No. 00-1086

In the Supreme Court of the United States

ANGEL C. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in sentencing petitioner for embezzlement under the Sentencing Guidelines, the district court properly determined the amount of the victim's loss by reference to the gains realized by petitioner and his co-conspirator.

2. Whether the Ex Post Facto Clause of the United States Constitution, Article I, Section 9, Clause 3, bars application of the provisions of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, 3664 (Supp. IV 1998), to offenses committed before the Act's effective date.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 222 F.3d 428.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on August 17, 2000. A petition for rehearing was denied on October 6, 2000. The petition for a writ of certiorari was filed on January 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Central

District of Illinois of conspiracy to embezzle from, misapply the funds of, and defraud a credit union, in violation of 18 U.S.C. 371. He was sentenced to 38 months' imprisonment and was ordered to pay $1,029,867 in restitution to the credit union. The court of appeals affirmed. Pet. App. 1-26.

1. Petitioner was the president of Credit Union One, a state-regulated credit union that also was within the regulatory authority of the National Credit Union Administration. Pet. App. 2. Between 1986 and 1992, petitioner conspired with Richard Binet, the chairman of the board of Credit Union One, to defraud the credit union in various ways. *Id.* at 2-7. In February 1988, petitioner and Binet used $8.8 million of the credit union's funds to purchase a financial instrument; as a result of the transaction, petitioner and Binet acquired a 20% interest in the instrument without investing any of their own funds. See *id.* at 6, 15. After the financial instrument was sold for a substantial profit, petitioner and Binet retained $800,000 or more, while returning the $8.8 million and some of the profit to the credit union. See Gov't C.A. Br. 16-19.

2. Pursuant to a plea agreement, petitioner pleaded guilty to the conspiracy offense, and the government agreed to move to dismiss the other six counts of the indictment. 12/29/97 Plea Agreement para. 1. The plea agreement did not address the subject of restitution. The agreement stated, however, that with respect to Sentencing Guidelines (Guidelines) § 2F1.1, which provides for an enhancement of the defendant's offense level based on the loss to the victim, "[t]he amount of funds for which [petitioner] could be held responsible could be as high as more than $1.5 million." 12/29/97 Plea Agreement para. 11.B.

At sentencing, the district court applied the 1989 version of the Sentencing Guidelines. Pet. App. 9 n.5.[1] Applying Guidelines § 2F1.1, the provision applicable to fraud and deceit, the court began with a base offense level of 6. Pet. App. 8. The court added 11 levels for a loss of $1,051,043. *Id.* at 9. In calculating the "loss" that formed the basis for the 11-level adjustment under Guidelines § 2F1.1(b)(1), the district court included $600,000 of profit that petitioner and Binet had retained from the $8.8 million investment of credit union funds. See Pet. App. 9 n.6.[2] The court also added two offense levels for more than minimal planning; added two levels for abuse of a position of public or private trust; added two levels for obstruction of justice based on petitioner's false grand jury testimony; and subtracted two levels for acceptance of responsibility. *Id.* at 9. Those calculations yielded a total offense level of 21 and a sentencing range of 37-46 months' imprisonment. *Ibid.* The court sentenced petitioner to 38 months' imprisonment. *Ibid.*

With respect to restitution, the district court applied the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, 3664 (Supp. IV 1998). See Pet. App. 9. The MVRA provides that in sentencing a defendant convicted of certain offenses, including fraud, see 18 U.S.C. 3663A(c)(1)(A)(ii) (Supp. IV 1998), "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant

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[1] The plea agreement reflected the parties' view that the 1989 Guidelines manual was applicable to this case. See 12/29/97 Plea Agreement para. 11.

[2] The presentence report (PSR) had recommended that the court include $800,000 from that transaction in calculating the victim's loss. See Gov't C.A. Br. 19-20; PSR paras. 43-44.

make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (Supp. IV 1998). The MVRA further provides that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A) (Supp. IV 1998). In determining the payment schedule, however, the MVRA requires that the court consider "the financial resources and other assets of the defendant." 18 U.S.C. 3664(f)(2)(A) (Supp. IV 1998). Congress directed that the MVRA "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [April 24, 1996]." 18 U.S.C. 2248 note (Supp. IV 1998).

