

No. _____

IN THE
Supreme Court of the United States

JOHN WILLIAM IRON ROAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals enforced an appeal waiver over petitioner's argument that restitution was awarded under an inapplicable statute and for losses not proximately caused by the offense conduct. The courts of appeals are divided on whether an appeal waiver should be enforced over an unlawful restitution award.

The question presented is:

Whether an appellate court should enforce an appeal waiver where the appeal challenges an unlawful restitution award?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Iron Road, No. 1:21-cr-00139, United States District Court for the District of North Dakota. Judgment entered August 16, 2022.

United States v. Iron Road, No. 22-2804, United States Court of Appeals for the Eighth Circuit. Judgment entered December 12, 2022.

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PETITION FOR A WRIT OF CERTIORARI

John William Iron Road respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The judgment of the court appeals dismissing the appeal (App. 1a) is unreported. The district court's judgment (App. 2a-9a) is also unreported.

JURISDICTION

The court of appeals dismissed Mr. Iron Road's appeal and entered judgment on December 12, 2022. Mr. Iron Road received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on February 8, 2023. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3663A provides in relevant part:

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

- (A) that is –
 - (i) a crime of violence, as defined in section 16;
 - (ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;
 - (iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;
 - (iv) an offense described in section 1365 (relating to tampering with consumer products); or
 - (v) an offense under section 670 (relating to theft of medical products).

18 U.S.C. § 16 defines the term “crime of violence” as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

N.D. Cent. Code Ann. § 14-09-22(1) provides in relevant part:

1. Except as provided in subsection 2 or 3, a parent, adult family or household member, guardian, or other custodian of any child, who willfully inflicts or allows to be inflicted upon the child mental injury or bodily injury, substantial bodily injury, or serious bodily injury as defined by section 12.1-01-04 is guilty of a class C felony except if the victim of an offense under this section is under the age of six years in which case the offense is a class B felony.

N.D. Cent. Code Ann. § 12.1-02-02(1)(e) provides in relevant part:

- e. “Willfully” if he engages in the conduct intentionally, knowingly, or recklessly.

INTRODUCTION

Petitioner John William Iron Road was ordered to pay \$15,075.05 in restitution under an inapplicable statute for, at least in part, charges that were not proximately caused by the offense conduct. Restitution plays a much larger role in federal criminal sentencing today than it had previously. *See Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., dissenting); *see generally* Lollar, *What is Criminal Restitution?* 100 Iowa L. Rev. 93 (2014). Criminal restitution orders were comparatively rare before the enactment of the Victim and Witness Protection Act of 1982 and the Mandatory Victims Restitution Act of 1996. Lollar, *What is Criminal Restitution?* 100 Iowa L. Rev. 93 (2014). Between 2014 to 2016, federal courts sentenced 33,158 defendants to pay \$33.9 billion in restitution, and between 1996 and 2016, unpaid federal criminal restitution rose from less than \$6 billion to more than \$110 billion. *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting). Failure or inability to pay restitution can have profound effects on the individual ordered to pay, including the suspension of the right to vote, continued court supervision, and even incarceration. *Id.*

Additionally, the vast majority of criminal defendants in the federal system plead guilty. U.S. Sentencing Comm’n, *2021 Overview of Federal Criminal Cases*, at 8. Most plead guilty under a plea agreement. *Cf. Lafler v. Cooper*, 566 U.S. 156,

170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”). Many of these plea agreements contain broad appeal waivers. *See* DOJ Justice Manual § 9-16.330, *Plea Agreements and Waivers of Ineffective Assistance of Counsel* (updated Jan. 2020) (federal prosecutors are “free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law as a component of plea discussions and agreements”).¹

Here, the Eighth Circuit enforced Mr. Iron Road’s appeal waiver over his argument that the restitution award was unlawful and that enforcement of the appeal waiver would result in a miscarriage of justice. In doing so, the court of appeals contributed to a divide among the circuits on whether an appeal waiver should be enforced over an argument that the restitution award was unlawful. This case presents the ideal opportunity for this Court to clarify the muddled interplay of commonly utilized appeal waivers and unlawful restitution orders.

