No. 14-256

In the Supreme Court of the United States

RICKEY J. KEELE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's appeal, in which he sought to challenge an order of restitution, on the ground that petitioner's waiver of his right to appeal encompassed challenges to an order of restitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

No. 14-256

RICKEY J. KEELE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 755 F.3d 752.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2014. The petition for a writ of certiorari was filed on August 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Texas to aiding and abetting the removal of property to prevent its seizure, in violation of 18 U.S.C. 2232(a) and 18 U.S.C. 2. Pet. App. 1. The district court sentenced him to 24 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3 (May

11, 2012). The district court also ordered petitioner to pay restitution of $3,691,102.70. Pet. App. 3. The court of appeals dismissed petitioner's appeal of the restitution order. *Id.* at 1-10.

1. From 2007 to 2009, petitioner participated in a large-scale telecommunications fraud centered in Texas. Pet. App. 20-27; Presentence Investigation Report (PSR) paras. 113-114, 117, 138; Gov't C.A. Br. 9-10. In August 2009, petitioner helped a coconspirator withdraw $1.5 million of the fraud proceeds from a bank in Texas, knowing that the coconspirator "wanted to transfer and conceal the funds for the purpose of * * * impairing the [government's] ability to seize" the money. Pet. App. 26-27.

2. Based on the broader fraud scheme, a fourth superseding indictment charged petitioner and 18 codefendants with conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1349. Fourth Superseding Indictment (Indictment) 13-51 (July 19, 2011); see Gov't C.A. Br. 5-7. The indictment also charged petitioner with aiding and abetting fraud and related activity in connection with electronic mail, in violation of 18 U.S.C. 1037(a)(2) and (b)(2)(C) and 18 U.S.C. 2. Indictment 52-56. After plea negotiations, the government agreed to dismiss the indictment as to petitioner in exchange for petitioner's plea of guilty to an information charging him with a single count of aiding and abetting his coconspirator's removal of $1.5 million to prevent seizure. Pet. App. 2, 12, 14-15; see Superseding Information 1-2 (Sept. 29, 2011).

Paragraph 3 of the plea agreement, entitled "Sentence," set forth "[t]he maximum penalties the Court [could] impose" for petitioner's offense. Pet. App. 12. It noted that the penalties "include[d]," *inter alia*,

"imprisonment for a period not to exceed 5 years"; "a mandatory term of supervised release of not * * * more than 3 years"; and "restitution to victims or to the community, which is mandatory under the law, and which [petitioner] agrees may include restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone." *Id.* at 12-13. Paragraph 11 of the plea agreement, entitled "Waiver of right to appeal or otherwise challenge or seek reduction in sentence," provided in relevant part that petitioner "waive[d] his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence." Pet. App. 15. Paragraph 11 added that petitioner "reserve[d] the rights" to appeal "a sentence exceeding the statutory maximum punishment," "to challenge the voluntariness of his plea of guilty or this waiver," or to claim "ineffective assistance of counsel" bearing on "the voluntariness of the plea or waiver." *Id.* at 16.

At petitioner's September 2011 change-of-plea hearing, the district court reviewed the provisions of the plea agreement with petitioner. 9/30/11 Tr. 9-11, 14-18. As relevant here, petitioner answered in the affirmative when the court asked whether he understood that "restitution is by statute mandatory in this case" and that the agreement provided for "no cap as to * * * restitution." *Id.* at 14-15. He similarly answered in the affirmative when the court inquired whether he understood that, in paragraph 11, he was "waiving [his] right of appeal and of post-conviction challenge to [his] sentence." *Id.* at 18. Finally, petitioner answered in the affirmative when the court asked whether he was "voluntarily giv[ing] up those rights." *Ibid.*

At petitioner's sentencing hearing, his counsel argued that "no restitution should be ordered" because petitioner's offense of conviction narrowly involved helping his coconspirator "execut[e] a check." 5/11/12 Tr. 10. But during his own allocution, petitioner acknowledged that the district court "ha[d] the right to" order restitution. *Id.* at 23. In light of petitioner's involvement in the broader fraud scheme, the court concluded that petitioner could reasonably foresee a loss of at least $3,691,102.70, as set forth in the presentence report. *Id.* at 12; see PSR paras. 144-145, 197. Thus, in addition to sentencing petitioner to 24 months of imprisonment, the court ordered him to pay total restitution of $3,691,102.70 to certain victims of the fraud scheme. 5/11/12 Tr. 32.

