

No. _____

**In The
Supreme Court of the United States**

—◆—
RICKY KEELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Whether a general appeal waiver bars a challenge to a restitution order.

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Petitioner Ricky Keele asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The June 2, 2014, opinion of the Fifth Circuit is attached at App. 1. *United States v. Keele*, 2014 U.S. App. LEXIS 10183. Keele's plea agreement is attached at App. 11.

JURISDICTION

The Fifth Circuit Court of Appeals rendered its decision January 7, 2014 and a revised opinion June 2. This petition was timely filed. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals possessed jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3771(d)(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS INVOLVED

Mandatory Victims Restitution Act, 18 U.S.C.A. § 3663A.



STATEMENT OF THE CASE

A. Indictment

On July 19, 2011, Ricky Keele and eighteen (18) co-defendants were named in a Fourth Superseding Indictment with one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349 (Count 1) and one count of Fraud and Related Activity in Connection with Electronic Mail and Aiding and Abetting, in violation of 18 U.S.C. § 1037(a)(2) and (b)(2)(C) & 2 (Count 2).

B. Superseding Information

On September 29, 2011, a one-count Superseding Information was filed charging Keele with Removing Property to Prevent Seizure and Aiding and Abetting, in violation of 18 U.S.C. § 2232(a) and 2.

C. Re-arraignment With A Written Plea Agreement

The next day, September 30, 2011, Keele pled guilty to the Information pursuant to a written 18 U.S.C. § 1037(c)(1)(C) plea agreement. App. 11. Keele simultaneously waived his right to be indicted by a grand jury.

D. Appeal Waiver Does Not Mention Restitution

Although “[t]he plea agreement set maximum sentencing exposure at 24 months and included restitution to the victims arising from ‘all relevant conduct’ and was not limited to the conduct arising from the offense of conviction alone,” *Keele*, 2014 U.S. App. LEXIS 10183, *2, the most salient aspect of the appeal waiver is its omission of the word “restitution”:

Keele waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. He further waives his right to seek any future reduction in sentence (e.g., based on a change in sentencing guidelines or statutory law). Keele, however, reserves the rights (a) to bring a direct appeal of a sentence exceeding the statutory maximum punishment that is applicable at the time of his initial sentencing, (b) to challenge the voluntariness of his plea or this waiver, or (c) to bring a claim of ineffective assistance of counsel that influences the voluntariness of the plea or waiver.

App. 11; ¶11.

E. Restitution And Victim Impact

1. Restitution

Probation addressed restitution in Paragraphs 195-197. The first two paragraphs merely list statutory citations to restitution statutes such as the MVRA. Paragraph 197 reads in its totality:

Restitution in the amount of \$3,691,102.70 is subject to the Mandatory Victims Restitution Act of 1996. Restitution should be made payable to the U.S. District Clerk for disbursement to:

See attached

The “see attached” list to which paragraph 197 refers is found at page 56 of the PSR.

2. Victim Impact

Probation discussed the related concept of victim impact in Paragraphs 144 and 145. Paragraph 145 explains:

To date, 5 victims have provided Victim Impact Statements listing actual losses totaling \$3,691,102.70. Should additional victims provide information, this will be included in an Addendum to the Presentence Report. A list of victims and their individual loss amounts are attached to this report.

These victim impact statements were not attached to the PSR or in any way presented to Keele before sentencing. However, a detailed

read of the PSR's use of the victim impact letters demonstrates that Keele was largely unconnected to these business entities.

For example, paragraph 105 states, "According to a Victim Impact Statement provided by Alpheus, UDC defrauded them of \$41,397.03." Yet in Paragraph 113, Probation states, "According to a Victim Impact Statement provided by Alpheus, they suffered loss in the amount of \$129,325.74." There is no way to reconcile the former with the latter, yet Keele was assessed the larger amount. Similarly, Paragraph 113 states:

By using each other as credit references, Simpson, Michael Faulkner, Keele, and various individuals associated with them were able to defraud Excel Communications in Las Colinas, Texas, in the amount of \$474,576.96 and Qwest in the amount of \$768,929.

No attempt was undertaken to particularize what sub-portion of these self-declared injuries was attributable to Keele. Even more salient is the restitution \$2.16 million deemed to be owed to 2020 United, which is the lion's share of the aggregate restitution assessed. Paragraph 114 tells us that 2020 United "suffered a loss of \$2.16 million" when Faulkner defaulted on his lease. However, Keele was a legitimate tenant at 2020 United who paid rent. App. 11; ¶117 ("Keele eventually did take space at 2020 Live Oak, and left that space after developing

a dispute for rents in excess of \$100,000 with the landlord.”).

F. Sentencing And Judgment Imposed

Sentencing was held on May 11, 2012. The District Court overruled all of Keele’s Guideline calculation objections. A sentence at the highest point on Keele’s (c)(1)(C) agreement was imposed, 24 months.

With regards to restitution, Keele was ordered to pay \$2.16 million to 2020 United; \$129,325.74 to Alpehus; \$768,929 to Qwest; \$474,576.96 to Excel Communications; and \$158,271 to United Partners Realty.

G. Appeal: Fifth Circuit Concedes A Circuit Split On This Issue

Whether a general appeal waiver bars a challenge to a restitution order is unsettled in this circuit, and other circuits have reached differing results, at least where restitution was not mentioned in the plea agreement.

Keele, at *5.