STATEMENT OF THE CASE

Mr. Iron Road and the government entered into a plea agreement under which Mr. Iron Road agreed to plead guilty to two counts of child abuse under 18

¹ The Sentencing Commission’s report cited in this paragraph is available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf (last accessed May 8, 2023). The Department of Justice’s Policy Manual is available at <https://www.justice.gov/jm/jm-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.330> (last accessed May 8, 2023).

U.S.C. § 1153 and N.D. Cent. Code Ann. §§ 14-09-22 and 12.1-32-01. Dkt. 45.²

Specifically, Mr. Iron Road was convicted of child abuse for breaking a child's femur and pinching him. Dkt. 45; Dkt. 24, at 2. The plea agreement contained two provisions relevant to restitution and the appeal waiver. First, Mr. Iron Road agreed to pay restitution under the Mandatory Victims Restitution Act (MVRA):

20. Defendant acknowledges the provisions of Title 18, United States Code, Sections 2259 and 3663A, which require the Court to order restitution.

Dkt. 24, at 7. And second, the plea agreement contained a partial waiver of Mr. Iron Road's appeal rights. Dkt. 24, at 7-8. Without objection, Mr. Iron Road was ordered to pay \$15,075.05 to the North Dakota Department of Human Services. Dkt. 45, at 7. Included in this total were expenses related to preventive care, routine vaccinations, gastrointestinal issues, and home care training. Dkt. 36-1 at 10-12.

Mr. Iron Road appealed and challenged the restitution award. Brief of Appellant at 7-14, *United States v. Iron Road*, No. 22-2804 (8th Cir. Oct. 13, 2022). As relevant here, he argued the appeal waiver should not be enforced because the restitution award was illegal for two reasons: (1) the MVRA did not apply to his offense, and (2) the restitution award included charges that were not proximately caused by the offense conduct. *Id.* The government moved to dismiss the appeal under the appeal waiver, and the court of appeals issued a judgment granting the

² All citations to "Dkt." are to the district court docket at *United States v. Iron Road*, No. 1:21-cr-00139 (D.S.D.). All materials cited in this petition are available on PACER. Mr. Iron Road cites to the docket under Supreme Court Rule 12.7.

government's motion to dismiss the appeal. App. 1a. Mr. Iron Road filed a petition for rehearing *en banc*. His petition was denied by the court of appeals. App. 10a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The question of whether an appeal waiver should be enforced when a restitution award is unlawful is an important question that must be settled by this Court. The court of appeals are divided on whether appeal waivers should be enforced over unlawful restitution awards, including when restitution was ordered under an inapplicable statute, and when the award included losses that were not proximately caused by the offense conduct. This case presents the ideal opportunity for the Court to provide much-needed guidance on this important question of federal law.

I. The courts of appeals are divided on the question presented.

This Court has explained that “no appeal waiver serves as an absolute bar to all appellate claims,” and “all jurisdictions appear to treat at least some claims as unwaivable,” including in some jurisdictions, “claims that a sentence . . . exceeds the statutory maximum authorized.” *Garza v. Idaho*, 139 S. Ct. 738, 744. 745, n.6 (2019) (quoting King & O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 224 (2005)). The courts of appeals are divided on if and when they should enforce appeal waivers when the restitution award is unlawful.

Many courts refuse to enforce appeal waivers where the sentence exceeds the statutory maximum sentence authorized. King & O’Neill, *Appeal Waivers and the*

Future of Sentencing Policy, 55 Duke L.J. 209, 224 (2005); see *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995); *United States v. Litos*, 847 F.3d 906, 910 (7th Cir. 2017); *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003); *United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (per curiam).

Several circuits have held that when the restitution award exceeds the losses authorized by statute, the award is no less “illegal” than when a sentence of imprisonment exceeds the statutory maximum. *Broughton-Jones*, 71 F.3d at 1147; see also *United States v. Kim*, 988 F.3d 803, 809-11 (5th Cir. 2021); *United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018); *United States v. Freeman*, 640 F.3d 180, 194 (6th Cir. 2011); *United States v. Gordon*, 393 F.3d 1044, 1050 (9th Cir. 2004), *abrogated by Lagos v. United States*, 138 S. Ct. 1684 (2018); *United States v. Williams*, 10 F.4th 965, 972 (10th Cir. 2021).

