No. 22-7518

IN THE SUPREME COURT OF THE UNITED STATES

JOHN WILLIAM IRON ROAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeal, where petitioner knowingly and voluntarily entered into a plea agreement that contained a waiver of appellate rights.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2022. A petition for rehearing was denied on February 8, 2023 (Pet. App. 10a). The petition for a writ of certiorari was filed on May 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the District of North Dakota, petitioner was convicted on two counts of child abuse in Indian

country, in violation of 18 U.S.C. 1153 and N.D. Cent. Code §§ 14-09-22 and 12.1-32-01. Judgment 1-2; Pet. App. 2a-3a. The district court sentenced petitioner to 27 months of imprisonment, to be followed by two years of supervised release. Judgment 3-4; Pet. App. 4a-5a. The district court also ordered $15,075.05 in restitution. Judgment 7; Pet. App. 8a. The court of appeals dismissed petitioner's appeal. Pet. App. 1a.

1. Petitioner and his wife were foster parents to R.K., a 14-month-old boy. Presentence Investigation Report (PSR) ¶ 5. While changing R.K.'s diaper, petitioner put his knee on R.K.'s leg and pushed down, fracturing R.K.'s left femur. PSR ¶ 6, 7; D. Ct. Doc. 24, at 2 (May 19, 2022) (Plea Agreement).

For approximately ten days thereafter, R.K. was finicky, crying, and increasingly agitated; petitioner repeatedly pinched R.K. during diaper changes to get R.K. to stop resisting. PSR ¶ 6; Plea Agreement 2. When petitioner eventually brought R.K. to the hospital for treatment, medical professionals determined that R.K. had a fractured left femur; contusions on his left arm, right eyelid, and both legs; and abrasions on his neck and right arm. PSR ¶ 7. R.K. remained in the hospital for two days, after which he was discharged to a new foster family. Ibid.

A grand jury in the District of North Dakota charged petitioner with two counts of child abuse in Indian country, in violation of 18 U.S.C. 1153 and N.D. Cent. Code §§ 14-09-22, 12.1-

32-01, and one count of child neglect in Indian country, in violation of 18 U.S.C. 1153 and N.D. Cent. Code §§ 14-09-22.1 and 12.1-32-01. Indictment 1-3. With the assistance of counsel, petitioner agreed to plead guilty to the two child-abuse counts, and in return, the government agreed to move to dismiss the child-neglect count, to move for a downward adjustment of petitioner's Sentencing Guidelines range, and to recommend a sentence at the low end of the applicable range. Plea Agreement 1-2, 5-6.

The written plea agreement stated that the government would recommend that petitioner "be ordered to pay restitution." Plea Agreement 6. Petitioner, in turn, "acknowledge[d] the provisions of [18 U.S.C.] 2259 and 3663A, which require the Court to order restitution." Id. at 7. And he "agree[d] to pay restitution as may be ordered by the [c]ourt," while "acknowledg[ing] and agree[ing] that the [c]ourt will order [him] to make restitution for all loss caused by [his] conduct, regardless of whether counts of the Indictment will be dismissed as part of th[e] Plea Agreement." Ibid.

The plea agreement also included a "knowing[] and voluntar[y]" waiver of, inter alia, petitioner's right to appeal his "conviction[s] or sentence," "all non-jurisdictional issues," and "any assessment, restitution or forfeiture order." Plea Agreement 7-8. The agreement expressly reserved only the right to appeal "a sentence of imprisonment imposed above the upper end of

the applicable guidelines range" and to appeal (or collaterally attack) his convictions or sentence based on certain claims of ineffective assistance of counsel. Ibid. At the plea hearing, the district court reviewed the plea agreement with petitioner, including the appeal waiver, D. Ct. Doc. 54, at 18-19 (Sept. 15, 2022); see id. at 9-21, and petitioner confirmed that he had no "questions * * * about what it means to give up [his] right to appeal," id. at 19-20.

Following petitioner's guilty plea, the Probation Office prepared a presentence report recommending, inter alia, that petitioner pay $15,075.05 in restitution to North Dakota Medicaid under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A. PSR ¶ 57. The MVRA requires a court to order restitution to victims when sentencing a defendant convicted of specified crimes, including "a crime of violence, as defined in [18 U.S.C. 16]." 18 U.S.C. 3663A(c)(1)(A)(i); see 18 U.S.C. 3663A(a)(1). A court also has discretion, under a related statute, to order restitution "when sentencing a defendant convicted of an offense under [Title 18]" and "to the extent agreed by the parties in a plea agreement." 18 U.S.C. 3663(a)(1)(A) and (1)(B)(3). The presentence report explained that North Dakota Medicaid had requested $15,075.05 in restitution to pay for "medical bills and targeted case management," PSR ¶ 8, and the report attached a 21-

page document detailing those costs, see D. Ct. Doc. 36-1, at 1-21 (Aug. 11, 2022).

