No. 18-288

In the Supreme Court of the United States

PHILIP A. MEARING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that petitioner's waiver of the right to appeal his sentence included an appeal of his restitution order.

2. Whether the court of appeals correctly determined that petitioner's challenges to the restitution and forfeiture orders were barred by the appeal waiver.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is unreported. The district court's order (Pet. App. 8a-17a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2018. On August 9, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 26, 2018, and the petition was filed on September 5, 2018. 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 Eastern District of Virginia, petitioner was convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 371. Pet. App. 1a; Judgment 1. The district court sentenced petitioner to

60 months of imprisonment, to be followed by three years of supervised release; ordered $15,413,029.76 in restitution; and ordered forfeiture of $13,614,648.56. Judgment 2-6; Restitution Order 1-2; Prelim. Order of Forfeiture (Forfeiture Order) 1-4. The court of appeals dismissed petitioner's appeal. Pet. App. 1a-7a.

1. As he admitted in a statement of facts filed with his plea agreement, from approximately 2004 to 2014, petitioner engaged in a fraudulent billing scheme involving subcontracts with United States Department of Defense entities. Statement of Facts ¶ 7. He did so through Global Services Corporation (Global), a corporation located in Fayetteville, North Carolina, that provided technical support services as a subcontractor on government contracts. *Id.* ¶ 1. "All or essentially all of Global's business was from the Government, primarily from the Department of Defense." *Id.* ¶ 13. Sometime after joining Global in 2002, petitioner became Global's president and chief executive officer, and, in 2007, he became its sole owner. *Id.* ¶ 2. Petitioner's co-conspirators included Kenneth Bricker, the owner of Tempo Consulting Services (Tempo) and Bricker Property Management (BPM). *Id.* ¶ 5.

To carry out the fraudulent scheme, Tempo and BPM submitted "hundreds of invoices" to Global, even though "[n]either Tempo nor BPM employed any persons, and neither business performed any work or services" for Global. Statement of Facts ¶¶ 8, 14. Petitioner and his co-conspirators then "allowed the amounts indicated on each of these false invoices to be recorded in Global's accounting system, knowing that such invoices were, in fact, false and would eventually be billed or allocated to Government contracts." *Id.* ¶ 14; see *id.* ¶ 8.

Global paid the fraudulent invoices with money "obtained from funds Global received as a Government subcontractor." *Id.* ¶ 13. Bricker, in turn, "normally retained five percent (5%) of the fraudulent payments" and transferred the remaining 95% back to petitioner or his affiliates. *Id.* ¶ 15.

Over the course of the conspiracy, Global made $13,614,648.56 in fraudulent payments to Bricker's companies on the false invoices. Statement of Facts ¶ 16. Of those payments, Bricker "retained approximately $558,036.66" and issued checks to petitioner and others for $13,056.661.90. *Ibid.* Petitioner also admitted to a separate conspiracy to defraud the government, involving Global's fraudulent receipt of $1,798,381.20 from a government prime contractor for work that Global had already completed and billed on a previous contract. *Id.* ¶¶ 17-18.

2. On June 19, 2017, the government filed an information in the United States District Court for the Eastern District of Virginia charging petitioner with one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 371. Criminal Information 2. The information also included a forfeiture allegation, pursuant to 18 U.S.C. 981(a)(1)(C) and 28 U.S.C. 2461(c). Criminal Information 8. Petitioner subsequently pleaded guilty pursuant to a plea agreement. Pet. App. 18a-29a.

a. In the agreement, petitioner agreed to plead guilty to conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. Pet. App. 18a. He acknowledged that the "maximum penalties" for the offense to which he was pleading guilty were "a maximum term of five years of imprisonment, a fine of $250,000, full restitution, forfeiture of assets as outlined below, special assessments * * * , and three years of supervised release." *Id.* at

18a-19a. "[I]n exchange for the concessions made by the United States in th[e] plea agreement," petitioner "knowingly waive[d] 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 18 U.S.C. § 3742 or on any ground whatsoever," except for a claim of ineffective assistance of counsel that is cognizable on direct appeal. *Id.* at 21a.

In addition to including "full restitution" among the "maximum penalties for [the] offense," the plea agreement contained a section focused on restitution, in which petitioner acknowledged that "restitution [wa]s mandatory pursuant to 18 U.S.C. § 3663A" and he "agree[d] to the entry of a Restitution Order for the full amount of the victims' losses." Pet. App. 22a. The parties "stipulate[d] and agree[d] to litigate the loss amount and [that] nothing in th[e] agreement foreclose[d] any party from presenting evidence on and arguing any theory regarding loss amount." *Id.* at 21a.

