No. 10-1132

# In the Supreme Court of the United States

ARTHUR WESTON STAPLES, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## 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.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The order of the district court on restitution (Pet. App. 1b-11b) is not published in the *Federal Supplement* but is available at 2009 WL 2827204.

## JURISDICTION

The judgment of the court of appeals was entered on December 20, 2010. The petition for a writ of certiorari was filed on March 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of knowingly transporting in interstate commerce, by use of a computer, visual depictions of a

minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(1). Petitioner was also separately charged in an information filed in the United States District Court for the Eastern District of Virginia with distributing computer files that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(2), and possessing images of child pornography on his computer, in violation of 18 U.S.C. 2252A(a)(5)(B). As permitted by Fed. R. Crim. P. 20(a)(1), petitioner consented to the transfer of the Virginia case to the Southern District of Florida. Petitioner thereafter pleaded guilty to the Virginia charges in Florida. At a consolidated sentencing hearing, petitioner was sentenced to 210 months of imprisonment, to be followed by a lifetime term of supervised release. Following a restitution hearing, the court entered an amended judgment in the Virginia case ordering petitioner to pay $3,680,153 in restitution to a victim. The court of appeals dismissed petitioner's appeal based on an appeal waiver in his plea agreement. Pet. App. 1a-4a.

1. a. On December 5, 2008, St. Lucie County, Florida Sheriff's Office Detective Neil Spector, working in an undercover capacity, entered a Yahoo! online chat room called "parenting one" and indicated that he was a father living in Florida. Spector received an instant message from petitioner, who used the Yahoo! screen name "nudeom2001" and identified himself as "Wes." Petitioner stated that he lived in Virginia and had an adolescent daughter and four grandchildren. Petitioner also stated that he was "interested in prepubescent children." Spector asked petitioner if he had any real experience with younger children and what he did with them; petitioner replied, "pet, coddle, touch, rub, lick."

Presentence Investigation Report (PSR) para. 12; Gov't C.A. Br. 5.

As the instant messaging communication continued, petitioner suggested that they "trad[e] images." Spector, in his undercover role, told petitioner that he had videos but that he could not send them over the Internet. Spector then sent petitioner a photograph of a deputy sheriff when she was 11 years old. Petitioner responded by sending Spector, via Yahoo! instant messaging, a photograph of a nude prepubescent female sitting on a bed with her legs spread open and her right hand touching her left breast area. The image was titled "YP0079n" and dated October 13, 2004, and Spector considered it to be lascivious child pornography. Petitioner stated he had other images of children. PSR para. 13.

Spector provided petitioner with an undercover phone number at the St. Lucie County Sheriff's Office. Petitioner called Spector on the undercover phone. The caller identification showed a telephone number with a (703) area code. Petitioner introduced himself as "Wes." During their 20-minute telephone conversation, petitioner told Spector that he lived with his wife in Virginia. Petitioner stated that he had more images of prepubescent children on his computer. Spector asked petitioner how long he had "been into the young," and petitioner replied, "I guess about as long as I can think about it. You gotta admit, they are pretty damn sexy." PSR para. 14. Later, when Spector was discussing oral sex with his alleged "daughter" during "play time," petitioner replied, "[t]hey love that." Petitioner also stated, "[i]f it's going to be done, it should be fun. It is supposed to be fun for them." Petitioner also stated that "[y]ou have to be cautious and discreet." Petitioner then told Spector that he was off of work on Fridays and he

suggested communicating again the following Friday. *Ibid.* Subsequent investigation revealed that the telephone number petitioner used to call Spector was registered in petitioner's name; that petitioner lived with his wife in Manassas, Virginia, PSR para. 16; that petitioner was employed as a deputy sheriff with the Prince William County Sheriff's Department in Manassas; and that he did not work on Fridays, PSR para. 17.

b. On December 12, 2008, a search warrant was executed at petitioner's Manassas, Virginia, residence. Law enforcement officers seized petitioner's computer and electronic media from his home. After being advised of his rights, petitioner admitted sending Spector an image of child pornography and possessing a large quantity of images depicting child pornography, stored on electronic media inside his residence. Petitioner also stated that the Yahoo! account "nudeom2001" was created in 2001 for the purpose of trading child pornography and chatting about child pornography; that he had received about 100 images of child pornography over the Internet; and that he sent images of child pornography in order to receive images of child pornography in return. PSR para. 18.