Petitioner did not object to the presentence report and did not address restitution either in his sentencing memoranda or at the sentencing hearing. See PSR Addendum; D. Ct. Doc. 37, at 1-3 (Aug. 15, 2022); D. Ct. Doc. 39, at 1 (Aug. 15, 2022); D. Ct. Doc. 55, at 26-28 (Sept. 15, 2022). At sentencing, the district court adopted the presentence report without change; dismissed the child-neglect count on the government's motion; sentenced petitioner to 27 months of imprisonment, to be followed by two years of supervised release; and ordered petitioner to pay $15,075.05 in restitution to the North Dakota Department of Human Services. D. Ct. Doc. 46, at 4 (Aug. 16, 2022); D. Ct. Doc. 55, at 31; Judgment 1, 3-4, 8.

2. Petitioner subsequently filed an appeal, which the court of appeals dismissed. Pet. App. 1a.

Petitioner's opening brief challenged the restitution order, raising two independent claims in support of an argument to vacate it: (1) a claim that the MVRA did not require restitution in his case because his child-abuse convictions do not qualify as "crime[s] of violence" under 18 U.S.C. 16, and (2) a claim that the restitution award included the costs of medical treatment and services that "do not appear to be connected to" the offense conduct underlying his child-abuse convictions. Pet. C.A. Br. 14;

see id. at 7-14. The brief did not mention the appeal waiver in petitioner's plea agreement. See id. at 1-17.

The government moved to dismiss petitioner's appeal as barred by the appeal waiver. Gov't C.A. Mot. to Dismiss 1-14. Petitioner opposed the government's motion. Pet. C.A. Resp. to Mot. to Dismiss 1-15. As relevant here, petitioner acknowledged that "the appeal waiver covered the 'restitution or forfeiture order,'" but he argued that enforcing the waiver would result in a miscarriage of justice because the restitution order was unlawful. Id. at 8 (citation omitted); see id. at 6-10.

The court of appeals granted the government's motion and dismissed petitioner's appeal in an unpublished summary order. Pet. App. 1a.

ARGUMENT

Petitioner contends (Pet. 6) that the court of appeals erred in dismissing his appeal of the restitution order on the theory that the order was assertedly "unlawful." But the court below correctly dismissed petitioner's appeal because he validly waived his right to appeal "any * * * restitution * * * order." Plea Agreement 8. The court's unpublished disposition does not conflict with any decision of this Court or another court of appeals. And this case would be an unsuitable vehicle for resolving the question presented because petitioner has failed to show that his restitution order was actually unlawful, which means that

petitioner could not circumvent his appeal waiver even if this Court were to adopt his proposed rule. No further review is warranted.

1. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389, 398 (1987) (waiver of right to file constitutional tort action). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. Ibid.

In accord with those principles, the courts of appeals have uniformly held that a defendant's voluntary and knowing waiver in a plea agreement of the right to appeal is enforceable.* As the

* See United States v. Teeter, 257 F.3d 14, 21-23 (1st Cir. 2001); United States v. Riggi, 649 F.3d 143, 147-150 (2d Cir. 2011); United States v. Khattak, 273 F.3d 557, 560-562 (3d Cir. 2001); United States v. Marin, 961 F.2d 493, 495-496 (4th Cir. 1992); United States v. Melancon, 972 F.2d 566, 567-568 (5th Cir. 1992) (per curiam); United States v. Toth, 668 F.3d 374, 377-378 (6th Cir. 2012); United States v. Woolley, 123 F.3d 627, 631 (7th Cir. 1997); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); United States v. Navarro-Botello, 912 F.2d 318, 320-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); United States v. Hernandez, 134 F.3d

courts of appeals have recognized, appeal waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001). Appeal waivers correspondingly benefit the government by enhancing the finality of judgments and discouraging meritless appeals. See, e.g., United States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); Teeter, 257 F.3d at 22.

This case illustrates the mutual benefits of appeal waivers. Under the plea agreement, the government agreed to move to dismiss a child-neglect count, to move for a downward adjustment of petitioner's Sentencing Guidelines range, and to recommend a sentence at the low end of the applicable range. Plea Agreement 1-2, 5-6. In exchange, petitioner pleaded guilty to the two child-abuse counts, agreed that the district court would order restitution "for all loss caused by [his] conduct," and waived his right to appeal his convictions or sentence, "all non-jurisdictional issues," and "any assessment, restitution or forfeiture order," except in certain limited circumstances that do not apply here. Id. at 7-8; see id. at 2.