The Fifth Circuit nevertheless dismissed Keele’s appeal by synthesizing aspects of the sentencing process extrinsic to the text of the appeal waiver:

We therefore conclude after reviewing the whole of the record – specifically, the plea agreement and the appeal waiver, the PSR,

the district court's statements to Keele at sentencing and arraignment, and Keele's statements at sentencing – that Keele's valid appeal waiver did in fact bar his right to appeal the restitution order.

Keele, at *9.

STATEMENT OF FACTS

A detailed Factual Resume is appended to the Plea Agreement.

Successive indictments painted a detailed picture of an elaborate scheme by Michael Faulkner, Nathan Shafer, and Matthew Simpson, and others, to defraud telecommunications providers of tens of millions of dollars. However, Keele was never alleged to have done any of these things. More importantly, the conduct undergirding Keele's plea (Factual Resume) was far different from that averred to in the preceding indictments.

Tech centers are set so that they are close to where major companies (AT&T; XO Communications) have connections. For this reason, such centers are colloquially called ("co-los") for short, meaning co-locations. Among the fixed assets that the tech centers offer are cooling equipment (to keep the computers from overheating), and generators/battery backup systems to keep the equipment from going offline. At various points in time, Keele's company, Digital NRG, was a tenant at co-los located at "2020 Live

Oak” and “2323 Bryan.” Several of the other defendants named in the Indictments were also tenants of these co-los.

Marcus Wentreck introduced Keele to Matthew Simpson and Michael Faulkner. Simpson agreed to sell Keele minutes at a good rate; Keele did not know that Simpson was getting his minutes by making false contracts with carriers such as AT&T. But even if this issue of Keele’s knowledge would have become an issue at trial, this was not an issue which formed any part of the plea agreement to which Keele assented.

Keele’s awareness of the FBI’s quest for Simpson’s assets is described in Paragraph 14:

In March 2009, Keele learned that the FBI executed search warrants at Faulkner’s business and home. Keele contacted Simpson who was in Phoenix. Upon his return to Dallas, Simpson met with Keele and disclosed a copy of the search warrant affidavit. Simpson assuaged Keele’s concerns by explaining that the Faulkner searches did not affect Simpson because he no longer did business with Faulkner and the FBI investigation involved only copyright violations. Simpson simply provided collocation to Faulkner. Keele accepted Simpson’s explanation, even though after reviewing the affidavit Keele recognized the name Eric Littlejohn. Keele had met Littlejohn at Simpson’s house for dinner and once at the collocation facility. Keele gave Simpson the name of an attorney

to assist in securing the return of any equipment seized by the FBI.

Paragraph 17 describes Keele's role in aiding and abetting Simpson's effort to remove the property sought to be attached:

On or about August 29, 2009, Simpson contacted Keele and asked Keele to pick up Simpson at DFW. Simpson then asked Keele to take him to his bank, Citizens National Bank of Texas (CNBT) in Waxahachie, Texas. Simpson told Keele that he had liquidated other assets which were wired to CNBT, and he needed to get a cashier's check for those liquidated assets from CNBT. Simpson told Keele that those assets totaled in excess of \$1,500,000. Keele understood that Simpson wanted to transfer and conceal the funds for the purpose of preventing and impairing the FBI's ability to seize additional assets.

Keele had run-of-the-mill business disputes with some of his vendors. For example, Qwest Communications (now owned by CenturyLink) claimed Keele owed \$166,119.42; the company later realized it was mistaken (insofar as Keele had never authorized the services for which Qwest was requesting payments) and reduced the amount claimed to zero.



REASONS FOR GRANTING THE WRIT

A Circuit split has emerged about whether a general appeal waiver bars appellate review of a restitution order.

Keele would urge this Court to note that the Fifth Circuit recognized both the intra-Circuit, and inter-Circuit, split on this issue:

Whether a general appeal waiver bars a challenge to a restitution order is **unsettled in *this circuit*, and *other circuits* have reached differing results. . . .**

Keele, at *5 (emphasis added).

ARGUMENT

I. Circuit Split Demonstrates That The Fifth Circuit Has Aligned With A Minority Position

Professor Goodwin explains, “Most circuits find that a general waiver of appeal does not prevent the defendant from appealing restitution.” Catharine Goodwin, *Federal Criminal Restitution*, § 13.4 (West 2012). Simply put, the Fifth Circuit has aligned with a minority position. Keele’s appeal would not be barred if he lived in the Second, Fourth, Ninth, or Tenth Circuit, or in the District of Columbia. Such haphazardness in the law must be remedied.

A. The Ninth Circuit

The Ninth Circuit has held that not only must the defendant know there would be a possibility of restitution, he or she must also have been on notice of approximately how much it might be, in order for the waiver to be considered knowing and to be enforced against the defendant. In *United States v. Tsosie*, the court held the defendant lacked sufficient notice to have knowingly waived appeal of restitution where it was simply noted as a possibility, with no amount specified. 639 F.3d 1213, 1219 (9th Cir. 2011). The court explained that the notice for restitution must be more specific than for other parts of the sentence, where there are statutory limits and guidelines. Restitution, on the other hand, “may depend on a request or submission by a third party. . . . As a result, in many cases, a defendant will plead guilty, as *Tsosie* appears to have done here, believing that he will not owe any restitution, when, in fact, the sky is the only limit to his potential exposure.” *Id.* This is why, the court explained, it had previously held, in *United States v. Gordon*, 393 F.3d 1044 (9th Cir. 2004), and *United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999) (holding waiver ineffective because the “plea agreement [was] ambiguous regarding the amount of restitution”), that the plea agreement set forth the amount of restitution, in order for the defendant to have knowingly entered into the waiver in the agreement. *Id.*

B. Tenth Circuit

In *United States v. Gordon*, 480 F.3d 1205 (10th Cir. 2007), the Tenth Circuit held that an appeal waiver does not prevent an appeal from an unlawful order of restitution. The defendant argued it exceeded the statutory limits under the Mandatory Victims Restitution Act (MVRA) for restitution. The court questioned whether a defendant can waive the right to appeal an unlawful sentence, even if the defendant clearly intends to do so, because an agreement permitting a court to impose restitution beyond that authorized by statute may be unenforceable on grounds of public policy.