In a section addressing forfeiture, petitioner acknowledged that "the forfeiture of assets [wa]s part of the sentence that must be imposed in this case." Pet. App. 23a. He "agree[d] to forfeit all interests in any fraud related or money laundering-related asset" that he "own[ed]" or "over which [he] exercise[d] control, directly or indirectly," as well as property traceable to a substitute for the "proceeds of his offense." *Ibid.* He "admit[ted] and agree[d] that the conduct described in the charging instrument and Statement of Facts provide[d] a sufficient factual and statutory basis for the forfeiture of the property as determined by the court at sentencing." *Id.* at 24a. And he "agree[d] that all prop-

erty covered by th[e] agreement [wa]s subject to forfeiture as property constituting, derive[d] from, or traceable to offense proceeds or as substitute assets for property otherwise subject to forfeiture." *Id.* at 25a.

The agreement further provided that, "if restitution is ordered as part of the sentence," and certain other criteria were met, the U.S. Attorney's Office would submit a request to the Asset Forfeiture and Money Laundering Section of the Department of Justice to apply any amount obtained through forfeiture toward any restitution ordered. Pet. App. 24a. Petitioner agreed not to challenge "any decision with respect to any [such] * * * recommendation." *Id.* at 25a. And petitioner "further agree[d] to waive all constitutional and statutory challenges to forfeiture in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with th[e] Plea Agreement on any grounds." *Ibid.*

b. At the plea hearing, the district court reviewed the plea agreement with petitioner and advised him of his rights pursuant to Fed. R. Crim. P. 11. Plea Tr. 1-31. Of relevance here, the court advised petitioner that the "maximum penalty" for his offense included, *inter alia*, "a term of five years in prison, a fine not exceeding $250,000, [and] full restitution." *Id.* at 8. The court explained that "[a]ny person who ha[d] suffered as a result of the acts for which [petitioner was] pleading guilty * * * may be the subject of a restitution order, and that restitution order may be made a part of [petitioner's] sentence." *Id.* at 9. With respect to forfeiture, petitioner acknowledged that the court "may require [him] to forfeit certain property to the Government if it was obtained with the proceeds of this illegal activity or if it was used to commit this illegal activity." *Ibid.*

The district court also advised petitioner of his appeal waiver. Plea Tr. 19. Petitioner acknowledged that he was "waiv[ing] [his] right to appeal [his] conviction and any sentence imposed upon any ground whatsoever so long as that sentence is within the statutory maximum." *Ibid.* He reiterated that he was "giving up [his] right to appeal" and agreed that he would "not appeal [his] conviction or any lawful sentence imposed by the Court." *Ibid.*

Finally, petitioner agreed that the statement of facts submitted with the plea agreement was "accurate" and the government could prove those facts "beyond a reasonable doubt." Plea Tr. 22-23. Following the Rule 11 colloquy, the district court found that petitioner was "fully competent and capable of entering an informed plea," and it accepted the plea as knowingly and voluntarily made. *Id.* at 23.

3. During sentencing, the parties litigated the amount of the government's loss on the principal conspiracy, as relevant to petitioner's advisory Sentencing Guidelines range and the appropriate amount of restitution.

a. Petitioner argued that, after considering the relevant "government-contract accounting and cost-allocation principles" and offsetting the government's gross loss by the fair market value of certain services that Global had provided the government, the government's net loss on the principal conspiracy amounted to $870,304.20. D. Ct. Doc. 32, at 2 (Nov. 22, 2017); see *id.* at 1-7; Sent. Tr. 64-65. To support that argument, petitioner offered the testimony of two different experts and a number of exhibits. Sent. Tr. 9-52; see D. Ct. Docs. 32-1 to 32-14 (Nov. 22, 2017).

For its part, the government relied on petitioner's factual admissions in connection with the plea agreement. It observed that, according to the statement of

facts, "Global, [petitioner's] company and with [petitioner's] knowledge, used $13 million of government funds to pay fake invoices for work that was never performed, by companies that had no employees." Sent. Tr. 54. The government argued that, "on those facts," petitioner was "not entitled to a setoff or reduction in the loss amount, based on some supposed value of services that his company, Global, may have separately performed on a contract." *Ibid.*; see also D. Ct. Doc. 29, at 1-8 (Nov. 22, 2017).

b. The district court agreed with the government. Sent. Tr. 68-71. The court found that, based on petitioner's admissions in the statement of facts, "the government ha[d] established by a preponderance of the evidence that the loss amount is $15,413,029.76"—consisting of $13,614,648.56 on the principal conspiracy and $1,798,381.20 on the separate conspiracy (which petitioner had not disputed). *Id.* at 70. The court also found that petitioner had not "met [his] burden at all" of proving the fair market value of any services that would offset that loss amount. *Id.* at 71. After considering the advisory Guidelines range and sentencing factors under 18 U.S.C. 3553(a), the court ordered 60 months of imprisonment, to be followed by three years of supervised release, a $100 special assessment, and restitution in the amount of $15,413,029.76. Sent. Tr. 95-98; Restitution Order 1.