A subsequent forensic examination of petitioner's computer and the electronic media recovered from his residence revealed more than 600 images of child pornography. PSR para. 19. The images were of both prepubescent and pubescent children, and some involved sadistic and masochistic acts. The forensic investigation also revealed that from March 26, 2008 through November 18, 2008, petitioner distributed images of child pornography over the Internet from his residence in Manassas. *Ibid.*

c. The images of child pornography recovered from petitioner's computer were submitted to the National Center for Missing and Exploited Children (NCMEC) for analysis.[1] On January 7, 2009, NCMEC issued a report indicating that law enforcement officers could identify the children in 412 of the images of child pornography. One of the children was a minor female known as "Amy." "Amy" is depicted engaging in sexually explicit conduct in a set of images, known as the Misty series, widely disseminated over the Internet. "Amy" was approximately nine years old when the images were produced. PSR para. 20; Gov't C.A. Br. 8.

2. On January 8, 2009, a federal grand jury sitting in the Southern District of Florida returned an indictment charging petitioner with knowingly transporting in interstate commerce, by use of a computer, visual depictions of a minor engaging in sexually explicit conduct between December 5, 2008 and December 12, 2008, in violation of 18 U.S.C. 2252(a)(1). 09-14002-CR Docket Entry No. (09-14002 Dkt. No.) 4. On February 11, 2009, petitioner entered into a written plea agreement with the government, pursuant to which he agreed to plead guilty to the Section 2252(a)(1) charge. As part of the agreement, petitioner agreed to waive his right "to appeal any sentence imposed, including any restitution order." 09-14002 Dkt. No. 32, at ¶ 8 (Fla. Plea Agmt.). On February 26, 2009, following the Rule 11 colloquy, the district court accepted petitioner's guilty plea and found him guilty.

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[1] The NCMEC compares images of child pornography and attempts to identify the children depicted in the images. The NCMEC notifies an identified victim every time someone possessing his or her image is arrested. See *United States* v. *McDaniel*, 631 F.3d 1204, 1206 (11th Cir. 2011).

3. a. On January 29, 2009, a criminal information was filed in the United States District Court for the Eastern District of Virginia charging that, between March 26, 2008, and November 18, 2008, petitioner distributed computer files that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(2); and that on December 12, 2008, petitioner possessed images of child pornography on his computer, in violation of 18 U.S.C. 2252A(a)(5)(B). 09-14017-CR Docket Entry No. (09-14017 Dkt. No.) 1. On March 19, 2009, petitioner, with the concurrence of the United States Attorneys for the District of Florida and the Eastern District of Virginia, consented in writing to the transfer of the Virginia case to the Southern District of Florida for plea and sentencing. The Virginia case was then formally transferred to the Southern District of Florida, and assigned to the same district court judge who presided over the earlier Florida case. *Ibid.*; see Fed. R. Crim. P. 20(a)(1).[2]

b. Petitioner subsequently entered into a written plea agreement with the United States, pursuant to which he agreed to plead guilty to the two counts charged in the Virginia information. Paragraph 1 of the

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[2] Titled "Transfer for Plea and Sentence," Rule 20 provides:

> (a) Consent to Transfer. A prosecution may be transferred from the district where the * * * information is pending * * * to the district where the defendant is arrested, held, or present if:
>
> (1) the defendant states in writing a wish to plead guilty * * * and to waive trial in the district where the * * * information * * * is pending; consents in writing to the court's disposing of the case in the transferee district; and files the statement in the transferee district; and
>
> (2) the United States attorneys in both districts approve the transfer in writing.