C. Fourth Circuit

In *United States v. Broughton-Jones*, 71 F.3d 1143 (4th Cir. 1995), the Fourth Circuit held that because restitution imposed for conduct outside the offense of conviction is illegal in the same way as is a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of restitution orders are therefore outside the scope of a defendant's appeal waiver.

D. Second Circuit

In *United States v. Pearson*, 570 F.3d 480 (2d Cir. 2009), the defendant agreed to pay "restitution in full to any person who would qualify as a victim. . . ." and waived his right to appeal any sentence "incorporating the agreed disposition specified herein. . . ." The

Court held that while he waived the right to appeal “full restitution,” he did not waive appeal of possible errors in the determination of what constituted full restitution.

E. D.C. Circuit

The D.C. Circuit has held that a waiver “does not prevent an appeal if the district court commits an error of law during sentencing.” *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009), cited in *In re Sealed Case*, 702 F.3d 59, 63 (D.C. Cir. 2012).

In re Sealed Case allowed the defendant to appeal his restitution despite his plea agreement in which he waived the right to appeal his “sentence or the manner in which it was determined.” *In re Sealed Case*, 702 F.3d 59, 63-64 (D.C. Cir. 2012).

II. Fifth Circuit Authority Is Internally Consistent

The Fifth Circuit has previously held:

[W]aivers do not bar this appeal of restitution orders that purportedly exceed the statutory maximum authorized by the Mandatory Victim Restitution Act.

United States v. Sharma, 703 F.3d 318, 321, at n.1 (5th Cir. 2012) (citing *United States v. Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012)).

Similarly, in *United States v. Campbell*, the Fifth Circuit concluded, “Just like in *C&MI*, Campbell’s appeal falls within the exception to the waiver appeal that the parties agreed to in the plea agreement.”); (“Campbell’s sentence is not lawful under *United States v. Hughey*, 495 U.S. 411 (1990), because the restitution order exceeds the scope of the offense of conviction.”). 552 Fed. Appx. 339, 343 (5th Cir. 2014).



CONCLUSION

This petition presents an ideal vehicle for resolving the confusion and Circuit splits surrounding whether an appeal waiver encompasses restitution.

The Fifth Circuit’s intra-court inconsistency on this issue only highlights the confusion which exists in this area of restitution doctrine.

Petitioner Keele respectfully asks the Court to grant a writ of certiorari and to remand to the Fifth Circuit with instructions to consider his substantive sentencing/restitution objections since the appeal waiver does not procedurally bar his appeal.

Respectfully submitted this 29th day of August,
2014.

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 12-10551

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKY J. KEELE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Jun 2, 2014)

Before STEWART, Chief Judge, and JOLLY and
SMITH, Circuit Judges.

CARL E. STEWART, Chief Judge:

IT IS ORDERED that the opinion previously filed
in this case, *United States v. Keele*, No. 12-10551, 742
F.3d 192 (5th Cir. Jan. 7, 2014), is WITHDRAWN.
The following opinion is substituted therefor:

Defendant-Appellant Ricky J. Keele pled guilty
to a superseding information that charged him with
removing property to prevent seizure and aiding and
abetting in violation of 18 U.S.C. §§ 2232(a) and 2.

The district court sentenced Keele and ordered restitution. Despite the general appeal waiver provision contained in his plea agreement, Keele now challenges the district court's restitution order, arguing that it was not encompassed by his appeal waiver. We dismiss.

FACTS

Keele was charged in a superseding bill of information with helping Matthew Simpson dispose of, transfer and conceal a \$1,500,000 cashier's check from Citizens Bank of Texas in order to prevent the funds from being seized by the Government. Keele waived his right to an indictment and entered into a written agreement to plead guilty to the superseding information. The plea agreement set maximum sentencing exposure at 24 months and included restitution to the victims arising from "all relevant conduct" and was not limited to the conduct arising from the offense of conviction alone. The plea agreement also contained an appeal waiver which stated that Keele waived the right to appeal his conviction and sentence except in the case of a sentence in excess of the statutory maximum, an involuntary plea or appeal waiver, or ineffective assistance affecting the voluntariness of the plea or appeal waiver.

The presentence report ("PSR") described a long term, complex conspiracy, perpetrated by Keele, Simpson, Michael Faulkner and sixteen other co-defendants, to defraud telecommunication companies

of property and services and to defraud individual victims of money, property, and services. Five victim impact statements referenced in Keele's PSR contained losses totaling \$3,691,102.70. However, according to the second, third and fourth superseding information, the aggregate loss of all victims of the conspiracy was estimated to be between \$15,000,000 and \$20,000,000.

The district court sentenced Keele to twenty-four months' imprisonment and ordered him to pay \$3,691,102.70 in restitution to the victims under the Mandatory Victim Restitution Act ("MVRA").¹ Keele filed the instant appeal.