After further briefing and a hearing on the appropriate forfeiture amount, the district court additionally ordered petitioner to forfeit $13,614,648.56 in "proceeds" from his offense. Forfeiture Order 1. In a written decision, the district court stated that this amount "plainly was transferred and exchanged between the coconspirators," that petitioner "used these funds to facilitate

the commission of this crime," and that the "full amount is properly considered 'proceeds' of the fraud." Pet. App. 14a; see *ibid.* (citing *United States* v. *Herder*, 594 F.3d 352, 363-364 (4th Cir.) (discussing the drug forfeiture statute, 21 U.S.C. 853), cert. denied, 560 U.S. 977 (2010)). In the forfeiture order itself, the court found that "the government has met its burden to prove * * * the amount of proceeds obtained by [petitioner] to be $13,614,648.56." Forfeiture Order 1.

4. Petitioner appealed, challenging the restitution and forfeiture that the district court had ordered. The court of appeals dismissed the appeal, in an unpublished order, finding the appeal to be barred by the waiver provisions in the plea agreement. Pet. App. 1a-7a.

As relevant here, the court of appeals first rejected petitioner's argument that he did not waive his right to appeal restitution, which was premised on the theory that "the appeal waiver provision does not specifically mention restitution, the magistrate judge did not explicitly tell him at the [plea] hearing that he was waiving his right to appeal as to restitution, and any ambiguity in the plea agreement must be construed against the Government." Pet. App. 2a. The court explained that "restitution is * * * part of the criminal defendant's sentence," and, as a general matter, a defendant who agrees to waive his right to appeal "whatever sentence is imposed has waived his right to appeal a restitution order." *Ibid.* (quoting *United States* v. *Cohen*, 459 F.3d 490, 496-497 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007)). The court reasoned that petitioner had "not show[n] that his case is an exception to this general rule." *Ibid.*

The court of appeals also rejected petitioner's argument that the appeal waiver did not bar his argument

that the district court "exceeded the district court's statutory authority under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A-3664 (2012)," by "impos[ing] a restitution amount larger than * * * the victim's actual loss amount." Pet. App. 3a-4a. The court of appeals agreed that "a defendant could not be said to have waived his right to appellate review of a restitution order imposed when it is not authorized by the applicable restitution statute." *Id.* at 4a (quoting *Cohen*, 459 F.3d at 497) (brackets omitted). But it found that petitioner's challenge to the loss amount did not fit within that rule, reasoning that, if petitioner's challenge could proceed, "a defendant could always challenge the district court's determination of the restitution amount even if he had waived the right to appeal his sentence." *Ibid.* The court observed that petitioner "d[id] not dispute that [the] MVRA authorized and required the district court to order him to pay restitution to the victim," but instead "that the district court committed legal error in determining the restitution amount." *Id.* at 4a-5a.

Finally, the court of appeals rejected petitioner's similar challenges to the forfeiture order. Pet. App. 6a-7a. The court determined that petitioner's appellate waiver "encompasse[d] the forfeiture order" because "[f]orfeiture, like restitution, is part of a defendant's sentence." *Id.* at 6a. The court also noted that a "separate provision" in petitioner's plea agreement "explicitly and unambiguously waive[d] the right to make any further constitutional or statutory challenges to any forfeiture imposed under the agreement." *Ibid.* As to petitioner's challenge to "the amount of forfeiture as legally erroneous," the court determined that petitioner failed to raise "a colorable claim that the order is illegal, such that the

claim could potentially fall outside of [petitioner's] valid and unambiguous appeal waiver." *Id.* at 6a-7a.

ARGUMENT

Petitioner first contends (Pet. 10-14, 23-25) that the court of appeals erred in dismissing his appeal because petitioner's waiver of appellate rights should not be construed to include an appeal of a restitution order. The court of appeals correctly interpreted the appeal waiver to encompass petitioner's appeal, and its unpublished order does not conflict with any decision of this Court or of another court of appeals. Petitioner cites no case holding a similarly worded plea agreement and appeal waiver to allow for appeal on restitution. This Court has repeatedly denied petitions for a writ of certiorari presenting similar questions. *Grundy* v. *United States*, 138 S. Ct. 63 (2017) (No. 16-8487); *Keele* v. *United States*, 135 S. Ct. 1174 (2015) (No. 14-256); *Staples* v. *United States*, 565 U.S. 814 (2011) (No. 10-1132). The Court should follow the same course here.

