *Dolan* thus makes clear that deferred restitution cases involve two appealable judgments, not one." 581 U.S. 116, 123 (2017).[1]

There is no dispute Alexander's sentencing proceedings were bifurcated, resulting in two final orders. The district court first issued its judgment imposing incarceration and supervision terms and deferred its restitution judgment, which issued a year later. Pet., 7–10 & n.4.[2] Under *Dolan* and *Manrique*, *supra*, the bifurcated sentencing procedure created two separate judgments, each of which are immediately appealable final orders.

That Alexander has separately appealed his conviction judgment does not affect the finality of his restitution judgment. *Contra* Gov. Br. in Opp., 14–15; Doe

---

[1] It "makes sense" defendants may appeal from the earlier sentencing judgment imposing incarceration and supervision and separately appeal the deferred restitution judgment like the one present here. *Dolan*, 560 U.S. at 618. Otherwise, the delay between the initial judgment and the adjudication of deferred restitution "could delay" defendants' ability to seek appellate review of their "conviction when they could ordinarily do so within 14 days." *Id.* That delay could stall conviction appeals by 90 days—the statutory deadline by which district courts must make a final determination of a victim's losses for purposes of restitution. *Id.* at 618; *see also id.* at 613 (referencing 18 U.S.C. § 3664(d)(5)). That delay can also extend beyond the 90-day statutory deadline where "the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount." *Id.* at 608.

[2] *See also* Pet. Appx. 4a (district court "defer[red] a decision on restitution" until a later date); Dist. Ct. Dkt., 302, pp. 5–6 (indicating on final judgment of conviction that restitution was "TBD," i.e., to be determined).

Br. in Opp., 20. In the event the writ of mandamus is upheld and the case remanded, Alexander may appeal the restitution judgment to challenge *the amount* of restitution that may be ordered on remand. If he does so, he may also move to consolidate the pending direct appeal of his conviction with a possible future direct appeal of the amount of restitution ordered, though there is no requirement he do so and no requirement the appellate court order consolidation. *See* Fed. R. App. P. 3(b)(2). But beyond the instant petition for a writ of certiorari, Alexander may not challenge in any direct appeal the district court's *authority* to impose restitution, as explained *supra* at pp. 2–4. The Ninth Circuit has already issued its final decision on the merits of the district court's authority to issue restitution. Pet. Appx. 5a–9a.

As such, "the ultimate outcome" of Alexander's petition does not depend on the disposition of any pending proceedings. *Contra* Gov. Br. in Opp., 13. If this Court reverses the writ of mandamus, there will be no subsequent restitution proceedings. If the Court upholds the writ of mandamus, restitution proceedings will occur on remand to determine only the amount of restitution to be issued—an issue beyond the scope of the question presented here.[3]

[3] It is also irrelevant to the question presented that Alexander additionally argued in the district court that (1) the government and Respondent Doe failed to establish proof substantiating any restitution; and (2) Alexander proposed the amount of $1,000.00 when the district court asked him the amount he believed would be appropriate if a legal basis to impose restitution existed, Mand. Appx., 9th Cir. Dkt. 1, pp. 199–201. *Contra* Gov. Br. in Opp., 8–9; Doe Br. in Opp., 10. Both arguments were necessary to preserve Alexander's direct appeal right to challenge any restitution amount ordered if the district court had found a legal basis to impose restitution.

Finally, in addition to the writ of mandamus being a final appealable order, the mandamus action itself constitutes a "case" falling squarely within this Court's jurisdiction under 28 U.S.C. § 1254(1). *Accord* Doe Br. in Opp., 20. Under § 1254(1), "[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The extraordinary nature of a writ of mandamus warrants this Court's scrutiny. Indeed, this Court has granted certiorari to review the propriety of mandamus grants. *See, e.g., Paroline*, 572 U.S. 434; *Will v. United States*, 389 U.S. 90, 94–95 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Review is especially critical here given the mandamus grant flows from the Ninth Circuit's prejudicial reformation of Alexander's binding plea agreement and further deepens the entrenched federal circuit split concerning plea interpretation.