In *Broughton-Jones*, the Fourth Circuit refused to enforce an appeal waiver where restitution was ordered for conduct that was charged but was not proximately caused by the offense of conviction. 71 F.3d at 1147 (“Because a restitution order imposed when it is not authorized by the VWPA is no less ‘illegal’ than a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of restitution orders are similarly outside the scope of a defendant’s otherwise valid appeal waiver.”). Similarly, the Fifth, Sixth, Ninth, and Tenth circuits have declined to enforce appeal waivers where the losses in the restitution award were not proximately caused by the offense of conviction. See *Kim*,

988 F.3d at 809 (“We conclude that *Leal*’s holding controls the outcome in the present case. According to *Leal*, a district court imposes a sentence expressly foreclosed by statute when it orders restitution . . . for losses not proximately caused by the defendant”) (internal citations omitted); *Winchel*, 896 F.3d at 389 (“[I]f a court orders a defendant to pay restitution under § 2259 without determining that the defendant’s conduct proximately caused the victim’s claimed losses, the amount of restitution necessarily exceeds the statutory maximum.”); *Freeman*, 640 F.3d at 194 (“We therefore hold that Freeman did not waive the right to appeal whether the district court exceeded its statutory authority by imposing a restitution order that was based on losses exceeding those caused by the conduct underlying the offense of conviction); *Gordon*, 393 F.3d at 1050, *abrogated by Lagos v. United States*, 138 S. Ct. 1684 (2018) (“A restitution order which exceeds its authority under the MVRA is equivalent to an illegal sentence. Such a restitution order is in excess of the maximum penalty provided by the statute and, therefore, the waiver of appeal is inapplicable to it.”) (cleaned up); *Williams*, 10 F.4th at 972 (“On appeal, Williams has made a sufficient threshold argument that the total restitution exceeds the MVRA’s limit (i.e., what the district court had authority to order paid to WebBank) that he may proceed to the merits.”).

Similarly, the Seventh Circuit has declined to enforce an appeal waiver where the restitution award was unlawful because it was awarded to an entity that did not qualify as a “victim” under the statute. *Litos*, 847 F.3d at 911 (“Likewise, Bank of America was not a proper victim for the purposes of restitution under 18

U.S.C. § 3663A, and so the order of restitution was contrary to the applicable statute and therefore illegal—just as a prison term that exceeded a statutory maximum would be illegal.”).

By contrast, the Eighth Circuit has enforced appeal waivers where the losses proximately caused by the offense conduct were in dispute, or the losses awarded exceeded the total amount of the victim’s losses. *See United States v. Schulte*, 436 F.3d 849, 851 (8th Cir. 2006) (“Restitution orders are not subject to any prescribed statutory maximum . . . so a challenge to a restitution order based on sufficiency of the evidence does not implicate the sort of ‘illegality’ that . . . might justify voiding a voluntary agreement”); *United States v. Sullivan*, 853 F.3d 475, 481 (8th Cir. 2017) (per curiam) (“We further conclude that enforcement of the appeal waiver in this case will not result in a miscarriage of justice because a challenge to a restitution order based on sufficiency of the evidence does not implicate the sort of illegality that we have said in *Andis* might justify voiding a voluntary agreement between the parties.”) (internal citation omitted); *United States v. Greger*, 98 F.3d 1080, 1082 (8th Cir. 1996) (“Since Greger knowingly and voluntarily waived his right to appeal any issue other than jurisdiction, we need not consider the merits of his arguments [that no such evidence of loss was produced relating to] restitution.”). *But see United States v. Thomas*, 932 F.3d 1139, 1140-41 (8th Cir. 2019) (“We conclude the restitution order in this case survives the appeal waiver because the order is not authorized by the statute. We allow appeals of illegal sentences to prevent a miscarriage of justice.”).