Petitioner separately contends (Pet. 14-18, 25-28) that, regardless of the scope of his appellate waivers, the court of appeals erred in refusing to address his argument that the amount of restitution and forfeiture exceeded the statutory maximum. The court of appeals also correctly rejected that contention. And this case would be a poor vehicle to address any disagreement among the courts of appeals on that question, because petitioner's challenges would be barred even under petitioner's preferred rule. Further review is not warranted.

1. a. This Court has repeatedly held that a defendant may knowingly and voluntarily waive constitutional and statutory rights as part of a plea agreement. 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 those courts have recognized, such waivers benefit a defendant by serving as a means of gaining concessions from the government and also 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), superseded on other grounds by Sentencing Guidelines App. C, Amend. 794 (Nov. 1, 2015). In determining whether an appeal waiver provision mandates dismissal of an appeal, courts first ask whether the waiver is valid, *i.e.*, whether the appellant 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. *Archie*, 771 F.3d 217, 221 (4th Cir. 2014).

"In general, plea agreements are construed according to contract law principles." *United States* v. *Green*, 595 F.3d 432, 438 (2d Cir. 2010) (brackets, citation, and internal 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 (citation omitted), courts interpreting 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) (citation omitted). 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").

b. In this case, petitioner does not dispute that his waiver of appellate rights was valid, and the record demonstrates its validity. The waiver is memorialized in the written plea agreement signed by petitioner, and the district court reviewed the terms of the waiver with petitioner and his counsel during the plea hearing. See pp. 3-6, *supra*. He has raised no claim that the Rule 11 colloquy was insufficient or that his counsel was ineffective by failing to advise him that longstanding circuit precedent construed appeal waivers similar to his to encompass restitution. See *United States* v. *Cohen*, 459 F.3d 490, 497 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007). Petitioner nevertheless contends (Pet. 23-25), however, that his challenge to restitution was not within the scope of his waiver. The court of appeals correctly rejected that contention.

The terms of petitioner's plea agreement demonstrate that petitioner knowingly and voluntarily waived his right to appeal the order of restitution in this case. Petitioner 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 18 U.S.C. § 3742 or on any ground whatsoever," except for a small category of claims not relevant here. Pet. App. 21a. The waiver's inclusion of an appeal of "any sentence within the statutory maximum described above" cannot be understood to exclude

restitution appeals. The plea agreements earlier description of the "maximum penalties" for petitioner's offense included "full restitution." *Id.* at 18a-19a.

Elsewhere in the agreement, moreover, the parties expressly acknowledged that any restitution would be "ordered *as part of the sentence*." Pet. App. 24a (emphasis added). And the agreement similarly included "forfeiture" within the category of "maximum penalties," *id.* at 18a-19a, and explicitly acknowledged petitioner's "understand[ing] that the forfeiture of assets is part of the sentence," reinforcing the mutual understanding that petitioner's "sentence" was not limited to the prison sentence, but included the financial penalties. *Id.* at 23a.

The text of the agreement, read as a whole, thus clearly evinces the parties' understanding not only that petitioner was subject to a "sentence" including "restitution," but also that petitioner had waived his right to challenge that and the other enumerated components of the sentence. That is particularly so in light of longstanding Fourth Circuit precedent that "as a general rule, a defendant who has agreed '[t]o waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed,' has waived his right to appeal a restitution order," *Cohen*, 459 F.3d at 497 (citation omitted). See Restatement (Second) of Contracts § 220(1) (1981) ("An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage.").

Petitioner confirmed that mutual understanding at his plea hearing. There, petitioner expressly acknowledged his understanding that the "maximum penalty"

for his offense included "full restitution," Plea Tr. 8, and that, in addition to any prison sentence the court might impose, he "may be required to make restitution" for "all losses." *Id.* at 9. The district court also specifically stated that a "restitution order may be made a part of [petitioner's] sentence" and would have "the effect of a judgment against [him]." *Ibid.* And petitioner acknowledged that he was waiving his right to appeal "any sentence * * * so long as that sentence is within the statutory maximum" and that he was giving up the right to appeal "any lawful sentence." *Id.* at 19.

c. Petitioner contends (Pet. 11-13) that the decision below conflicts with decisions from the Second, Fifth, Eighth, Ninth, and D.C. Circuits. In each of the cases on which petitioner relies, however, the court's analysis of whether a challenge to a restitution order was covered by a sentence appeal waiver turned on the particular language of the plea agreement at issue. And none included language comparable to the plea agreement at issue here.