For each of these reasons, the Ninth Circuit's writ of mandamus reversing the merits of the district court's authority to issue restitution is a final decision properly before this Court.

B. The Ninth Circuit reformed the parties' accepted, valid, and binding plea agreement to excise a mutual mistake of law to Alexander's prejudice.

The Ninth Circuit's writ of mandamus results from its reformation of the parties' binding plea agreement to avoid and excise a mutual mistake of law. Respondents' suggestion to the contrary does not reflect the record or the Ninth Circuit's analysis. *See* Gov. Br. in Opp., 20–21; Doe Br. in Opp., 21–22.

The government argued in its mandamus briefing that, even if the parties' citation to 18 U.S.C. § 2259 as the statutory basis for restitution "was erroneous, the parties' error" did not "extinguish the district court's authority" to order restitution under a different and permissive restitution statute not contained in the binding plea agreement—18 U.S.C. § 3663(a)(3).[4] Alexander argued the parties' binding plea agreement purposely limited the district court's restitution authority to that mandated by § 2259—a decision that was not a mere citation error or drafting mistake.[5] It was a mutual mistake of law that Alexander argued cannot be modified or corrected.[6] But because Alexander later discovered § 2259 does not authorize or mandate restitution here, he argued the district court correctly determined it had no authority to order restitution despite the parties' erroneous agreement to the contrary.[7]

In accord with Alexander's interpretation, the Ninth Circuit agreed the first and third sentences of the binding restitution provision could be interpreted to mean the parties agreed mandatory restitution would be ordered "only to the extent that the district court later determined that [Alexander's] conduct resulted in the commission of a crime encompassed by § 2259." Pet. Appx. 7a–8a. And the Ninth Circuit found the parties believed at the time of the plea and for years thereafter that Alexander had an "obligation" to pay restitution. Pet. Appx. 8a. It was not

---

[4] Gov. Br., 9th Cir. Dkt. 6, p. 10 n.4.

[5] Alexander Br., 9th Cir. Dkt. 9, pp. 27–28.

[6] *See* Oral Argument at 29:16–29:35, https://www.ca9.uscourts.gov/media/video/?20220919/22-70098/ (Alexander arguing a mutual mistake of law in a binding, accepted plea agreement cannot modified or corrected).

[7] Alexander Br., 9th Cir. Dkt, pp. 21–40

until Alexander was appointed new counsel that anyone discovered Alexander was not obligated to pay restitution because restitution is not statutorily authorized under § 2259. Pet. Appx. 8a.

Because § 2259 does not authorize mandatory restitution, the Ninth Circuit offered two reasons for rejecting Alexander's interpretation of the restitution provision. First, the court stated Alexander's interpretation would "render[] the restitution paragraph void on its face." Pet. Appx. 7a. ("rejecting, as 'contrary to basic principles of contract interpretation,' an interpretation of a plea agreement that 'would render meaningless' a provision of the plea agreement") (quoting *United States v. Medina-Carrasco*, 815 F.3d 457, 462 (9th Cir. 2015)). Second, the court stated the parties' competing interpretations rendered the restitution provision ambiguous. Pet. Appx. 8a.

Then, instead of construing the perceived ambiguity created by the restitution provision's inclusion of § 2259 against the government as the plea agreement's drafter, the Ninth Circuit reformed the restitution provision to excise the legal error. The Ninth Circuit did this by reading the restitution provision in reverse order to avoid the parties' mistake as to the applicability of § 2259. Pet. Appx. 7a. This backwards reading impermissibly modified the binding plea agreement. Pet., 21–23. That the Ninth Circuit failed to acknowledge its reformation avoided the parties' mutual mistake of law using that phrase is immaterial. *Contra* Doe Br. in Opp., 21–22; Gov. Br. in Opp., 20–21. The court declined to interpret and enforce the restitution provision as written because it

believed doing so would render the provision "meaningless" and "ambiguous" given that restitution cannot be mandated under § 2259.[8]