DISCUSSION

A. Whether the Appeal Waiver Precludes Appeal of the Restitution Order

Keele maintains that the appeal waiver in his plea agreement does not encompass restitution. Keele argues that the waiver did not specifically mention restitution and further claims that the district court, in discussing the appeal waiver at arraignment, did not specify that he was waiving his right to appeal any restitution order. On this basis, Keele asserts that the restitution order is reviewable despite the

¹ The order specified that Keele would be held jointly and severally liable with the other co-defendants for the total amount of restitution set forth in the order.

appeal waiver contained in his plea agreement. We disagree.

This court reviews de novo whether an appeal waiver bars an appeal. *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002).

To determine the validity of an appeal waiver, this court conducts “a two-step inquiry.” *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). Specifically, this court considers whether the waiver was knowing and voluntary and whether, under the plain language of the plea agreement, the waiver applies to the circumstances at issue. *Id.* In determining whether a waiver applies, this court employs ordinary principles of contract interpretation, construing waivers narrowly and against the Government. *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006).

A defendant may waive his right to appeal as part of a valid plea agreement if the waiver is knowing and voluntary. *United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005). “A defendant must know that he had a right to appeal his sentence and that he was giving up that right.” *United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994) (internal quotation marks and citation omitted). A waiver is both knowing and voluntary if the defendant indicates that he read and understood the agreement and the agreement contains an “explicit, unambiguous waiver of appeal.” *McKinney*, 406 F.3d at 746. District courts must ascertain that defendants understand

provisions in plea agreements waiving the right to appeal. Fed. R. Crim. P. 11(b)(1)(N).

The written appeal waiver in Keele's plea agreement stated that he waived the right to appeal his conviction and sentence on direct appeal or on collateral review except in the case of a sentence in excess of the statutory maximum, an involuntary plea or appeal waiver, or ineffective assistance affecting the voluntariness of the plea or appeal waiver. Keele also signed a written provision at the end of the agreement affirming that he fully understood the plea agreement and entered into it knowingly and voluntarily. At arraignment, the district court asked Keele whether he understood the plea agreement and the appeal waiver provision, and Keele answered affirmatively. Keele stated that his plea was voluntary and that he had voluntarily waived his right to appeal. Thus, we conclude that Keele's appeal waiver was knowing and voluntary. *See McKinney*, 406 F.3d at 746.

Whether a general appeal waiver bars a challenge to a restitution order is unsettled in this circuit, and other circuits have reached differing results, at least where restitution was not mentioned in the plea agreement. *See Smith*, 528 F.3d at 424-25 (declining to reach issue and comparing cases from other circuits); *United States v. Lam*, 233 F.3d 575, at *1 & n.2 (5th Cir. 2000) (per curiam) (unpublished). In *Smith*, the defendant appealed an order of restitution on the basis that it was not supported by sufficient evidence. *Smith*, 528 F.3d at 423-24. The Government asserted

that the defendant's challenge was barred by her appeal waiver. *Id.* at 424. This court noted that restitution is ordinarily considered a component of a sentence and that, in two unpublished opinions, the court had held that a general appeal waiver barred review of a restitution order. *Id.* at 424-25 (citing *United States v. Hemler*, 169 F. App'x 897, 898 (5th Cir. 2006); *United States v. Glynn*, 149 F. App'x 322, 323 (5th Cir. 2005)). However, in those prior cases, the plea agreements expressly stated that the defendant had agreed to pay restitution as determined by the district court. *See Smith*, 528 F.3d at 424. In *Smith*, by contrast, the plea agreement was silent regarding restitution, and the Rule 11 colloquy did not resolve whether restitution was part of the agreement. *Id.* However, because the appeal could easily be resolved on the merits, the *Smith* court declined to address "whether a general appeal waiver bars review of a restitution order when the plea agreement does not discuss restitution." *Id.*

In *Lam*, this court held that an appeal waiver did not bar a challenge to restitution. *Lam*, 233 F.3d 575, at *1. There, the plea agreement stated that the defendant agreed to pay restitution and agreed to waive his right to appeal his sentence except for an upward departure. *Id.* However, the waiver did not mention restitution, the defendant was not admonished regarding the provisions of the MRVA [sic], and the Government conceded that restitution was not contemplated as being included in the waiver. *Id.*

Keele's case, however, is distinguishable from *Lam*. In addition to restitution's being mentioned in Keele's plea agreement, the district court also informed Keele 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. The district court admonished Keele that he "will be required to make full restitution . . . because restitution is by statute mandatory in this case." Moreover, Keele stated at sentencing, "[t]he restitution, I know you have the right to do that. You have said that. The only thing I ask you to consider is that at 58 years old it will be a burden that I cannot accomplish, and I know that. I ask you to think about that before you sentence me." Keele also agreed that he understood that he was waiving his right to appeal his conviction and sentence with certain limited exceptions.

The written plea agreement also stated that restitution was mandatory under the law and that the extent of restitution ordered by the court may include "restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone[.]" Additionally, Keele's factual resume contains fourteen paragraphs of "relevant conduct," which Keele admitted to be true, that exceeded the scope of the 18 U.S.C. § 2232(a) offense of which he

was convicted.² Further, as the Government points out, Keele expressly waived his right to appeal his “sentence” or “seek any future reduction in his sentence” in his plea agreement. That same plea agreement defines “sentence” to include mandatory “restitution to victims.” Because the whole of this factual scenario greatly differs from that which took place in *Lam*, the two cases are clearly distinguishable.