In *United States* v. *Sistrunk*, 432 F.3d 917 (2006), for example, the Eighth Circuit acknowledged that plea agreements "are essentially contracts between the defendant and the Government," and thus that the court "must look to the language of the agreement to determine the scope of an appeal waiver." *Id.* at 918. The court held only that the plea agreement in that case, which tied the waiver directly to the defendant's advisory Guidelines range, did not clearly encompass a restitution order, to which the Guidelines range is irrelevant. See *ibid.* ("[T]he defendant hereby waives all rights conferred by Title 18, United States Code, Section 3742 to appeal his sentence, unless the Court sentences the defendant above offense level 10.") (citation

omitted; brackets in original). Indeed, in *United States* v. *Schulte*, 436 F.3d 849 (8th Cir. 2006), the court held that a provision that waived "all rights to appeal all non-jurisdictional issues" *did* include an appeal of a restitution order. *Id.* at 850 (citation and emphasis omitted).

Likewise, the Second Circuit decisions petitioner cites (Pet. 11-12) do not conflict with the decision below because the plea agreements in those cases, unlike petitioner's, were ambiguous about whether the defendant's waiver encompassed the restitution component of his sentence. In *United States* v. *Oladimeji*, 463 F.3d 152 (2d Cir. 2006), the court noted that, "[w]ithout doubt, a restitution order is part of the sentence." *Id.* at 156. But it nevertheless found "the agreement's use of the term 'sentence' * * * at least ambiguous," because it stated that defendant would not challenge "'[his] conviction or sentence * * * in the event that the Court imposes a total *term of imprisonment* of 114 months . . . or below,'" and it made other references to "sentence" that could only "refer[] to the period of imprisonment." *Id.* at 156-157 (emphasis added).

In *United States* v. *Pearson*, 570 F.3d 480 (2009) (per curiam), the Second Circuit found ambiguity and permitted the defendant to challenge the amount of restitution where his plea agreement waived only his right to appeal "any sentence incorporating the agreed disposition specified herein" and the only "agreed disposition" as to restitution was that the defendant would *pay* it "in full." *Id.* at 483, 485 (citation omitted). Unlike this case, the appeal waiver did not encompass any sentence below a maximum, which was then defined to include "full restitution." Pet. App. 19a; see *id.* at 21a. And, in *United States* v. *Ready*, 82 F.3d 551 (2d Cir. 1996), the court carefully analyzed the specific language of the

plea agreement before finding "ambiguity * * * as to whether the term 'sentence' includes the restitution penalty" because "sentence" was repeatedly used in context to refer to a prison term. *Id.* at 559.[1] By contrast, the plea agreement here noted that restitution would be "part of the sentence." Pet. App. 24a.

The cases from the Ninth and D.C. Circuits on which petitioner relies are similarly inapposite. See *United States* v. *Zink*, 107 F.3d 716, 718 (9th Cir. 1997) (permitting appeal of restitution order where waiver of right to appeal sentence was conditioned on the "sentence [being] within the statutory maximum specified above" and the "'statutory maximum specified above'" referred only to then-mandatory "sentencing guideline range calculations"); *In re Sealed Case*, 702 F.3d 59, 65 (D.C. Cir. 2012) (permitting appeal of a restitution order where the defendant waived appeal of his "sentence," but where the "plea agreement define[d] sentence without reference to restitution"); see also *United States* v. *Heslop*, 694 Fed. Appx. 485, 488 (9th Cir. 2017), cert. denied, 138 S. Ct. 2573 (2018) (noting that the agreement "waived the right to challenge 'any portion of [the defendant's] sentence,'" but "the next paragraph implied that all portions of his sentence would fall within a maximum statutory range of imprisonment").

Finally, although petitioner asserts that the decision below conflicts with the approach of the Fifth Circuit, that court has interpreted a waiver of the right to appeal the defendant's "sentence except in the case of a

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[1] In any event, the court in *Ready* first held that the defendant had not knowingly agreed to waive a challenge to the legality of his restitution order based in part on deficiencies in the Rule 11 colloquy. 82 F.3d at 557. The court's interpretation of the appeal waiver was therefore dicta.

sentence in excess of the statutory maximum" as including challenges to a restitution order, where restitution was "mentioned" in the plea agreement, the plea agreement made clear that the "sentence" would include "'restitution to victims,'" and the district court "informed" the defendant that "his sentence 'includes restitution.'" *United States* v. *Keele*, 755 F.3d 752, 753, 755-756 (2014), cert. denied, 135 S. Ct. 1174 (2015). All of those circumstances are present here. The Fifth Circuit cases petitioner cites involve circumstances different from *Keele* and the decision below. See *United States* v. *Sharma*, 703 F.3d 318, 321 n.1 (2012) (noting that the government conceded that the waiver did not bar the defendant's appeal), cert. denied, 571 U.S. 820 (2013); *United States* v. *Chemical & Metal Indus., Inc.*, 677 F.3d 750, 752-753 (2012) (concluding that a challenge based on the court's failure to enter any finding of loss fit within the scope of a reservation in the defendant's waiver for "any punishment imposed in excess of the statutory maximum"); see also *United States* v. *Gunselman*, 643 Fed. Appx. 348, 348, 350, 355 n.24 (2016) (per curiam) (finding that the defendant's challenge to a restitution order based on losses outside the time period charged in the indictment fit within the scope of a reservation in his appeal waiver for "any punishment imposed in excess of the statutory maximum"). In any event, this Court does not grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