The presentence report (PSR) stated that petitioner had a net worth of $682,238 and a monthly salary income of $4,948. PSR para. 84. At sentencing, the district court reviewed petitioner's objections to the PSR's calculation of his assets and found petitioner's net worth to be $572,888. 3/23/99 Sentencing Tr. 128-131. In reference to the MVRA's mandatory restitution requirement, the court stated, "I don't believe that I have the freedom that I would have had prior to the application of this act to make decisions on the basis of your—what appears is your ability to pay." Pet. App. 33. The court ordered petitioner to pay $1,029,867 in restitution to Credit Union One or its bonding company. *Id.* at 34.

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1-26.

a. The court of appeals held that the district court had not committed any clear error in including $600,000 of the conspirators' gain, realized from their illicit

purchase of a financial instrument with Credit Union One funds, in its calculation of "loss" under Guidelines § 2F1.1. Pet. App. 15-18. Petitioner argued that the credit union had suffered no "loss" on that transaction and that no amount should have been included in the sentencing calculation with respect to that transaction. *Id.* at 17. The court of appeals rejected that contention, holding that "any estimated profit which Binet made on the investment was correctly determined to be a loss to [Credit Union One]" because "Binet's profit from this particular transaction would not have been realized without his illegal use of [Credit Union One's] funds." *Ibid.* The court also held that the gain realized by Binet was properly attributable to petitioner because it arose out of "jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." *Ibid.* (quoting Guidelines § 1B1.3 comment. (n. 1)).

b. Petitioner also contended that the district court should have applied the Victim and Witness Protection Act of 1983 (VWPA), 18 U.S.C. 3663—the predecessor to the MVRA—in determining whether and how much restitution should be awarded in this case. Pet. App. 25-26. Under the VWPA, the decision whether to award restitution is discretionary, and the district court must consider the economic circumstances of the defendant before ordering restitution. See 18 U.S.C. 3664(a). Petitioner contended that application of the MVRA to this case violated the Ex Post Facto Clause, because it increased the punishment applicable to his offense insofar as it required entry of a restitution order without regard to his economic circumstances. See Pet. App. 25. The court of appeals rejected that claim, relying on its prior decision in *United States* v. *Newman*, 144 F.3d 531 (7th Cir. 1998), which held that restitution under the MVRA is an equitable remedy rather than

criminal punishment and therefore is not subject to the Ex Post Facto Clause. See *id.* at 537-539; Pet. App. 25-26. The court acknowledged that its resolution of the Ex Post Facto Clause issue conflicted with rulings of other circuits, see *id.* at 25, but it "decline[d] to reconsider the holding in [*Newman*]," *id.* at 26.[3]

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the court of appeals misapplied Sentencing Guidelines § 2F1.1 by treating the conspirators' $600,000 profit from their purchase of a financial instrument with credit union funds as a "loss" to the credit union. That claim lacks merit and does not warrant this Court's review.

Petitioners purchased the financial instrument with $8.8 million that belonged to Credit Union One. Under traditional equitable doctrine, the entire profit therefore belonged to the credit union, and the conspirators held their share of the investment in constructive trust for the credit union. When they kept profit from the transaction, petitioners appropriated funds that belonged to the credit union, and thus caused an actual "loss" to the credit union in that amount. See *Counihan* v. *Allstate Ins. Co.*, 194 F.3d 357, 361 (2d Cir.

[3] The court of appeals also rejected petitioner's contentions that the district court had erred by (1) enhancing petitioner's sentence in violation of his immunity proffer, Pet. App. 10-13; (2) enhancing his sentence for obstruction of justice, *id.* at 13-15; (3) basing the estimated gain to the conspirators on unreliable and contradictory evidence, *id.* at 18-21; (4) determining an arbitrary value for services rendered to the credit union by Binet, *id.* at 21-23; (5) failing to reduce the loss incurred by Credit Union One to reflect the resale value of the cars recovered by the credit union, *id.* at 23-24; and (6) including in the loss figure bonuses paid to certain credit union employees, *id.* at 24-25. Petitioner does not press those arguments in this Court.

1999); *United States* v. *Briscoe*, 65 F.3d 576, 583-584 (7th Cir. 1995); *Amalgamated Clothing & Textile Workers* v. *Murdock*, 861 F.2d 1406, 1410-1411 (9th Cir. 1988).