3. Petitioner appealed the restitution order and primarily argued that his offense of conviction—as distinguished from the broader fraud scheme—could not support the order. Pet. C.A. Br. 22-33. The court of appeals dismissed the appeal, finding it barred by the waiver in petitioner's plea agreement. Pet. App. 1-10.

The court of appeals explained that it "determine[s] the validity of an appeal waiver" by inquiring (1) "whether the waiver was knowing and voluntary" and (2) "whether, under the plain language of the plea agreement, the waiver applies to the circumstances at issue." Pet. App. 4 (citing *United States* v. *Bond*, 414 F.3d 542, 544 (5th Cir. 2005)). Based on both the language of the appeal waiver and petitioner's comments at the change-of-plea hearing, the court of appeals held that his appeal waiver "was knowing and voluntary." *Id.* at 5.

After reviewing "the whole of the record," Pet. App. 8, the court of appeals relied on "ordinary principles of contract interpretation" to conclude that the waiver, even "construe[d] narrowly," covered petitioner's appeal under the "circumstances at issue" here, *id.* at 4; see *id.* at 4-10. The court noted that restitution was "mentioned in [petitioner's] plea agreement" and that "the district court also informed [petitioner] multiple times at sentencing and rearraignment that his sentence 'includes restitution' arising from all 'relevant conduct' and would not be limited to that arising from the offense of conviction." *Id.* at 7. The court further explained that petitioner "expressly waived his right to appeal his 'sentence,'" that the plea agreement "define[d] 'sentence' to include mandatory 'restitution to victims,'" and that the district court "admonished" petitioner that "restitution is by statute mandatory in this case." *Id.* at 7-8. In light of the specificity of the waiver terms in the plea agreement and the restitution-specific warnings from the district court, the court of appeals concluded that petitioner's waiver was not a general appeal waiver that may or may not be interpreted to include a waiver of the right to appeal a restitution order. *Id.* at 5-8. The court also noted that, although petitioner had reserved his right to appeal a sentence exceeding the statutory maximum, *id.* at 5, he had "made no * * * argument on appeal" that the restitution order exceeded any maximum, *id.* at 8.[1]

[1] The court of appeals also rejected petitioner's Eighth Amendment challenge to the restitution order, as similarly barred by the waiver provision. Pet. App. 9-10.

ARGUMENT

Petitioner asks this Court to grant review in order to decide whether a criminal defendant's "general appeal waiver" encompasses the right to appeal an order of restitution. Pet. i, 10-14. This case does not present that question because petitioner specifically waived his right to appeal his sentence, which was defined in the plea agreement to include restitution, and because petitioner was informed by the district court at his sentencing hearing that one result of his plea agreement would be a waiver of his right to appeal restitution. The court of appeals correctly dismissed petitioner's appeal based on the particular facts of his plea agreement and plea colloquy and the court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. This Court has repeatedly held that a defendant may waive constitutional and statutory rights as part of the plea-bargaining process. *United States* v. *Mezzanatto*, 513 U.S. 196, 200-202 (1995); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). Applying that principle, every court of appeals with criminal jurisdiction has recognized that knowing and voluntary waivers of the right to appeal a sentence are enforceable. See, *e.g.*, *United States* v. *Van Thi Nguyen*, 618 F.3d 72, 74 (1st Cir.), cert. denied, 131 S. Ct. 548 (2010); *United States* v. *Pearson*, 570 F.3d 480, 485 (2d Cir. 2009) (per curiam); *United States* v. *Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009); *United States* v. *Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006); *United States* v. *Wilson*, 438 F.3d 672, 673-674 (6th Cir. 2006); *United States* v. *Wilson*, 429 F.3d 455, 460-461 (3d Cir. 2005); *United States* v. *Lockwood*, 416 F.3d 604,

608 (7th Cir. 2005); *United States* v. *Young*, 413 F.3d 727, 729-730 (8th Cir. 2005), cert. denied, 546 U.S. 1095 (2006); *United States* v. *Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005); *United States* v. *Hahn*, 359 F.3d 1315, 1324 & n.10 (10th Cir. 2004) (en banc) (per curiam); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States* v. *Marin*, 961 F.2d 493, 496 (4th Cir. 1992). As courts have recognized, such waivers benefit a defendant by gaining concessions from the government and benefit the government by saving the time and resources involved in defending appeals. See, *e.g.*, *United States* v. *Elliott*, 264 F.3d 1171, 1173-1174 (10th Cir. 2001); *United States* v. *Teeter*, 257 F.3d 14, 22 (1st Cir. 2001).