1435, 1437 (10th Cir. 1998); United States v. Bushert, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

Petitioner no longer disputes that he knowingly and voluntarily entered into the plea agreement, including the appeal waiver, and he has acknowledged that the terms of his appeal waiver encompass his current restitution challenge. See Pet. C.A. Resp. to Mot. to Dismiss 8. Accordingly, the court of appeals correctly enforced the terms of petitioner's bargain with the government. Pet. App. 1a.

2. Petitioner contends (Pet. 6) that appeal waivers should not be enforced "when a restitution award is unlawful." See Pet. 6-12. But that proposed exception would essentially swallow the rule, as every defendant who seeks to challenge a restitution award on appeal could presumably frame his challenge as an argument that the award is "unlawful." Adopting petitioner's proposed rule would thus largely, if not entirely, eliminate the benefits of appeal waivers in the restitution context.

Petitioner errs (Pet. 7) in analogizing a restitution award that "exceeds the losses authorized by statute" to "a sentence of imprisonment that exceeds the statutory maximum." "[T]here is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense." United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012) (emphasis omitted), cert. denied, 569 U.S. 959 (2013). Thus, even if an exception to an appeal waiver were

warranted for a claim that a sentence exceeds the statutory maximum, a defendant's contention that a particular restitution order exceeds the appropriate amount generally "does not implicate the sort of 'illegality' that * * * might justify voiding a voluntary agreement between the parties." United States v. Schulte, 436 F.3d 849, 851 (8th Cir. 2006); see United States v. Grundy, 844 F.3d 613, 617 (6th Cir. 2016) (rejecting analogy to statutory maximums), cert. denied, 138 S. Ct. 63 (2017); United States v. Sharp, 442 F.3d 946, 952 (6th Cir. 2006) (same).

In any event, petitioner has failed to show that his restitution order is unlawful, so he could not elide his appeal waiver even if this Court were to adopt his proposed rule. Petitioner principally criticizes (Pet. 11-12) the district court's finding that the MVRA applied to his offenses of conviction. See PSR ¶ 57; D. Ct. Doc. 46, at 1. But any error in that finding did not affect the lawfulness of the court's restitution order, because a separate provision, 18 U.S.C. 3663(a), gives a sentencing court the discretionary authority to order restitution both "when sentencing a defendant convicted of an offense under [Title 18]," 18 U.S.C. 3663(a)(1)(A), and "in any criminal case to the extent agreed to by the parties in a plea agreement," 18 U.S.C. 3663(a)(3). Here, petitioner pleaded guilty to two child-abuse offenses under Title 18, and "agree[d] to pay restitution as may be ordered by the Court." Plea Agreement 7;

see ibid. ("[Petitioner] acknowledges and agrees that the Court will order [petitioner] to make restitution for all losses caused by [petitioner's] conduct."). The restitution order was therefore within the authority of the district court even if, as petitioner claims (Pet. 11-12), the MVRA did not apply to his offenses of conviction.

Petitioner alternatively contends (Pet. 11) that the restitution award was unlawful on the theory that it included "losses that were not proximately caused by the offense." In his plea agreement, however, petitioner agreed to pay "restitution for all loss caused by [his] conduct, regardless of" the dismissal of the child-neglect count. Plea Agreement 7. The district court's authority to order restitution "to the extent agreed to by the parties in a plea agreement," 18 U.S.C. 3663(a)(3), thus permitted it to order restitution for all such losses, without regard to any limitations that the restitution statutes might impose in the absence of a plea agreement. And because petitioner fails to explain why the medical costs that petitioner was ordered to reimburse were not "loss caused by [his]" abuse and neglect of R.K., he has not shown that the court erred in including those amounts in its restitution calculation.

3. Petitioner suggests (Pet. 6-10) that the court of appeals' decision conflicts with the decisions of other courts of appeals. But the cases on which petitioner relies do not establish

that those circuits would disagree with the Eighth Circuit's decision to dismiss petitioner's appeal.