agreement, entitled "Offense and Maximum Penalties," set forth the maximum penalties for the distribution and possession offenses, respectively: "[1] a mandatory minimum term of imprisonment of five years, a maximum term of twenty years of imprisonment, a fine of $250,000.00, full restitution, a special assessment, and supervised release for five years to life for distribution of child pornography, and [2] a maximum term of ten years of imprisonment, a fine of $250,000.00, full restitution, a special assessment, and supervised release for five years to life for possession of child pornography." 09-14017 Dkt. No. 15, at ¶ 1 (Va. Plea Agmt.). Paragraph 6 of the agreement, entitled "Waiver of Appeal, FOIA, and Privacy Act Rights," provided in relevant part that petitioner "knowingly waives the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement." *Id.* ¶ 6.

At the May 6, 2009 change-of-plea hearing, the magistrate judge reviewed the provisions of the plea agreement with petitioner, including paragraph 1, which advised him that the "maximum penalties" for his offenses included "full restitution." 09-14002 Dkt. No. 48, at 15-16. Petitioner stated that he understood those penalties. *Id.* at 16. The magistrate judge next reviewed the appeal waiver provision. After reading paragraph 6, petitioner, in response to the magistrate judge's questions, stated that he understood his appeal rights and had discussed them with his counsel. In particular, petitioner stated that he "underst[oo]d that by signing this plea

agreement," he was "giving up [his] rights to appeal, except under very limited circumstances which are set forth in [the] plea agreement." *Id.* at 16-18. Petitioner reiterated that understanding at the end of the colloquy. *Id.* at 24.[3]

On June 3, 2009, the district court accepted the magistrate judge's recommendation and accepted petitioner's guilty pleas and found him guilty of both charges in the Virginia case. A consolidated sentencing hearing on all charges was set for June 8, 2009.

4. On May 4, 2009, the Probation Office disclosed to the parties a single PSR for both cases. The PSR, which was revised on May 21, 2009, noted in relevant part that "[r]estitution is not applicable in this case." PSR para. 89.[4]

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[3] THE COURT: Do you recall the appeal waiver I just read to you from your plea agreement?

DEFENDANT: Yes, sir, I do.

THE COURT: Do you understand that by entering into the plea agreement and entering a plea of guilty, you will have waived or given up your right to appeal or collaterally attack all or part of the sentence imposed by the District Court in your case, except under the limited circumstances I read to you from your plea agreement?

DEFENDANT: Yes, sir.

[4] Congress has provided for mandatory restitution in "the full amount of the victim's losses" for the victim of "any offense" under Chapter 110 of Title 18 of the United States Code ("Sexual Exploitation and Other Abuse of Children"). See 18 U.S.C. 2259(a) and (b)(1). All three of petitioner's offenses of conviction involve violations of Chapter 110. The PSR's statement that restitution was not applicable presumably reflected the absence at that time of any claim for restitution by a victim of any of these offenses.

On June 4, 2009, four days before the sentencing hearing, the government filed a motion in the Florida case requesting a continuance of the sentencing hearing in part because the government recently learned that one of the victims of petitioner's offenses, who was represented by counsel, wanted to file a claim for restitution. The government's motion requested additional time to investigate and support the claim. 09-14002 Dkt. No. 39, at 3 ¶ 4. The district court denied the motion but scheduled a separate restitution hearing for August 10, 2009. See 18 U.S.C. 3664(d)(5) (court may defer restitution hearing until 90 days after sentencing); see generally *Dolan* v. *United States*, 130 S. Ct. 2533 (2010).