Petitioner asserts (Pet. 7-8) that the court of appeals' decision conflicts with the decisions of the Fourth and Tenth Circuits in *United States* v. *Marcus*, 82 F.3d 606 (4th Cir. 1996), and *United States* v. *Galbraith*, 20 F.3d 1054 (10th Cir.), cert. denied, 513 U.S. 889 (1994). In fact, no conflict exists. Those cases simply state that a defendant's gain from criminal activity is not, in and of itself, a basis for an enhancement under Guidelines § 2F1.1 in the absence of any loss to the victim. See Pet. 7; *Marcus*, 82 F.3d at 608; *Galbraith*, 20 F.3d at 1060. Neither of those cases, however, involved the situation presented here, where the conspirators have kept a gain from a misappropriated corporate opportunity, and neither case addressed the question whether a fiduciary's failure to disgorge profits that rightfully belong to the corporation causes a "loss" to the victim.[4]

Even if a circuit conflict on this question existed, the case would not warrant this Court's review. In directing the Sentencing Commission "periodically [to] review and revise" the Sentencing Guidelines, 28 U.S.C. 994(*o*), "Congress necessarily contemplated that the Commission would periodically review the work of the

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[4] Petitioner also asserts (Pet. 7-8) that the court of appeals' decision conflicts with the Seventh Circuit's ruling in *United States* v. *Vitek Supply Corp.*, 144 F.3d 476 (7th Cir. 1998), cert. denied, 525 U.S. 1138 (1999). An intracircuit conflict is not an appropriate ground for invocation of this Court's certiorari jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, *Vitek Supply* did not present the question whether a defendant's gain from misappropriation of a corporate opportunity is an appropriate measure of the loss to the corporate victim.

courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Commission is also authorized to determine whether and to what extent Guidelines amendments that have the effect of reducing sentences will be given retroactive application. *Ibid.*; see 28 U.S.C. 994(u). Because the Commission has been given primary responsibility for the resolution of conflicts in authority involving the application of the Guidelines, this Court's review would not be warranted even if the Seventh Circuit's decision in fact conflicted with rulings of other courts of appeals.[5]

2. Petitioner argues (Pet. 8-9) that the MVRA is a penal statute, and that the Ex Post Facto Clause bars the retroactive imposition of a mandatory restitution order without regard to a defendant's ability to pay. The courts of appeals are divided on that question. The majority view is that restitution under the MVRA is

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[5] In the court of appeals, petitioner relied (see Pet. App. 15-16) on Application Note 8(b) to Guidelines § 2F1.1. Application Note 8(b) states that "if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." Guidelines § 2F1.1, comment. (n.8(b)). As the court of appeals explained, however, petitioner was sentenced under the 1989 Guidelines, and Application Note 8(b) was not added until 1991. See Pet. App. 8-9 & n.5, 15-16. In any event, that Application Note—which by its terms governs "fraudulent loan application and contract procurement cases"—does not speak to the question whether a corporate fiduciary's failure to disgorge profits made from a misappropriated corporate opportunity causes a "loss" to the victim for purposes of Guidelines § 2F1.1. In this Court, petitioner does not rely on Application Note 8(b).

criminal punishment subject to the Ex Post Facto Clause. See *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d Cir. 1998); *United States* v. *Siegel*, 153 F.3d 1256, 1258-1260 (11th Cir. 1998); *United States* v. *Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States* v. *Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States* v. *Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997). Along with the Seventh Circuit, the Tenth Circuit has concluded that restitution is not criminal punishment subject to the constraints of the Ex Post Facto Clause. See *United States* v. *Nichols*, 169 F.3d 1255, 1279-1280, cert. denied, 528 U.S. 934 (1999).

That conflict in authority does not warrant this Court's review. The question whether the MVRA may be applied to criminal offenses committed before the date of its enactment is of diminishing significance in criminal cases generally. That question has relevance only to persons who committed their offenses before April 24, 1996, when Section 3663A and the new Section 3664 became effective. The number of offenders potentially affected by the question presented here is therefore limited. This Court recently has denied review in two other cases from the Seventh Circuit raising the same Ex Post Facto Clause question that is presented here. See *United States* v. *Bach*, 528 U.S. 950 (1999) (No. 99-127); *United States* v. *Stoecker*, 121 S. Ct. 885 (2001) (No. 00-6007).

It is unlikely that the district court would have imposed a less substantial restitution obligation upon petitioner if the court had applied the VWPA rather than the MVRA. Petitioner possessed assets of more than $500,000 at the time of sentencing (see p. 4, *supra*), and he might have been ordered to pay the entire amount of the credit union's loss even under the old statute. See

United States v. *Ahmad*, 2 F.3d 245, 247 (7th Cir. 1993) (Under the VWPA, "[w]hen there is doubt about ability to pay, the court should order full restitution.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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