No. 22-7518

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case squarely raises the question of whether an appellate court should enforce an appeal waiver where the appeal challenges an unlawful restitution award. 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. The Eighth Circuit enforced the 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.

Contrary to the government's arguments, the circuits are divided 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 this convoluted relationship between commonly utilized appeal waivers and unlawful restitution orders.

ARGUMENT

I. The Victim Witness Protection Act ("VWPA") does not authorize the full award of restitution.

The government asserted that Mr. Iron Road failed to show his restitution award was unlawful because even if the Mandatory Victim Restitution Act ("MVRA") did not apply, the district court could have utilized a separate discretionary restitution provision, 18 U.S.C. § 3663(a), since Mr. Iron Road, "agree[d] to pay restitution as may be ordered by the Court." B.I.O. at 10. A closer look at the provisions of Mr. Iron Road's plea agreement reveal that at least part of the restitution award would *not* have been authorized under § 3663(a)(3):

> Defendant agrees to pay restitution as may be ordered by the Court. Defendant acknowledges and agrees that the Court will order Defendant to make restitution *for all loss caused by Defendant's conduct*, regardless of whether counts of the Indictment will be dismissed as part of this Plea Agreement.

Dkt. 24, at 7 (emphasis added). Mr. Iron Road agreed to make restitution "*for all loss caused by Defendant's conduct*." *Id.* The restitution award included expenses that were not caused by Mr. Iron Road's conduct: routine vaccinations such as the pneumococcal vaccine ("PCV13"), the diphtheria, tetanus, and pertussis vaccine ("DTaP"), the polio vaccine ("IPV"), the heamophilus influenzae type b vaccine ("Hib"), and the hepatitis b vaccine ("HepB"), gastrointestinal issues such as Giardia and Cryptosporidium, and family training sessions involving "family home care training" and "target case management." Dkt. 36-1, at 10-12.

And even if the full restitution award was authorized under § 3663(a)(3), the difference between ordering restitution under that statute and the MVRA mattered. Under the MVRA, the district court was unable to consider Mr. Iron Road's financial circumstances as the MVRA is a *mandatory* restitution statute. So even if § 3663(a)(3) authorized restitution for all of the expenses, which it did not, this statute would have permitted the court to use its discretion when ordering restitution. This had a dramatic effect on Mr. Iron Road's restitution award, 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 had authorized court-appointed counsel.

II. 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.

The government claimed every circuit would have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's appeal. B.I.O. at 11-12. That is not so. Each circuit lacks uniformity on the question presented, and of the conflicting decisions both within and across the circuits, Mr. Iron Road's facts align more closely with the more favorable circuit cases.

Fourth Circuit. The Fourth Circuit would not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's appeal. In *United States v. Broughton-Jones*, the court held the district court exceeded its authority in ordering restitution under 18 U.S.C. § 3663(a)(1) for losses that were not traceable to the defendant's offense of conviction. 71 F.3d 1143, 1147 (4th Cir. 1995). This error occurred in Mr. Iron Road's case as his restitution award was not authorized under the MVRA, and as previously discussed, at least part of the restitution award would not have been authorized under the VWPA. *See supra* at 1-2.

But in *United States v. Boutcher*, the Fourth Circuit determined that a court does not exceed its authority to award restitution if that award was authorized but calculated incorrectly. 998 F.3d 603, 610-11 (4th Cir. 2021). Even so, the Fourth Circuit still would not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's appeal as the full restitution award was not authorized under any restitution statute.

Fifth Circuit. The Fifth Circuit would similarly not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's appeal. In *United States v. Meredith*, the court enforced an appeal waiver under the correct restitution statute where the plea agreement acknowledged under § 3663(a)(3) that the district court would determine the amount of restitution. 52 F.4th 984, 987 (5th Cir. 2022); B.I.O. at 13. Mr. Iron Road agreed to pay restitution "for all loss caused by Defendant's conduct." Dkt. 24, at 7. Thus, contrary to the government's assertion, Mr. Iron Road's case is actually more like *United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018) and *United States v. Kim*, 988 F.3d 803, 809 (5th Cir. 2021). In both cases the Fifth Circuit declined to enforce appeal waivers where the defendants were unlawfully ordered to pay restitution for losses that were not proximately caused by the defendant. The Fifth Circuit would not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's appeal.

Sixth Circuit. The Sixth Circuit would similarly not have agreed with the Eighth Circuit's decision to dismiss the appeal. In *United States v. Freeman*, the Sixth Circuit held that when the restitution award exceeds what was authorized by statute, that award is no less illegal than when a sentence of imprisonment exceeds the statutory maximum. 640 F.3d 180, 193-94 (6th Cir. 2011). The government asserted that because *United States v. Grundy* rejected the holding in *Freeman*, *Freeman* is not good law. 844 F.3d 613 (6th Cir. 2016); B.I.O. at 13-14. But *Grundy* was not an *en banc* decision in which the Sixth Circuit uniformly and decisively addressed any perceived conflict with *Freeman*.