We therefore conclude after reviewing the whole of the record – specifically, the plea agreement and the appeal waiver, the PSR, the district court’s statements to Keele at sentencing and rearraignment, and Keele’s statements at sentencing – that Keele’s valid appeal waiver did in fact bar his right to appeal the restitution order. Additionally, we note that, while defendant has made no such argument on appeal herein, an ‘in excess of the statutory maximum’ challenge, if properly raised on appeal, would not be barred by an appeal waiver. See *United States v. Chem. & Metal Indus., Inc. (C& MI)*, 677 F.3d 750, 752 (5th Cir. 2012). Accordingly, Keele’s appeal of the restitution order is dismissed.

² This court has previously held that where the defendant’s “plea agreement contemplated a scheme that went beyond the [defendant’s crimes] alleged in the indictment” we will interpret the conviction as part of the broader scheme and uphold the district court’s award of restitution to all of the victims under the broader scheme. *United States v. Cothran*, 302 F.3d 279, 290 (5th Cir. 2002).

B. Whether the Restitution Order Violates Keele's Eighth Amendment Rights

Keele argues that the amount of restitution ordered by the district court was disproportionate to his role in the offense and, therefore, his Eighth Amendment rights were violated. For the reasons stated herein, we hold that Keele's Eighth Amendment claims are also waived.

The right to appeal is statutory, not constitutional. *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) (citations omitted). Generally, constitutional rights can be waived as part of a plea agreement. *Id.* (citation omitted). “[I]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights.” *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) (citations omitted).

This court noted in *United States v. Walton*, ___ F. App'x ___, 2013 WL 3855550, at *6 (5th Cir. 2013) (per curiam) (unpublished), that “[w]hether an appeal waiver may bar a prisoner from arguing on direct appeal that . . . his sentence exceeds Eighth Amendment limitations appears to be an open question in this circuit . . . [.] Assuming *arguendo* that the appeal waiver does not bar us from considering [the defendant's] Eighth Amendment arguments, those arguments, unpreserved before the sentencing court, fail under plain error review.” (citations omitted). In *United States v. Lytle*, 90 F. App'x 453, 454 (5th Cir. 2004) (per curiam) (unpublished), however, this court

held that the waiver-of-appeal provision in the defendant's signed, written plea agreement barred the defendant from raising his Eighth Amendment claims on appeal. Here, because the appeal waiver in Keele's signed, written plea agreement waived his right to appeal his sentence with only three specific exceptions,³ none of which apply here, we conclude that his Eighth Amendment claims are also waived. *See id.*

CONCLUSION

In light of the foregoing, the appeal of Defendant Ricky J. Keele is **DISMISSED**.

³ A sentence in excess of the statutory maximum, an involuntary plea or appeal waiver, or ineffective assistance affecting the voluntariness of the plea or appeal waiver.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§
OF AMERICA	§
v.	§ No. 3:09-CR-249-D
	§
RICKY J. KEELE (14 15)	§

PLEA AGREEMENT

(Filed Sep. 29, 2011)

Ricky J. Keele, the defendant's attorney David Finn, and the United States of America (the government), agree as follows:

1. **Rights of the defendant:** Keele understands that he has the rights

- a. to have the allegations set out in the Information presented to a Grand Jury for indictment;
- b. to plead not guilty;
- c. to have a trial by jury;
- d. to have his guilt proven beyond a reasonable doubt;
- e. to confront and cross-examine witnesses and to call witnesses in his defense; and
- f. against compelled self-incrimination.

2. **Waiver of rights and plea of guilty:** Keele agrees to waive these rights and plead guilty to the offense alleged in a one count Superseding Information, charging Keele with aiding and abetting another person to remove property to prevent seizure, a violation of 18 U.S.C. §§ 2 and 2232(a). Keele understands the nature and elements of the crime(s) to which he is pleading guilty. He agrees that the factual resume he has signed is true and understands that it will be submitted as evidence.

3. **Sentence:** The maximum penalties the Court can impose include:

- a. imprisonment for a period not to exceed 5 years;
- b. a fine not to exceed \$250,000, or twice any pecuniary gain to the defendant or loss to the victim(s);
- c. a mandatory term of supervised release of not less than 2 years nor more than 3 years, which must follow any term of imprisonment. If Keele violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release;
- d. a mandatory special assessment of \$100;
- e. restitution to victims or to the community, which is mandatory under the law, and which Keele agrees may include restitution arising from all relevant conduct,

not limited to that arising from the offense of conviction alone;

- f. costs of incarceration and supervision;
and
- g. forfeiture of property.

4. **Sentencing agreement.** Pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P., the parties agree that the appropriate term of imprisonment in this case is a period of imprisonment not to exceed 24 months. If the Court accepts this plea agreement, this provision is binding on the Court. Other than the agreed term of imprisonment, the Court remains free to determine the sentence it deems appropriate, under the advisory United States Sentencing Guidelines.

5. **Rejection of agreement.** Pursuant to Rule 11(c)(5), Fed. R. Crim. P., if the Court rejects this plea agreement, Keele will be allowed to withdraw his guilty plea. If Keele declines to withdraw his guilty plea, the disposition of the case may be less favorable than that contemplated by this agreement.