And, as the court of appeals did in Mr. Iron Road’s case, the Fifth Circuit has enforced an appeal waiver over the defendant’s argument that the restitution statute did not apply. *See, e.g., United States v. Hemler*, 169 F. App’x 897, 897 (5th Cir. 2006) (per curiam) (dismissal of appeal as barred by the appeal waiver where “Hemler contends that . . . 18 U.S.C. § 3663A does not authorize an order of restitution for offenses such as misprision of a felony . . .”).

The courts declining to enforce appeal waivers under these circumstances have the correct approach. Though the Eighth Circuit asserted that restitution is “not subject to any prescribed statutory maximum,” *Schulte*, 436 F.3d at 851 (internal citation omitted), the Sixth Circuit explained:

[T]he restitution statute *does* set a statutory maximum on the amount of restitution. . . . This maximum is, absent two exceptions that are not applicable here, the amount causally linked to the offense of conviction.

Freeman, 640 F.3d at 193 (internal quotations omitted) (quoting *Gordon*, 480 F.3d at 1210). Because courts should only impose restitution in circumstances authorized by statute, appeal waivers should not be enforced when restitution unlawfully exceeds this authority.

The courts of appeals apply a range of approaches to enforcement of appeal waivers where the defendant challenges the legality of the restitution award on appeal. This Court should act to ensure that defendants will be treated uniformly across the circuits when appeal waivers are considered in the context of an unlawful restitution order.

II. This case is an ideal vehicle for the questions presented.

This case squarely presents whether an appeal waiver should be enforced when restitution is ordered unlawfully. Here, Mr. Iron Road was ordered to pay restitution under an inapplicable statute, and the restitution award included losses that were not proximately caused by the offense. The MVRA only authorizes restitution when a physical injury or a pecuniary loss is caused by certain enumerated offenses. 18 U.S.C. § 3663A(c)(1)(A)(i)-(v). Mr. Iron Road's child abuse offenses could only qualify under the MVRA as "crimes of violence." 18 U.S.C. § 3663A(c)(1)(A)(i). The term "crime of violence" means:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. Subsection (b), or the "residual clause," was struck down as void for vagueness. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). Thus, Mr. Iron Road's statute of conviction must qualify as a crime of violence under § 16(a)'s "force clause." It does not because an individual can be convicted under the statute of conviction for reckless conduct. Specifically, North Dakota's child abuse statute permits the offense to be committed "willfully." *See* N.D. Cent. Code Ann. § 14-09-22. North Dakota's indivisible definition of "willful" includes "reckless" behavior. *See* N.D. Cent. Code Ann. §§ 12.1-17-02(1)(a), 12.1-02-02(1)(e); *see United States v. Schneider*, 905 F.3d 1088, 1091-92 (8th Cir. 2018) (because North Dakota's

definition of “willfully” includes recklessness, an offense that can be committed willfully is not a “crime of violence”). Under *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021), any offense that can be committed recklessly does not qualify as a violent felony under the analogous force clause in the Armed Career Criminal Act. *See also United States v. Benally*, 19 F.4th 1250, 1257 (10th Cir. 2021) (noting *Borden’s* holding applies to “crime of violence” under the MVRA).

Additionally, Mr. Iron Road’s restitution award included losses related to routine preventive care, gastrointestinal issues, and family training, which were not losses that were proximately caused by the offense conduct. The inapplicable statute required mandatory restitution without consideration of Mr. Iron Road’s ability to pay. This had a dramatic effect on Mr. Iron Road’s restitution order, as he was ordered to pay \$15,075.05 to the North Dakota Department of Human Services when the court had found him indigent and authorized court-appointed counsel. In addition, the restitution order included expenses that were not related to the offense and amounted to a windfall to the victim.

The courts of appeals have failed to come to a consensus on whether an appeal waiver can be enforced when restitution is unlawfully ordered. Restitution plays an increasing role in federal criminal sentencing. This Court should act now to provide clear answers to the important issues raised by the interplay between unlawful restitution awards and appeal waivers. This case is an ideal vehicle for the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 8th day of May, 2023.

Respectfully submitted,

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