On June 8, 2009, the court sentenced petitioner to 210 months of imprisonment in the Florida case, to be served concurrently with the sentence to be imposed in the Virginia case and to be followed by a lifetime of supervised release. The court then sentenced petitioner to 210 months and 120 months of imprisonment on the two counts in the Virginia case, respectively, to be served concurrently with each other and with the sentence imposed in the Florida case, and to be followed by a lifetime of supervised release. The court also ordered petitioner to pay a fine of $20,000.00. The court entered separate judgments on the dockets reflecting the sentences imposed in the two cases. 09-14002 Dkt. No. 43; 09-14017 Dkt. No. 42.

5. On June 4, 2009, the attorney representing "Amy" (one of the child pornography victims, see p. 5, *supra*) submitted a package of information to the government in support of "Amy's" request for restitution in the amount of $3.68 million, reflecting lost future wages and benefits as well as treatment and counseling costs. See 18 U.S.C. 2259(b)(3)(A)-(F) (defining the term "full

amount of the victim's losses" to include such losses). The following day, the prosecutor forwarded this information to petitioner's counsel, the Probation Office, and the district court.

On July 31, 2009, petitioner filed (in the Florida case) a "Memorandum Regarding Restitution" opposing any restitution for "Amy" on the grounds that her restitution claim was untimely; that the denial of restitution would not harm her because she could pursue damages in a civil restitution action; and that, in any event, he did nothing more than possess child pornography and that the primary victim in possession cases is "society as a whole," not the child. 09-14002 Dkt. No. 46. The government filed a response (also in the Florida case) to petitioner's memorandum supporting "Amy's" request for restitution in an amount determined by the court and noting that an award of restitution was mandatory. 09-14002 Dkt. No. 47.

After the August 10, 2009, restitution hearing, in which the court heard testimony from a number of witnesses, the court found that "Amy" is a "victim" of petitioner's crimes, as defined in the 18 U.S.C. 2259, and that petitioner was thus responsible for "the full amount of ["Amy's"] losses." Pet. App. 4b-7b. Based on expert evidence, the district court found that her losses included $3,204,353 for lost future wages and employee benefits and $475,800 for future treatment and counseling costs. *Id.* at 7b. The court found petitioner jointly and severally liable with all other defendants ordered to pay "Amy" restitution, for the total amount of $3,680,153. *Id.* at 10b.

The district court entered an amended judgment, on the Virginia case docket only, to reflect the award of restitution. 09-14017 Dkt. Nos. 28, 42. Petitioner filed

a notice of appeal, and an amended notice of appeal following the issuance of the amended judgment, in the Virginia case.

6. On appeal, petitioner argued that the district court erred in ordering him to pay restitution to "Amy" on the ground that her injuries were not "proximately caused" by his crime of possessing her images. Petitioner also argued that the court failed to follow the procedures set forth in Section 3664 in connection with the restitution hearing.

The government filed a motion to dismiss petitioner's appeal based on the appeal-waiver provision in his plea agreement. Specifically, the government argued that petitioner's plea agreement in the Virginia case waived his right to appeal "any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever," and that this provision encompassed the right to appeal a restitution award. Gov't C.A. Mot. to Dismiss 7-11.

The court of appeals entered a three-page per curiam opinion dismissing petitioner's appeal, holding that petitioner "knowingly, voluntarily, and intelligently waived his right to appeal," Pet. App. 4a, and that his waiver covered his restitution-related claims of error, *id.* at 3a ("Because we conclude restitution is included as part of the phrase 'any sentence,' in the Virginia plea agreement, the waiver applies.").