For example, petitioner cites (Pet. 7) United States v. Broughton-Jones, 71 F.3d 1143 (1995), in which the Fourth Circuit declined to enforce a defendant's appeal waiver where the defendant claimed that the applicable restitution statute did not authorize the restitution award against him. Id. at 1146-1147. But the Fourth Circuit has since clarified that Broughton-Jones establishes only that defendants who have waived their appellate rights may raise challenges "to sentences imposed beyond the authority of the district court." United States v. Moran, 70 F.4th 797, 802 n.3 (2023); see also United States v. Thornsbury, 670 F.3d 532, 539, cert. denied, 568 U.S. 856 (2012). Accordingly, in United States v. Boutcher, 998 F.3d 603 (2021), the Fourth Circuit enforced a defendant's appeal waiver to bar a claim that a restitution award was "'illegal,'" where the claim rested on alleged errors that "did not impact the court's authority to order restitution under" the applicable statute. Id. at 609-610. Because petitioner's claims here likewise do not affect the district court's authority to order restitution under Section 3663, see pp. 10-11, supra, Boutcher indicates that the Fourth Circuit would agree with the decision below.

Similarly, petitioner's cited authorities do not establish that the Fifth Circuit would set aside petitioner's appeal waiver

and reach the merits of his restitution claims. See Pet. 7-8 (citing United States v. Kim, 988 F.3d 803 (5th Cir.), cert. denied 142 S. Ct. 225 (2021); United States v. Winchel, 896 F.3d 387 (5th Cir. 2018)). A more recent Fifth Circuit decision, United States v. Meredith, 52 F.4th 984 (2022), explains that even when a defendant specifically reserves the right to appeal a sentence above the statutory maximum, that "statutory-maximum carveout authorizes an appeal only when the district court exceeds 'the upper limit of punishment that Congress has legislatively specified for violations of a statute' -- not when the sentencing judge commits any error under the sentencing statute." Id. at 987 (citation omitted). And because the defendant there had agreed "to an unspecified amount of restitution, to be determined by the district court," ibid., the Fifth Circuit found that the defendant had waived his right to appeal the restitution order. See id. at 986-987. Petitioner here similarly "agree[d] to pay restitution as may be ordered by the Court" and to "make restitution for all loss caused by [his] conduct." Plea Agreement 7. Meredith thus indicates that the Fifth Circuit would reach the same result as the Eighth Circuit did below.

Petitioner likewise errs in asserting (Pet. 7-8) a conflict with the Sixth and Seventh Circuits. Petitioner's reliance on United States v. Freeman, 640 F.3d 180 (6th Cir. 2011), is misplaced, because the Sixth Circuit has since "rejected Freeman's

premise (that there is a statutory maximum for restitution) as conflicting with prior controlling precedent." Grundy, 844 F.3d at 617. And although the Seventh Circuit concluded in United States v. Litos, 847 F.3d 906 (2017), that enforcing the appeal waiver there would result in a "miscarriage of justice" on the theory that doing so would require one of three jointly and severally liable codefendants to pay the entire restitution order to an "undeserving bank," id. at 910, the court did not announce a categorical exception for challenges (legal or otherwise) to the amount of restitution orders. See ibid. (focusing on the "facts of this case"). Indeed, the Seventh Circuit has repeatedly declined to extend Litos beyond its facts. See Oliver v. United States, 951 F.3d 841, 847 (2020) ("Litos concerned a unique circumstance that required an exercise of our equitable powers."); United States v. Nulf, 978 F.3d 504, 507 (2020) ("Litos addressed a unique situation."); United States v. Carson, 855 F.3d 828, 831 (per curiam), cert. denied 138 S. Ct. 268 (2017) ("[T]hat exceptional situation is not present here.").

Petitioner also errs in relying on (Pet. 7-8) the Ninth Circuit's decision in United States v. Gordon, 393 F.3d 1044 (2004), cert. denied, 546 U.S. 957 (2005). There, the defendant had waived only his "right to appeal the 'orders of the Court'" -- not restitution orders specifically -- and the court found that he "lacked sufficient notice to waive his right to appeal the

restitution award." Id. at 1050. Here, in contrast, petitioner's appeal waiver expressly encompassed "any" "restitution * * * order," Plea Agreement 8, and petitioner does not dispute that he had sufficient notice of the waiver. The Ninth Circuit's subsequent discussion of whether the defendant would have been able to appeal "[e]ven if" he had "voluntarily and knowingly waived his general right to appeal," Gordon, 393 F.3d at 1050 (citation omitted; brackets in original), was unnecessary to the disposition of the case, and Gordon would therefore not compel a future Ninth Circuit panel to disregard an appeal waiver like petitioner's.

Finally, in United States v. Williams, 10 F.4th 965 (2021), the Tenth Circuit found only that the defendant's restitution appeal fell outside the scope of that appeal waiver's "ambigu[ous]" terms. Id. at 972. The court did not consider whether and when it would decline to enforce an appeal waiver where, as here, the plea agreement authorized the district court to determine the losses and expressly waived the defendant's right to appeal "any" restitution order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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