In determining whether an appeal-waiver provision mandates dismissal of an appeal, courts first ask whether the waiver is valid, *i.e.*, whether the defendant knowingly and voluntarily agreed to waive his appellate rights. If the waiver is valid, courts then ask whether the issue sought to be raised on appeal is within the scope of the waiver. See, *e.g.*, Pet. App. 4; *United States* v. *Cohen*, 459 F.3d 490, 494 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007). In this case, the court of appeals found that petitioner's waiver of appellate rights was valid. Pet. App. 5. The waiver was memorialized in the written plea agreement signed by petitioner and the district court reviewed the terms of the waiver with petitioner during the change-of-plea hearing. *Id.* at 11-29; 9/30/11 Tr. 9-11, 14-18. Petitioner does not dispute that he validly waived his right to appeal the non-restitution components of his sentence. The only question, therefore, is whether his valid waiver encompassed the right to appeal the restitution amount. That fact-bound de-

termination turns on an analysis of the plea agreement.

b. "In general, plea agreements are construed according to contract law principles." *United States* v. *Green*, 595 F.3d 432, 438 (2d Cir. 2010) (internal quotation marks, brackets, and citation omitted); see *Ricketts* v. *Adamson*, 483 U.S. 1, 9 (1987) ("Under the terms of the plea agreement, both parties bargained for and received substantial benefits."); *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) ("[P]etitioner 'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges."). Because "[p]lea agreements are essentially contracts between the defendant and Government," *United States* v. *Andis*, 333 F.3d 886, 890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003), courts construing them seek to determine "the intent of the parties as expressed in the plain language of the agreement when viewed as a whole," *United States* v. *Martinez-Noriega*, 418 F.3d 809, 815 (8th Cir. 2005) (quoting *United States* v. *Taylor*, 258 F.3d 815, 819 (8th Cir. 2001)); see *United States* v. *Gebbie*, 294 F.3d 540, 545 (3d Cir. 2002) (courts interpret plea agreements by "examin[ing] first the text of the contract").

The terms of petitioner's plea agreement demonstrate that he knowingly and voluntarily waived his right to appeal the order of restitution in this case. Specifically, he "waive[d] his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his * * * sentence," and the plea agreement expressly defined "[s]entence" to include "restitution to victims or to the community, which is mandatory under the law, and which [petitioner] agrees may include restitution arising from all relevant conduct, not limited to

that arising from the offense of conviction alone." Pet. App. 12-13, 15. Petitioner's plea agreement also incorporated a "factual resume" setting forth his relevant conduct, some of which exceeded the scope of his crime of conviction. *Id.* at 7, 20-27. Accordingly, the text of the agreement, read as a whole, indicates that the parties understood not only that petitioner was subject to a "sentence" including "restitution * * * not limited to that arising from the offense of conviction," but also that petitioner had waived his right to challenge that and the other enumerated components of the sentence. *Id.* at 7. Petitioner's conduct at the plea hearing reinforces that understanding: he acknowledged that restitution was a "mandatory" component of the penalties he faced and that he was waiving his right to appeal his "sentence," absent circumstances that he does not contend apply here. 9/30/11 Tr. 15, 17-18.

Petitioner reserved only a narrow portion of his appeal rights, limited to "bring[ing] a direct appeal of a sentence exceeding the statutory maximum that is applicable at the time of his initial sentencing," challenging the voluntariness of his plea agreement, and claiming ineffective assistance of counsel with respect to the voluntariness of his plea or his waiver. Pet. App. 16. On appeal, the court of appeals concluded that petitioner's waiver was knowing and voluntary. *Id.* at 8. The court also concluded that, although petitioner did retain the right to argue on appeal that the restitution order was "in excess of the statutory maximum," he had "made no such argument on appeal herein." *Ibid.* Petitioner does not challenge that aspect of the court of appeals' decision in his petition for a writ of certiorari.