d. Any disagreement among the courts of appeals on the first question presented is of limited significance and does not warrant this Court's review. Petitioner does not dispute that the term "sentence" in an appel-

late waiver *can* include restitution. See Pet. 24 (suggesting that "the 'term' sentence could sometimes be clear enough to encompass restitution"). At bottom, therefore, petitioner is asking simply for a default rule of interpretation. And, whatever the default rule may be, parties can readily draft plea agreements to avoid controversy about whether restitution appeals are encompassed within an appellate waiver. Any decision of this Court on the question presented in this case is therefore likely to have a practical effect only in appeals that are already pending, involve plea agreements and appellate waivers with language similar to the agreement in this case, and include a meritorious challenge to restitution. The petition provides no evidence that a significant number of cases would meet that criteria.

2. The court of appeals also correctly determined that petitioner's waiver of appellate rights barred his claims that the amount of restitution and forfeiture were excessive. And that issue likewise does not warrant this Court's review.

a. As petitioner notes (Pet. 14), the courts of appeals have permitted appeals in limited circumstances despite a defendant's knowing and voluntary waiver of appellate rights. Courts have permitted appellate review if the sentence imposed exceeds the statutory maximum penalty, *e.g.*, *United States* v. *Feichtinger*, 105 F.3d 1188, 1190 (7th Cir.), cert. denied, 520 U.S. 1281 (1997); if the sentencing court relies on a constitutionally impermissible factor, such as race, *e.g.*, *United States* v. *Johnson*, 347 F.3d 412, 414-415 (2d Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *United States* v. *Hicks*, 129 F.3d 376, 377 (7th Cir. 1997); or if the defendant shows a "miscarriage of justice," *e.g.*, *United States* v.

Hahn, 359 F.3d 1315, 1327-1328 (10th Cir. 2004) (per curiam); *Andis*, 333 F.3d at 891; *United States* v. *Khattak*, 273 F.3d 557, 562-563 (3d Cir. 2001). Petitioner suggests (Pet. 25-28) that his contention that the restitution and forfeiture orders exceed, respectively, the government's loss and petitioner's proceeds fits within the exception for sentences that exceed the statutory maximum penalty. That is incorrect.

The district court ordered petitioner to pay restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, and to forfeit the "proceeds" of his fraudulent scheme under 18 U.S.C. 981(a)(1)(C). The MVRA provides that, when a defendant is convicted of certain fraud and other offenses, "the court shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). The Act requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C. 3663A(d). Section 981(a)(1)(C), meanwhile, authorizes forfeiture orders for "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation" of certain offenses. 18 U.S.C. 981(a)(1)(C); see 28 U.S.C. 2461(c).

By authorizing restitution and forfeiture of specific sums—"the full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), and the "proceeds" of the offense, 18 U.S.C. 981(a)(1)(C)—rather than prescribing a maximum amount certain that may be ordered, these statutes establish indeterminate sentencing frameworks. That is, "there 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); *United States* v. *Reifler*, 446 F.3d 65, 118-120 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). And the same is true for forfeiture. See *United States* v. *Simpson*, 741 F.3d 539, 560 (5th Cir.), cert. denied, 572 U.S. 1127 (2014); *United States* v. *Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006).

Because such "orders 'are not subject to any prescribed statutory maximum,'" a defendant's contention that a particular restitution or forfeiture order exceeds the appropriate amount generally "does not implicate the sort of 'illegality' that * * * might justify voiding a voluntary agreement between the parties.'" *Schulte*, 436 F.3d at 851 (citation omitted); see *United States* v. *Grundy*, 844 F.3d 613, 617 (6th Cir. 2016) (rejecting argument that an appeal waiver "does not bar" appeal of "restitution orders above the statutory maximum" because "'[t]he restitution statutes do not specify a statutory maximum'") (citation omitted), cert. denied, 138 S. Ct. 63 (2017); *United States* v. *Sharp*, 442 F.3d 946, 952 (6th Cir. 2006) ("Because the restitution statutes do not contain a maximum penalty, [a defendant] cannot be heard to complain that the restitution order violates the statutory maximum for his offense.").