**ARGUMENT**

1. Petitioner primarily contends (Pet. 11-18) that this Court should grant review to decide whether a criminal defendant's written waiver of his right to appeal

"any sentence" encompasses the right to appeal an order of restitution imposed in the underlying criminal case. Although courts of appeals have differed on the scope of appeal waivers covering "any sentence," each case has turned on the precise language of the specific plea agreement there at issue. The plea agreement in petitioner's case shows that the parties expressly considered the possibility of an award of "full restitution" to be part of petitioner's sentence, and, accordingly, the court of appeals correctly held that his waiver of appeal of his sentence covered restitution. Petitioner cites no case holding that a similarly worded plea agreement does not waive an appeal of an order of restitution. Further review is not warranted.

a. This Court has repeatedly held that a defendant may waive constitutional and statutory rights as part of the plea-bargaining process. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-202 (1995); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). Applying that principle, the courts of appeals have generally enforced knowing and voluntary waivers of the right to appeal a sentence. See, *e.g.*, *United States* v. *Andis*, 333 F.3d 886, 889 (8th Cir.) (en banc) (citing cases), cert. denied, 540 U.S. 997 (2003). As courts have recognized, such waivers benefit a defendant by serving as a means of 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 appeal waiver is valid, *i.e.*, whether the petitioner 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.*, *United States* v. *Cohen*, 459 F.3d 490, 494 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007).

In this case, petitioner does not dispute that his waiver of appeal rights was valid, and the record demonstrates its validity. The waiver is memorialized in the written plea agreement signed by petitioner, and the court reviewed the terms of the waiver with petitioner and his counsel during the change-of-plea hearing. The only remaining question, therefore, is whether the issue petitioner sought to raise on appeal was within the scope of his waiver. That determination 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 citation and quotation marks 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," *Andis*, 333 F.3d at 890, 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); see also *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 the Virginia plea agreement dem-

onstrate that petitioner waived his right to appeal the order of restitution.

Petitioner waived his right to appeal, *inter alia*, "any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement." Va. Plea Agmt. ¶ 6. And the agreement also indicated that the "maximum penalties" for petitioner's offenses included "full restitution." *Id.* ¶ 1; see pp. 6-7, *supra*. Accordingly, the plain language of petitioner's Virginia plea agreement, read as a whole, indicates that the parties understood not only that petitioner was subject to an order of "full restitution" as a "penalty," but also that petitioner had waived his rights to challenge that penalty—imposed as part of his sentence—"on any ground" on appeal.

c. Consistent with the decision below, several courts of appeals have held that a waiver of the right to appeal "any sentence" encompasses the right to appeal an order of restitution because restitution is a "penalty" (18 U.S.C. 2259(a)) imposed by a court "when sentencing a defendant convicted of" a qualifying offense, Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A(a)(1). Pet. 15 (citing cases); see, *e.g.*, *United States* v. *Worden*, No. 10-3567, 2011 WL 2725858, at *2 (7th Cir. July 14, 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"); *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"); *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.") (citation omitted), cert. denied, 129 S. Ct. 1026 (2009); *Cohen*, 459 F.3d at 497 ("[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.").

Petitioner's allegation of a conflict among the courts of appeals is based on decisions from the Second, Seventh, Eighth, and Ninth Circuits. Pet. 15 (citing cases). In each of those cases, the courts analyzed the language of the specific plea agreements there at issue. In two of those cases, the courts concluded that the agreements, as written, were ambiguous about the parties' intent to waive the right to appeal restitution orders. See *United States* v. *Oladimeji*, 463 F.3d 152, 157 (2d Cir. 2006) ("We find that the agreement's use of the term 'sentence' was at least ambiguous, and we resolve that ambiguity against the government."); *United States* v. *Zink*, 107 F.3d 716, 717-718 (9th Cir. 1997) (similar). In the other two cases, the courts concluded that the agreements, as written, reflected the parties' intent not to waive restitution claims. See *United States* v. *Sistrunk*, 432 F.3d 917, 918 (8th Cir. 2006) (general waiver of right to appeal "whatever sentence is imposed" did not cover

restitution under prior circuit law); *United States* v. *Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000) (agreement to waive the right to appeal any sentence "within the maximum provided in the statute(s) of conviction" did not cover restitution because authorization to impose an order of restitution arose from a statute other than the "statute of conviction").