2. Claiming a circuit conflict, petitioner suggests (Pet. 10-14) that his appeal would not have been dismissed in the Second, Fourth, Ninth, Tenth, or D.C. Circuits. He cannot sustain that speculation, however, because the cases on which he relies turned on the language of the specific plea agreements at issue and reached differing results based on distinguishable facts.[2]

Petitioner errs in contending (Pet. 11) that three decisions of the Ninth Circuit conflict with the decision below. Petitioner relies on broad language from those decisions stating that a defendant cannot knowingly waive his right to appeal a restitution order if his plea agreement does not specify with reasonable accuracy the amount of any possible restitution order. But an examination of those cases reveals that none squarely conflicts with the decision below. In *United States* v. *Phillips*, 174 F.3d 1074 (1999), for example, the Ninth Circuit's statements that the defendant did not validly waive his right to appeal his restitution order (because the plea agreement did not specify what the amount of actual damages would be) were dicta. See *id.* at 1076. That court ultimately held that, "[e]ven if [the defendant] had voluntarily and knowingly waived his general right to appeal" his restitution order, "th[e] waiver would not affect his ability to" pursue the appeal before the court because the defendant argued on appeal that the order violated the federal statute that governed the restitution order. *Ibid.* The same is true of another Ninth Circuit

---

[2] This Court denied a petition for a writ of certiorari claiming the same circuit conflict in *Staples* v. *United States*, 132 S. Ct. 92 (2011) (No. 10-1132). For the reasons discussed below, the same result is warranted here.

case on which petitioner relies. See *United States* v. *Gordon*, 393 F.3d 1044, 1050 (2004) (explaining that, even if the defendant had knowingly waived his right to appeal the restitution order, the waiver would not have precluded his arguing on appeal that the order violated the federal restitution statute). In petitioner's case, the court of appeals concluded that he did not argue on appeal that the restitution order exceeded the statutory maximum—and petitioner does not challenge that holding now. Thus, the Ninth Circuit dicta on which petitioner relies does not create a circuit conflict warranting this Court's review.

The third Ninth Circuit case on which petitioner relies also does not squarely conflict with the decision below. In *United States* v. *Tsosie*, 639 F.3d 1213 (2011), the court held that a general appeal waiver in a plea agreement did not encompass a waiver of the right to appeal restitution because the waiver did not give the defendant sufficient notice of the amount of restitution he might be required to pay. *Id.* at 1218. But the waiver provision at issue in that case is materially different from the provision at issue here. In *Tsosie*, the plea agreement failed to specify that restitution would be mandatory, instead suggesting that the district court could "determine[] that restitution would not be appropriate in the case." *Id.* at 1216. In contrast, petitioner's plea agreement made clear that "restitution to victims or to the community * * * is mandatory under the law." Pet. App. 12. Unlike the defendant in *Tsosie*, therefore, petitioner could not reasonably have believed that he might be subject to no restitution order at all.

The Fourth and Tenth Circuit cases on which petitioner relies (Pet. 12) also do not conflict with the

decision below. In *United States* v. *Broughton-Jones*, 71 F.3d 1143 (1995), the Fourth Circuit permitted a defendant to appeal a restitution order she claimed was not authorized by the relevant statute, even though she had agreed to "waive[] the right to appeal her sentence." *Id.* at 1146 (citation omitted). In so holding, the court relied on circuit precedent noting that a defendant would be able to appeal a sentence that did not comply with a statutory maximum even if the defendant had agreed to waive her right to appeal. *Id.* at 1146-1147. In *United States* v. *Gordon*, 480 F.3d 1205 (2007), the Tenth Circuit reached the same result on similar facts. *Id.* at 1208-1209 (defendant could challenge restitution order as "unlawful" where she "did not waive the right to appeal a sentence * * * in excess of the maximum penalty") (internal quotation marks and citation omitted).[3] Those holdings (like the ultimate holdings in the Ninth Circuit's decisions in *Gordon* and *Phillips*, *supra*) do not conflict with the outcome in petitioner's case, because (a) the terms of petitioner's plea agreement expressly reserved his right to appeal any sentence not within the specified maximum, Pet. App. 16; and (b) the court

---

[3] In *United States* v. *Cooper*, 498 F.3d 1156 (2007), which was decided several months after *Gordon* and was authored by the same judge, the Tenth Circuit clarified that *Gordon*'s "exception" for "challenge[s] to the legality of * * * restitution award[s]" is "extremely narrow." *Id.* at 1160. There, the court dismissed an appeal of a restitution order where the defendant waived the right to appeal his "sentence" and where "[t]he plea agreement expressly and unambiguously state[d] that, * * * 'as part of the sentence resulting from the defendant's plea, the Court [would] enter an order of restitution for all losses caused to the victims of the defendant's relevant conduct.'" *Id.* at 1159 (emphasis omitted; citation omitted).

of appeals determined that petitioner had "made no * * * argument on appeal" that the restitution order exceeded any maximum, *id.* at 8.[4]