Freeman is also more factually similar to Mr. Iron Road's case than *Grundy*. In *Freeman* the defendant's losses weren't causally linked to the count of conviction. 640 F.3d at 193. The court explained, "A defendant's ability to appeal sentences above the statutory maximum allows the defendant to object to sentences that plainly have no basis in law." *Id.* Similarly here, Mr. Iron Road's restitution award was neither authorized under the MVRA, nor was it fully authorized under the VWPA as the government suggested. By contrast, in *Grundy* there was no indication that the defendant's restitution award was not authorized by statute. 844 F.3d at 616. The Sixth Circuit would not have agreed with the Eighth Circuit to dismiss his case.

Seventh Circuit. The Seventh Circuit would also not have supported the Eighth Circuit's decision to dismiss Mr. Iron Road's case. The government's brief recognized that the Seventh Circuit refused to enforce an appeal waiver where restitution was awarded to an entity that did not qualify as a "victim." *United States v. Litos*, 847 F.3d 906, 910-11 (7th Cir. 2017); B.I.O. at 14. The court determined that allowing that entity to receive that award would have been a miscarriage of justice. *Litos*, 847 F.3d at 910-11. The government clarified that while *Litos* is good law, it did not create a categorical exception to restitution orders. B.I.O. at 14. But similar to *Litos*, the restitution recipient in Mr. Iron Road's case received a windfall from the unlawful restitution award because some costs were unrelated to the offense conduct. It is of no consequence that a categorical exception

to restitution orders was not established in the Seventh Circuit. Under *Litos* the Seventh Circuit would not have dismissed Mr. Iron Road's case.

Ninth Circuit. The Ninth Circuit would not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's case. Indeed, in *United States v. Gordon*, the Ninth Circuit stated, "A restitution order which exceed[s] its authority under the [MVRA] is equivalent to an illegal sentence." 393 F.3d 1044, 1050 (9th Cir. 2004) (internal citations omitted) *abrogated by Lagos v. United States*, 138 S. Ct. 1684 (2018). Without pointing to any other authority on the issue, the government only noted that this discussion by the Ninth Circuit was merely dicta and would not be relied upon as authoritative by other panels of the Ninth Circuit. B.I.O. at 15. But the government overlooked another Ninth Circuit case where the court held that under the VWPA a restitution order which exceeds its authority is equivalent to an illegal sentence. *United States v. Phillips*, 174 F.3d 1074, 1076-77 (9th Cir. 1999) (citing *Broughton-Jones*, 71 F.3d at 1146-49). Indeed, in *Phillips* the court held that since the defendant did not specifically agree to pay restitution related to conduct for charges that were dismissed, ordering restitution for that conduct was not authorized under § 3663(a)(3) because that provision only authorized restitution based on party agreement. *Id.* at 1077. Similarly in Mr. Iron Road's case, he only agreed to pay restitution for losses caused by his conduct, so the restitution award is similarly not authorized under § 3663(a)(3). The Ninth Circuit would not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's case.

Tenth Circuit. Finally, the Tenth Circuit would not have agreed with the Eighth Circuit's decision to dismiss Mr. Iron Road's appeal. The government cited no cases in support of its position, but only noted that a case cited by Mr. Iron Road was dissimilar to the facts of his case. B.I.O. at 15. Specifically, in *United States v. Williams*, 10 F.4th 965 (9th Cir. 2021), the government clarified that the Tenth Circuit only found the defendant's appeal waiver was not enforced because it was ambiguous, not because it held the restitution order was unlawful. B.I.O. at 15. But *Williams* was cited by Mr. Iron Road because the Tenth Circuit said that the MVRA *does* have a "maximum." The court explained, "Determining the maximum restitution requires more work," and that the maximum was tied to the amount of loss *caused by the defendant's conduct. Williams*, 10 F.4th at 972. The restitution award in Mr. Iron Road's case included expenses that were not caused by his conduct. While the court in *Williams* did not enforce the appeal waiver for other reasons, the Tenth Circuit would not agree with the decision to dismiss Mr. Iron Road's case.

As these cases show, appellate courts apply a range of approaches to enforcement of appeal waivers where the defendant challenges the legality of the restitution award on appeal. Even if the government is correct that some circuits have shifted their approach to how and when to enforce appeal waivers involving restitution awards, it remains clear that there is still a circuit divide. 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.

III. Petitioner's case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether an appeal waiver should be enforced when restitution is ordered unlawfully. The government argued the floodgates would open if this Court were to permit defendants to appeal unlawful restitution awards because, "Every defendant who seeks to challenge a restitution award on appeal could presumably frame his challenge as an argument that the award is 'unlawful.'" B.I.O. at 9. Even if this concern is realistic, it does not warrant denial of review in this case. The government could prevent such appeals by drafting more precise language about restitution in plea agreements. The restitution statutes allow the parties to agree to expanded restitution awards. *See* 18 U.S.C. § 3663(a)(3) ("The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."); 18 U.S.C. § 3663A(a)(3) ("The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."). And if appeals do grow exponentially, the need for clarity outweighs this concern.

Because the vast majority of criminal defendants in the federal system plead guilty, and because 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 22nd day of August, 2023.

Respectfully submitted,

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