6. **Mandatory special assessment:** Keele agrees to pay to the U.S. District Clerk prior to his sentencing hearing the amount of \$100.00, in satisfaction of the mandatory special assessment in this case.

7. **Defendant's agreement:** Keele shall give complete and truthful information and/or testimony concerning his participation in the offense of conviction. Upon demand, Keele shall submit a personal financial statement under oath and submit to interviews

by the government and the U.S. Probation Office regarding his capacity to satisfy any fines or restitution. Keele expressly authorizes the United States Attorney's Office to immediately obtain a credit report on him in order to evaluate the Defendant's ability to satisfy any financial obligation imposed by the Court. Keele fully understands that any financial obligation imposed by the court, including a restitution order and/or the implementation of a fine, is due and payable immediately. In the event the Court imposes a schedule for payment of restitution, defendant agrees that such a schedule represents a minimum payment obligation and does not preclude the U.S. Attorney's Office from pursuing any other means by which to satisfy defendant's full and immediately enforceable financial obligation. Keele understands that he has a continuing obligation to pay in full as soon as possible any financial obligation imposed by the court.

8. **Government's agreement:** The government will not bring any additional charges against Keele based upon the conduct underlying and related to defendant's plea of guilty. The government will file a Supplement in this case, as is routinely done in every case, even though there may or may not be any additional terms. The government will dismiss, after sentencing, the remaining charges in the pending indictment or superseding indictments as to Keele. This agreement is limited to the United States Attorney's Office for the Northern District of Texas and

does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against Keele or any property.

9. Violation of agreement: Keele understands that if he violates any provision of this agreement, or if his guilty plea is vacated or withdrawn, the government will be free from any obligations of the agreement and free to prosecute Keele for all offenses of which it has knowledge. In such event, Keele waives any objections based upon delay in prosecution. If the plea is vacated or withdrawn for any reason other than a finding that it was involuntary, Keele also waives objection to the use against him of any information or statements he has provided to the government, including any resulting leads.

10. Voluntary plea: This plea of guilty is freely and voluntarily made and is not the result of force or threats or of promises apart from those set forth in this plea agreement.

11. Waiver of right to appeal or otherwise challenge or seek reduction in sentence: Keele waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. He further waives his right to seek any future reduction in his sentence (e.g., based on a change in sentencing guidelines or statutory law).

Keele, however, reserves the rights (a) to bring a direct appeal of a sentence exceeding the statutory maximum punishment that is applicable at the time of his initial sentencing, (b) to challenge the voluntariness of his plea of guilty or this waiver, or (c) to bring a claim of ineffective assistance of counsel that influenced the voluntariness of the plea or waiver.

12. **Representation of counsel:** Keele has thoroughly reviewed all legal and factual aspects of this case with his lawyer and is fully satisfied with that lawyer's legal representation. Keele has received from his lawyer explanations satisfactory to him concerning each paragraph of this plea agreement, each of his rights affected by this agreement, and the alternatives available to him other than entering into this agreement. Because he concedes that he is guilty, and after conferring with his lawyer, Keele has concluded that it is in his best interest to enter into this plea agreement and all its terms, rather than to proceed to trial in this case.

13. **Entirety of agreement:** This document is a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties.

JAMES T. JACKS
UNITED STATES ATTORNEY

/s/ Candina S. Heath 9-28-2011
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APPROVED

/s/ Linda C. Groves 9/28/2011
LINDA C. GROVES Date
Deputy Criminal Chief

/s/ Chad E. Meacham 9/29/2011
CHAD MEACHAM Date
Criminal Chief

I have read (or had read to me) this Plea Agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

/s/ Ricky J. Keele 9/29/11
RICKY J. KEELE Date
Defendant

I am Ricky J. Keele's counsel. I have carefully reviewed every part of this Plea Agreement with my client. To my knowledge and belief, my client's decision to enter into this Plea Agreement is an informed and voluntary one.

/s/ <u>David Finn</u>	<u>9/29/11</u>
DAVID FINN	Date
Attorney for Defendant	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§
OF AMERICA	§
v.	§ No. 3:09-CR-249-D
	§
RICKY J. KEELE (14 15)	§

FACTUAL RESUME

Ricky J. Keele, the defendant's attorney David Finn, and the United States of America (the government), agree that the following accurately states the elements of the offense and the facts relevant to the offense to which the defendant is pleading guilty:

Elements:

1. In order for Ricky J. Keele to be convicted at trial of a violation of 18 U.S.C. §§ 2 and 2232, the United States would have to prove each of the following elements of the offense beyond a reasonable doubt:

First: a violation of 18 U.S.C. § 2232(a) (see below paragraph 2) was committed by some person;

Second: Keele associated with the criminal venture;

Third: Keele purposefully participated in the criminal venture; and

Fourth: Keele sought by action to make that venture successful.

2. The essential elements of a violation of 18 U.S.C. § 2232 are as follows:

First: After a search or seizure by a person authorized to make such search or seizure;

Second: a defendant knowingly disposed of, transferred property or otherwise took any action; and

Third: for the purpose of preventing or impairing the Government's lawful authority to the custody or control of the such property.