The Second and D.C. Circuit decisions petitioner cites (Pet. 12-13) also do not conflict with the decision below because the plea agreements there, unlike petitioner's, were ambiguous about whether the defendant's waiver encompassed the restitution component of his sentence at all. In *Pearson*, the Second Circuit permitted the defendant to challenge the amount of restitution where his plea agreement waived his right to appeal "any sentence incorporating the agreed disposition specified herein" but where the only "agreed disposition" as to restitution was that the defendant would pay it "in full." 570 F.3d at 483, 485 (citations omitted). The court construed the agreement as securing the defendant's consent to entry of an order to pay restitution in full, but concluded that the defendant had "not unambiguously waived his right to appeal whether the amount of restitution ordered compensates the victims 'in full.'" *Id.* at 486. In this case, petitioner's reservation of appeal rights as to the substance of his sentence was limited to arguing that the sentence exceeds the applicable statutory maximum, which he did not argue on appeal.

In *In re Sealed Case*, 702 F.3d 59 (2012), the D.C. Circuit reached a similar conclusion on analogous facts. That court permitted appeal of a restitution

---

[4] The prior Fifth Circuit cases petitioner cites (Pet. 13-14) are distinguishable for the same reason, and the court of appeals made clear that it was not departing from them. Pet. App. 8. In any event, any intra-circuit tension would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

order where the defendant waived appeal of his "sentence" but where the "plea agreement define[d] sentence without reference to restitution" and was "at the very least" "ambiguous as to whether 'sentence' includes restitution." *Id.* at 65. The plea agreement in this case contained no similar ambiguity: petitioner waived his right to appeal his "sentence," which expressly included "restitution." Pet. App. 12-13, 15.

Moreover, the decision below is fully consistent with cases that have addressed plea agreements similar to petitioner's. See, *e.g.*, *United States* v. *Okoye*, 731 F.3d 46, 48 (1st Cir. 2013) (dismissing appeal from forfeiture order where defendant waived appeal from "any sentence" and his plea agreement expressly included "[r]estitution of up to the amount of the loss" as one of the "penalties" he faced) (emphasis omitted; brackets in original), cert. denied, 134 S. Ct. 1329 (2014); *United States* v. *Cooper*, 498 F.3d 1156, 1159 (10th Cir. 2007) (same, where plea agreement "expressly" included "restitution" "as part of the sentence resulting from the defendant's plea") (emphasis omitted).

Indeed, some courts have dismissed appeals even when a plea agreement did not specifically mention restitution based on the background principle that restitution is a penalty imposed by a court "when sentencing a defendant convicted of" a qualifying offense. 18 U.S.C. 3663A(a)(1); see, *e.g.*, *United States* v. *Worden*, 646 F.3d 499, 502 (7th Cir. 2011) ("Because restitution is a part of a criminal sentence, and [defendant] agreed not to challenge his sentence, he may not appeal the restitution order."); *United States* v. *Johnson*, 541 F.3d 1064, 1067 (11th Cir. 2008) (explaining that Congress intended for restitution orders

"to be incorporated into the traditional sentencing structure" and that "a waiver of the right to appeal a sentence necessarily includes a waiver of the right to appeal the restitution imposed") (citation omitted), cert. denied, 557 U.S. 906 (2009); *United States* v. *Gibney*, 519 F.3d 301, 306 (6th Cir. 2008) ("Because '[r]estitution is a part of one's sentence under the statutory scheme,' and because the plea agreement contemplated a waiver of the right to appeal [defendant's] criminal sentence, we hold that defendant has waived this issue.") (first set of brackets in original; citation omitted), cert. denied, 555 U.S. 1148 (2009); *United States* v. *Perez*, 514 F.3d 296, 299 (3d Cir. 2007) (agreeing with other courts that a valid waiver of the right to appeal a sentence "waive[s] the right to appeal a restitution order"); *Cohen*, 459 F.3d at 497 (4th Cir.) ("[A]s a general rule, a defendant who has agreed '[t]o waive knowingly and expressly all rights * * * to appeal whatever sentence is imposed' has waived his right to appeal a restitution order.") (citation omitted). But no need to resort to such background principles exists where, as here, the plea agreement itself is explicit. See *Okoye*, 731 F.3d at 50 n.3 (noting tension among courts of appeals in cases where the "plea agreement * * * does not specifically refer to restitution," but underscoring the absence of any such tension "where, as here, the plea agreement specifically outlines restitution as part of a defendant's sentence") (emphasis omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

DECEMBER 2014