As the court of appeals observed, accepting petitioner's contrary contention would mean that "a defendant could always challenge the district court's determination of the restitution [or forfeiture] amount even if he had waived the right to appeal his sentence," Pet. App. 4a, because any calculation error could be characterized as resulting in a sentence that exceeded the amount of the victim's losses or defendant's proceeds. Nor is petitioner's all-encompassing loophole necessary

to address a hypothetical circumstance in which a defendant who stole $100 is ordered to pay $5 million in restitution "altogether without basis," Pet. 27 (quoting *Oladimeji*, 463 F.3d at 156). The Fourth Circuit has made clear that a "defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *Cohen*, 459 F.3d at 497 (quoting *United States* v. *Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995)). Thus, were a case of an "unconscionable" sentence ever to arise, Pet. 26, the Court could potentially address it without a general exception for challenges to the amount of restitution or forfeiture.[2]

b. Petitioner contends (Pet. 14-18) that the court of appeals' decision conflicts with decisions from the Seventh, Ninth, and Tenth Circuits. But petitioner significantly overstates any disagreement among the courts of appeals on the limits of enforcing appellate waivers against challenges to restitution orders. And, in any event, it is far from clear that this case implicates any such disagreement.

Contrary to petitioner's contention (Pet. 16), for example, the Tenth Circuit in *United States* v. *Gordon*, 480 F.3d 1205 (2007), did not refuse to enforce an appellate waiver against a restitution order on the ground that the order exceeded the statutory maximum. Ra-

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[2] Petitioner errs in suggesting (Pet. 28) that the decision below is internally inconsistent. The plea agreement can identify the "maximum penalties" including "full restitution," Pet. App. 18a-19a, and restitution of a court-determined amount can be considered part of the sentence for purposes of an appeal waiver, without every legal challenge to restitution (or forfeiture) constituting a claim that the sentence exceeds the "statutory maximum." *Id.* at 21a.

ther, the court determined that the waiver did not, according to its own terms, apply to the defendant's challenge. See *id.* at 1209 ("Ms. Gordon did not intend to waive the right to appeal an unlawful restitution order."). Unlike petitioner's agreement, the appellate waiver in *Gordon* was specifically conditioned on the "sentence" being "within or below the applicable guideline range," suggesting that it may not include any challenge to a restitution order. *Id.* at 1208 (citation and emphasis omitted); see pp. 14-15, *supra*.[3]

Petitioner's assertion of conflict with respect to the Seventh Circuit is likewise misplaced. Two of the cases on which petitioner relies (Pet. 16) did not involve appellate waivers at all. See *United States* v. *Webber*, 536 F.3d 584, 587, 601-604 (7th Cir. 2008) (reviewing a restitution order entered after a jury trial); *United States* v. *Wolf*, 90 F.3d 191, 194 (7th Cir. 1996) (construing Federal Rule of Criminal Procedure 35(a)). In *United States* v. *Litos*, 847 F.3d 906, 910-911 (7th Cir. 2017), the court did conclude that enforcing an appellate waiver in the context of that case, where the restitution order included the losses of individuals other than the victim of the offense, would result in a "miscarriage of justice." *Id.* at 910. But the court did not announce a categorical exception for challenges (legal or otherwise) to the amount of restitution orders. See *ibid.* (focusing on the

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[3] In a decision not cited by petitioner, the Tenth Circuit did refuse to enforce an appellate waiver against a challenge to the "legality of the court's restitution order." *United States* v. *Hudson*, 483 F.3d 707, 710 (2007). But it did so based primarily on Fourth Circuit precedent, and the decision therefore provides no basis for an assertion of a conflict involving the Fourth Circuit's unpublished order here. See *id.* at 709 ("We find the *Broughton-Jones* reasoning persuasive.").

"facts of this case"). And the Fourth Circuit has declined to enforce an appeal waiver against similar claims that a restitution order included losses to non-victims. See *Broughton-Jones*, 71 F.3d at 1147-1149.

Finally, petitioner alleges (Pet. 15-16) a conflict with two decisions from the Ninth Circuit. Petitioner acknowledges (Pet. 16 n.5), however, that in *United States* v. *Gordon*, 393 F.3d 1044 (9th Cir. 2004), cert. denied, 546 U.S. 957 (2005), the Ninth Circuit refused to enforce the defendant's appellate waiver on the ground that he "lacked sufficient [advance] notice" of the approximate amount of any restitution order to knowingly waive his right to appeal such an order. *Id.* at 1050 (citing *United States* v. *Phillips*, 174 F.3d 1074 (9th Cir. 1999)).[4] The court's subsequent statement concerning the defendant's ability to appeal his restitution order, "[e]ven if" he had "voluntarily and knowingly waived his general right to appeal," was therefore dicta. *Gordon*, 393 F.3d at 1050 (citation omitted; brackets in original).