Despite this, Respondents suggest the Ninth Circuit's analysis and decision did not resolve a mutual mistake of law. *See* Doe Br. in Opp., 20–21; Gov. Br. in Opp., 21–22. Respondents are incorrect. The Ninth Circuit's writ of mandamus raises the very question presented to this Court: "May a court reform an accepted, valid, federal plea agreement containing a mutual mistake of law to circumvent the mistake to the defendant's prejudice." Pet., i.

C. The federal circuits are divided over how to resolve plea agreements containing a mutual mistake of law.

Respondents do not dispute this Court has yet to address how federal courts must interpret an accepted plea agreement to resolve disputes arising from a mutual mistake of law, let alone how to do so when that plea agreement is binding. Pet., 13–14. Nor do Respondents dispute consistent approaches to resolving plea disputes must exist for our system of pleas to function. Pet., 1–3, 20, 23–24. Respondents instead argue the circuits do not disagree how to resolve mistakes of

---

[8] Courts resolving commercial contracts often seek to interpret contract terms to avoid rendering any term "meaningless." *See, e.g., Bay Shore Power Co. v. Oxbow Energy Sols., L.L.C.*, 969 F.3d 660, 666 (6th Cir. 2020); *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 111 (2d Cir. 2008). Otherwise, the contract could be deemed "unenforceable." *Bay Shore Power Co.*, 969 F.3d at 666. But this interpretive principal is ill-fitted for plea agreement disputes where a defendant's liberty is at stake. *See United States v. Partida-Parra*, 859 F.2d 629, 634 (9th Cir. 1988) (binding plea agreements are governed by the Federal Rules of Criminal Procedure, "not by the Uniform Commercial Code"). As detailed in Alexander's Petition, defendants who enter plea agreements in criminal cases are guaranteed constitutional due process protections that parties to commercial contracts are not. Pet., 13–16.

law in plea agreements. Gov. Br. in Opp., 21–23; Doe Br. in Opp., 23–26. In making this claim, Respondents fail to acknowledge the various circuit court positions governing mutual mistakes of law in plea agreements and instead focus on whether those circuits ultimately reformed the mutual mistake. Gov. Br. in Opp., 21–23; Doe Br. in Opp., 23–26. But Alexander does not seek review of whether a particular circuit properly applied its respective approach. He seeks certiorari to resolve the circuit split concerning the process by which federal courts resolve mutual mistakes of law in plea agreements. Pet., 15–20.

With no consistency among the circuits, disputes arising from mutual mistakes of law in plea agreements will be resolved differently from circuit to circuit:

- The Eighth Circuit would not have reformed Alexander's plea agreement to excise the mistake of law. *See United States v. Ritchison*, 887 F.3d 365, 369 (8th Cir. 2018) (declining to extend the doctrine of mutual mistake to plea agreements); Pet., 18.
- The Tenth Circuit also would not have reformed Alexander's plea agreement because, *inter alia*, the mistake is one for which the government bears the risk as drafter of the plea agreement. *See United States v. Frownfelter*, 626 F.3d 549 (10th Cir. 2010) (setting forth three-part test that must be satisfied to reform a plea due to a mistake of law); Pet., 19.
- The Second Circuit would also not have reformed Alexander's plea agreement unless the government proved the mistake pertained to the

"foundation" of the agreement and, as such, "prevent[ed] the contract from representing the meeting of the minds 'in some material respect.'" *United States v. Hilliard*, No. 21-2358-CR, 2022 WL 4479520, at *1 (2d Cir. Sept. 27, 2022) (quoting *Gould v. Bd. of Educ.*, 81 N.Y.2d 446, 453 (1993)); *see also* Pet., 18–19.