FACTS:

3. Ricky Keele and coconspirator Marcus Wentrcek met while Keele was operating DigitalNRG and Wentrcek worked for Ntegrated. Both were friends with LC and met through LC. DigitalNRG was primarily in the business of supporting telemarketing clients by providing automated dialers, known as robodialers, however Keele also offered colocation services through one of his companies called Colosite. A few months later, in or around January 2007, Keele learned via email from Wentrcek that Wentrcek had been bought out of Ntegrated and was working with coconspirator Michael Faulkner of Union Datacom (UDC). Wentrcek told Keele that UDC provided colocation services, resold T-1s, and provided VoIP services. Wentrcek suggested that Keele meet with him and Faulkner. Keele met with Faulkner in or around February or March of 2007 at Faulkner's office in 2020 Live Oak, Dallas, Texas.

4. Shortly after meeting Faulkner, Faulkner asked Keele if Keele would be interested in purchasing UDC's colocation customers. As part of the sale of UDC's colocation customers to Keele, Faulkner agreed to include the cabinets housing the servers. Faulkner also told Keele that Faulkner needed to move out of 2020 Live Oak because he could not afford to pay his rent and that he planned on moving to 1950 Stemmons Freeway, Dallas, Texas (Infomart). At the time, Keele had offices and colocation space on the 6th floor at the Infomart. While negotiating for the sale of UDC's colocation customers, Faulkner also

convinced Keele to purchase phone services from him. As negotiations for the sale of UDC's colocation customers continued, Keele determined that some of Faulkner's claims were false. For example, Faulkner claimed certain customers paid on a monthly basis and that the customers were current. In turn, those customers showed Keele proof that their services were prepaid for a period of six months. At the same time, Keele began experiencing problems with his automated calls going across Faulkner's equipment and services. These problems resulted in complaints from Faulkner's upstream providers that the CallerID had been stripped from the calls. Additionally, Faulkner used a telephone switch belonging to conspirator Matthew Simpson to send traffic. The equipment used by Simpson, a Coppercom switch, had difficulty keeping up with the volume of Keele's customers' telemarketing calls.

5. Keele understood that Faulkner left without paying the landlord at 2020 Live Oak during a "mid-night move" in or around May 2007. The 2020 Live Oak landlord locked Faulkner out of the space in 2020 Live Oak. In the 2020 Live Oak space, Faulkner left some equipment (some switches) and property, including the cabinets Keele believed he bought from Faulkner. With the understanding that Faulkner would pay Keele some amount for rent, Keele permitted Faulkner to relocate some of Faulkner's equipment into Keele's space at the Infomart, because Faulkner's space at the Infomart was not ready for occupancy.

6. In an effort to get both Keele's cabinets and Faulkner's equipment from the landlord at 2020 Live Oak, Faulkner generated a false lease showing that Keele was the owner of this equipment. Faulkner instructed Keele to run the lease through a fax machine to make it look more "legit." Keele knew this was fraudulent and decided not to follow Faulkner's instructions.

7. Prior to the "midnight move," Keele learned that Faulkner partnered with Simpson. Keele realized that Simpson's and Faulkner's networks were set up in a conjoined or interdependent manner. Keele learned that the services he purchased from Exigo had been purchased by Exigo from both Faulkner and Simpson. Simpson told Keele that Faulkner basically resold service which could be obtained directly from Simpson at a rate of 0025 instead of 0026 which Faulkner was charging Keele.

8. After Faulkner's space in the Infomart was ready, Faulkner, now using the name Premier Voice, moved out of Keele's space and into his own. When Faulkner did so, he failed to pay Keele what Keele believed he was owed. Due to the non-payment, the "midnight move," and the CallerID stripping and IP moving, Keele ceased working with Faulkner and began working directly with Simpson. In the fall of 2007, Keele purchased colocation from Simpson's company Coloexchange. Keele installed a Cisco switch at Coloexchange and paid Simpson \$350 a month in colocation fees. Simpson referred Keele to coconspirator

Neal Behgooy for phone service. Behgooy and Simpson were partners and co-owners of TelUnited.

9. Faulkner's and Simpson's upstream provider began to block service due to the stripped CallerID and moving IP addresses. Wentrcek transferred the calls, including Keele's calls, to Cost Plus Communications, a CLEC and a company in which Simpson maintained an ownership interest.

10. Shortly after this, Keele relocated from the Infomart to 2020 Live Oak. Keele was able to reacquire the cabinets and the switches left behind by Faulkner, and used the lease prepared by Faulkner to prove his right to possession. Faulkner eventually reclaimed the switches from Keele. After Keele moved into 2020 Live Oak, Wentrcek and Faulkner had a falling out. Wentrcek left Faulkner's employment and worked briefly for Keele.

11. In early 2008, Simpson told Keele that he replaced the Coppercom switches for Sonus switches, which were better able to handle Keele's traffic. Keele assisted Simpson in operating and installing the SONUS equipment. Keele continued working with Simpson throughout 2008 and assisted Simpson with installing DS-3s at the SONUS.

12. Simpson advised Keele that he was selling Cost Plus to Bandwidth.com, Bandwidth.com was negotiating with Google, and Bandwidth.com's purchase of Cost Plus would help ensure the transaction between Bandwidth.com and Google. Simpson repeatedly told Keele that the deal with Google was worth tens of

millions of dollars, the deal would make all of them rich, and they would all get substantially lower rates. Keele knew that Simpson worked for Bandwidth after the sale for less than a year. In the fall of 2008, Simpson advised Keele that Simpson was leaving Bandwidth.com. Simpson claimed that Bandwidth.com was unable to conduct business. Simpson announced he was joining Clear Voice Calling (CVC), which operated in Phoenix, Arizona.