The Ninth Circuit did not rely on its notice rule in *United States* v. *Johnston*, 199 F.3d 1015 (1999), cert. denied, 530 U.S. 1207 (2000), in refusing to apply an appellate waiver to the defendant's challenge that a since-amended restitution statute required the defendant's restitution order to be reduced by the amount the government obtained in forfeiture. *Id.* at 1022-1023. But, again, given the Fourth Circuit's refusal to enforce appellate waivers against some legal challenges to restitution orders, see *Broughton-Jones*, 71 F.3d at 1147-1149,

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[4] Petitioner suggests in a footnote (Pet. 16 n.5) that the same reasoning applies here. But he made no such argument below, and the court of appeals' unpublished order did not pass upon it. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

it is not clear that the Fourth Circuit would have refused to consider a claim of a similar nature. No such claim was at issue in the unpublished disposition below.

c. Even if the second question presented otherwise warranted review, this case would be a poor vehicle in which to consider it, because the court of appeals correctly dismissed petitioner's appeal even under petitioner's view. In his view, "an appellate court [could] allow defendants to challenge *legal* errors in restitution or forfeiture orders, while still barring them from contesting '*factual* calculations' relating to such orders on appeal." Pet. 27 (citation omitted). Under that approach, his appeal was properly dismissed.

The district court's determination of the amount of restitution order did not turn on any disputed legal propositions. To the contrary, the heart of the dispute over the loss amount in this case was a factual dispute about the meaning and weight of petitioner's admissions in the statement of facts, and whether those statements, in light of petitioner's own evidence, are sufficient to carry the government's burden of proof. After carefully considering the evidence before it, the district court found that, although "the facts in the statement of facts are presented a little bit inartfully," they were sufficient to carry the government's burden to establish "by a preponderance of the evidence" the amount of loss. Sent. Tr. 70; see *id.* at 69-70. Petitioner's opening brief on appeal accordingly disputed the relevance of his admissions and relied on exhibits and expert testimony to argue that the district court's restitution order "miscalculate[d]" the government's loss and should be reduced to "the true amount of the government's actual loss." Pet. C.A. Br. 16, 18; see *id.* at 16-29; see Pet. Opp. to Mot. to Dismiss Appeal 7 ("Mr. Mearing maintains on

appeal that the district court * * * ordered restitution of a vastly greater sum ($15,413,029.76) than the actual amount the victim (the DoD) lost (only $870,304.20—less than one million dollars."). Although the order below credited petitioner as making a claim of "legal error," that characterization is not controlling on this Court or suggestive that his claim fits into a narrow window of purely legal claims that other courts have posited. See *United States* v. *Cooper*, 498 F.3d 1156, 1160 (10th Cir. 2007) (describing any exception as "extremely narrow and appl[ying] only in the case where there is no factual dispute as to the amount of restitution linked to an offense").

To the extent that petitioner's challenge to the amount of forfeiture may be more legal in nature than his challenges to restitution, the court of appeals did not refuse to consider any legal arguments. Rather, in dismissing petitioner's appeal of the forfeiture order, the court determined that petitioner "ha[d] not raised a *colorable* claim that the order is illegal, such that the claim could potentially fall outside of [petitioner's] valid and unambiguous appeal waiver." Pet. App. 6a-7a (emphasis added). Although the district court suggested in its written decision that $13,614,648.56 constituted "'proceeds' of the fraud" in part because petitioner "used these funds to facilitate the commission of this crime," *id.* at 14a; cf. 21 U.S.C. 853(a)(2) (drug forfeiture statute allows forfeiture of facilitating funds), petitioner acknowledged in the court of appeals that the district court only made that "assert[ion] in passing" and that it had in fact determined for forfeiture purposes that "the gross amount of proceeds 'obtained by [petitioner] was $13,614,648.56"—the "same amount" as the loss from the conspiracy involving the fraudulent invoices. Pet.

C.A. Br. 36-37 & n.16 (citation omitted); see also Forfeiture Order 1. And the court of appeals found that petitioner's challenge did not survive petitioner's waiver of "all constitutional and statutory challenges to forfeiture in any manner." Pet. App. 25a. Further review of that determination is not warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] As petitioner points out (Pet. 20 n.7), this Court granted certiorari in *Garza* v. *Idaho*, No. 17-1026 (argued Oct. 30, 2018), to consider whether a defendant who has pleaded guilty pursuant to an appeal waiver, yet requests that his attorney file a direct appeal, is entitled to a presumption of prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), if his attorney fails to perfect an appeal. Although *Garza* involves an appellate waiver, petitioner rightly does not contend that his case should be held for *Garza*.