- Nor would Alexander's plea agreement have been modified in the Fourth Circuit unless the government proved the mistake "materially affect[ed] the exchange of performances" and did not "deprive [Alexander] of the benefits for which he bargained." *United States v. Johnson*, 915 F.3d 223, 234 (4th Cir. 2019); *see also* Pet., 19.
- Alexander's plea agreement would also not have been reformed in the Seventh and Eleventh Circuits unless the government proved the agreement failed to accurately reflect the terms of the parties' agreement and that Alexander did not plead guilty "in reliance on the undertakings made by the government that were memorialized in the plea agreement." *United States v. Atkinson*, 979 F.2d 1219, 1223 (7th Cir. 1992); *United States v. Weaver*, 905 F.2d 1466 (11th Cir. 1990) (citing *Restatement (Second) of Contracts* § 155 (Am. Law Inst. 1979)); *see also* Pet., 19–20.
- Whether Alexander's plea agreement would be modified in the Ninth Circuit depends on the adjudicating panel. *Compare United States v. Transfiguracion*, 442 F.3d 1222, 1229 (9th Cir. 2006) ("The inability to rescind a plea agreement based on a mutual mistake of law applies to

criminal defendants as well as to the government."), *with* Pet. Appx. 1a–9a (reforming plea agreement containing a mutual mistake of law to Alexander's prejudice); *see also* Pet., 20.

Given the federal circuits' divergence on this important issue, the Court's review and intervention is necessary to bring and maintain comity.

D. Respondents misstate case facts.

The question presented does not require this Court to resolve or inquire into the unproven allegations Respondents proffer against Alexander. *See, e.g.,* Doe Br. in Opp., 2–4, Gov. Br. in Opp., 2–4. Respondents' recitations are far afield from the limited factual basis contained in the binding plea agreement. *See* Pet. Appx. 54a–55a. Moreover, the district court already resolved Respondents' proffered version of events in Alexander's favor due to lack of evidentiary proof. Pet. Appx. 51a (rejecting Doe's claims and concluding her "assertions and the record" are legally insufficient to "establish that Alexander committed a sex offense under Chapter 110").[9] The Ninth Circuit also twice corrected its published opinions to remove the same type of erroneous assertions Respondents now proffer.[10]

---

[9] Respondents' references to factual findings in the district court's suppression order also fail to accurately represent the record. The district court made clear its factual findings were limited to the suppression order and not dispositive: "The Court notes that the references to the alleged conduct of Mr. Alexander in the factual findings section of this order should not be construed as the Court making dispositive findings for the purposes of the trial or other motions regarding such conduct." Dist. Ct. Dkt. 219, p. 2 n.1.

[10] *Compare* Pet. App. 14a, 17a–19a (Alexander's petition for rehearing requesting factual correction in *In re Doe*, 51 F.4th 1023 (9th Cir. 2022)), and 9th

Respondents' assertions to the contrary belie the record and are, in any event, irrelevant to the question presented.

Conclusion

The Ninth Circuit's writ of mandamus is a final order that reformed Alexander's binding plea agreement to his prejudice to excise a mutual mistake of law. This case is an ideal vehicle for the Court to resolve an issue that has created an entrenched circuit conflict—what principles should courts apply to resolve a dispute arising from a mutual mistake of law contained in a valid, accepted federal plea agreement? This Court should grant the petition for a writ of certiorari.

Dated this 13th day of September, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

s/ Amy B. Cleary
*Amy B. Cleary
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577
Amy_Cleary@fd.org

**Lead counsel for Petitioner, Real Party in Interest, Vonteak Alexander*

Cir. Dkt. 26 (Alexander's petition for rehearing requesting factual correction in *In re Doe*, 49 F.4th 1264 (9th Cir. 2022)), *with* amended opinions in *In re Doe*, 57 F.4th 667 (9th Cir. 2023) (Pet. Appx. 1a–9a), and *In re Doe*, 50 F.4th 1247 (9th Cir. 2022).