But those cases are distinguishable from this case because none of them appears to have involved a plea agreement structured and worded like the one at issue here. In particular, the Virginia plea agreement expressly refers to "full restitution" as part of the "maximum penalties" available upon conviction and then waives appeal as to "any sentence within the statutory maximum described above." Compare Va. Plea Agmt. ¶¶ 1, 6 with *Oladimeji*, 463 F.3d at 153, 156 (focusing on appeal waiver's reference to the "total term *of imprisonment*") (emphasis added); *Zink*, 107 F.3d at 718 (appeal waiver's reference to sentence "within the statutory maximum specified above" referred to paragraph concerning Guidelines range calculations for imprisonment, not restitution; also noting district court's advisement of right to appeal judgment during plea colloquy); *Sistrunk*, 432 F.3d at 918 (providing no indication that restitution was mentioned in the plea agreement, let alone as a penalty); *Behrman*, 235 F.3d at 1052 (relying appeal waiver's reference only to sentence under "statute(s) of conviction," which did not provide for restitution).[5]

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[5] The Seventh Circuit's recent decision in *Worden* (see p. 14, *supra*) expressly distinguishes *Behrman* on that basis. 2011 WL 2725858, at *3. In any event, any intra-circuit tension does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

A further indication that the parties intended to cover restitution in the sentence appeal waiver, and an additional distinguishing fact particular to this case, is the language of the parallel Florida plea agreement. That agreement's express reference to restitution in the waiver provision itself (at ¶ 8; see p. 5, *supra*) makes clear that the parties understood that petitioner was giving up his right to appeal an award of restitution. The two related plea agreements should be interpreted in pari materia.

Petitioner also cites disagreement among the courts of appeals—in non-appeal-waiver contexts—about whether restitution is properly characterized as a "criminal penalty" for purposes of the Ex Post Facto Clause. See Pet. 11-13 (citing cases). Because this case does not involve an Ex Post Facto claim, any disagreement among the courts of appeals on that question is not presented here. In any event, petitioner's plea agreement acknowledged that an order of restitution could be imposed as a "penalty" for his offenses.

2. Petitioner raises several other factbound contentions, none of which merits this Court's review.

a. Petitioner contends that the amount of restitution ordered was "so shocking" that the court of appeals should have reviewed it notwithstanding a waiver of his right to appeal. Pet. 18-20. Petitioner cites no case holding that the size of a restitution order overrides a criminal defendant's knowing and voluntary waiver of his appeal rights, and his novel claim does not warrant this Court's review.

b. Petitioner also contends that the order of restitution imposed in this case was "unconstitutional under the 'excessive fines' [clause] of the Eighth [A]mendment." Pet. 21. Petitioner did not raise an Eighth

Amendment challenge to the restitution order in the district court. Nor did he adequately raise such a claim on appeal.[6] This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). Even assuming that an Eighth Amendment claim could be asserted notwithstanding an appeal waiver, petitioner could prevail on it only by showing "plain error," see Fed. R. Crim. P. 52(b), and petitioner has not met his burden of showing that the Excessive Fines Clause of the Eighth Amendment "plainly" or "clearly" applies to restitution orders. *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993).

c. Finally, petitioner contends that the court of appeals had a "duty to decide" the merits of his claim because, in his view, the district court erred in applying Section 2259. Pet. 22. The court of appeals had no such duty, however, because petitioner validly waived his right to such review in his plea agreement in exchange for concessions by the government. See pp. 12-15, *supra*. Further review is not warranted.

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[6] Petitioner did not raise an Eighth Amendment claim in his opening brief on appeal, and, while he alluded to the Eighth Amendment in his reply brief, he did so merely in the course of characterizing a district court decision suggesting that, in the absence of a proper application of principles of proximate causation, "the restitution statute," 18 U.S.C. 2259, "would violate the Eighth Amendment." C.A. Reply Br. 15. Petitioner did not specifically argue that the restitution order in his case violated the Eighth Amendment.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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