13. Around August or September 2008, while at the Infomart with Simpson, Keele and Simpson had drinks with Faulkner. Keele was surprised that they were having lunch with Faulkner as he had been told by Simpson that Simpson and Faulkner were no longer in business together. Simpson admitted to Keele that Simpson maintained a business relationship with Faulkner but not as “partners.” During the lunch, while Simpson was away from the table, Faulkner told Keele that Faulkner wanted to buy DigitalNRG from Keele for \$180,000 in cash. Keele told Faulkner that DigitalNRG was near insolvent and had large liabilities. Faulkner told Keele that the ‘solvency’ did not matter as Faulkner wanted Keele’s contracts with providers so that he could “exploit” them. Faulkner stated he would “churn and burn” the circuits on those contracts. Keele took this to mean that Faulkner would use the circuits, incur large debts on them, and not pay those debts. Keele knew that selling to Faulkner for the “churn and burn” scheme would adversely affect Keele’s business reputation, so he declined. The next day, Keele confronted Simpson about Faulkner’s proposal and

Simpson attempted to dismiss it as Faulkner being crazy.

14. In March 2009, Keele learned that the FBI executed search warrants at Faulkner's business and home. Keele contacted Simpson who was in Phoenix at CVC. Upon his return to Dallas, Simpson met with Keele and disclosed a copy of the search warrant affidavit. Simpson assuaged Keele's concerns by explaining that the Faulkner searches did not affect Simpson because he no longer did business with Faulkner and the FBI investigation involved only copyright violations. Simpson simply provided colocation to Faulkner. Keele accepted Simpson's explanation, even though after reviewing the affidavit Keele recognized the name Eric Littlejohn. Keele had met Littlejohn at Simpson's house for dinner and once at the colocation facility. Keele gave Simpson the name of an attorney to assist in securing the return of any equipment seized by the FBI.

15. In April 2009, Keele learned that the FBI executed search warrants at Simpson's home and business. Keele's equipment that was colocated at Coloexchange was seized. Keele confronted Simpson who again assuaged Keele's concerns that the FBI was mistaken in its accusations as to Simpson, and that Faulkner was the primary target. Keele was present when Simpson called Faulkner on Skype and Faulkner discussed being in Monterrey, Mexico. During this conversation Simpson told Keele that the FBI was basing Simpson's involvement on Simpson paying a bill for Incavox. Simpson also told Keele that

the FBI had seized his bank accounts. While it seemed suspicious to Keele, Keele chose to believe Simpson.

16. After the seizure of the equipment from Coloexchange, Simpson invited Keele to travel to Phoenix with him to meet the investors in CVC. Keele did so, and was again made suspicious because neither of CVC's investors appeared to be upset or surprised about the loss of nearly \$400,000 in equipment from the seizure. CVC's investors discussed obtaining new equipment to continue their plans. They asked Keele and Keele agreed to assist in setting up and configuring the new equipment for CVC. Keele recommended Simpson retain DH as an attorney, and Keele accompanied Simpson to some of the meetings with DH. During one such meeting, Simpson told DH that Simpson did not have any assets left after the FBI seizures.

17. On or about August 29, 2009, Simpson contacted Keele and asked Keele to pick up Simpson at the Dallas Fort Worth International Airport (DFW). Simpson then asked Keele to take him to his bank, Citizens National Bank of Texas (CNBT), in Waxahatchie, Texas. Simpson told Keele that he had liquidated other assets which were wired to CNBT, and he needed to get a cashier's check for those liquidated assets from CNBT. Simpson told Keele that those assets totaled in excess of \$1,500,000. Keele understood that Simpson wanted to transfer and conceal the funds for the purpose of preventing and impairing

the FBI's ability to seize additional assets. Coconspirator Alicia Cargill Smallwood also accompanied Keele and Simpson to the bank. CNBT advised them it would take some time to process the check, so they went to lunch. While at lunch, Simpson expressed concern that it was taking so long and speculated that the bank had probably alerted the FBI to his activities. When he finally received the cashier's check, Simpson showed the check to Keele. Simpson asked Keele to drive Simpson and the cashier's check back to the DFW to catch a return trip to Seattle, Washington. Within a day or two, Keele contacted DH and advised DH that Simpson had secreted over \$1,500,000.00.

18. Prior to assisting Simpson's efforts to obtain and conceal the funds, Keele knew that

- a. the FBI had seized some of Simpson's assets,
- b. the FBI was attempting to locate additional assets,.
- c. Simpson had already hidden money with one attorney in Austin; and
- d. Simpson denied having assets to DH.

19. Keele knew that Simpson was attempting to hide his assets from the government, and Keele agreed to assist Simpson accomplish this objective.

20. Keele understands that the asset he helped Simpson hide was valued at a little more than \$1,500,000 as of September 2009.

Respectfully Submitted,

~~JAMES T. JACKS~~ [SARAH R. SALDAÑA]
UNITED STATES ATTORNEY

/s/ Candina S. Heath 9-30-2011
CANDINA S. HEATH Date
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I have read (or had read to me) this Factual Resume and have carefully reviewed every part of it with my attorney. I fully understand it and I swear that the facts contained herein are true and correct.

/s/ Ricky J. Keele 9/30/11
RICKY J. KEELE Date
Defendant

I am Ricky J. Keele's counsel. I have carefully reviewed every part of this Factual Resume with my client. To my knowledge and belief, my client's decision execute this Factual Resume is an informed and voluntary one.

/s/	<u>David Finn</u>	<u>9/30/11</u>
	DAVID FINN	Date
	Attorney for Defendant	
