No. 05-1379

In the Supreme Court of the United States

NICK S. BOSCARINO, 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 a mail fraud scheme carried out by depriving one person of another's honest services may be a predicate offense for a money-laundering conviction.

2. Whether a federal court of appeals, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), should treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable.

3. Whether the district court's restitution order accords with the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulation and rules:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 437 F.3d 634.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2006. The petition for a writ of certiorari was filed on April 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); various instances of money laundering, in violation of 18 U.S.C. 1956(a)(1); conspiracy to defraud the United States by impeding the lawful functions of the Internal Revenue Service, in violation of 18 U.S.C. 371; and filing false tax returns, in violation of 26 U.S.C. 7206(1). Pet. App. 9-10. He was sentenced to 36 months of imprisonment, to be followed by two years of supervised release, and fined $55,000. *Id.* at 10-11. Petitioner was also ordered to forfeit $288,670, to pay $288,670 in restitution, and to pay the costs of prosecution, set at $4692. *Id.* at 11-12, 14. The court of appeals affirmed. *Id.* at 1-8.

1. Petitioner was a managing officer and shareholder of several Illinois corporations. Ralph Aulenta was petitioner's friend and the president of ABI/Acordia, an insurance brokerage agency that handled insurance for petitioner's corporations. Petitioner helped Aulenta secure a contract for ABI/Acordia to handle insurance for the City of Rosemont (Rosemont), and Rosemont placed its insurance through ABI/Acordia from 1991 until 1997. During that period, ABI/Acordia overcharged Rosemont for its services and kicked back part of the excess to petitioner. Pet. App. 1-2; Gov't C.A. Br. 3-10.

During each of the years that ABI/Acordia had the Rosemont contract, Aulenta caused ABI/Acordia to write a check to one of petitioner's corporations. The check was drawn on ABI/Acordia's Premium Fund Trust Account, an escrow account into which insurance premiums from various insured parties, including Rosemont and others, were deposited for payment to insurance carriers. Although the money that Aulenta caused to be drawn on this account supposedly was a referral fee compensating petitioner for helping ABI/Acordia obtain the Rosemont contract, the checks were not made out to petitioner, and petitioner did not deposit the funds into a corporate account. Rather, petitioner endorsed the checks to Aulenta, who returned half the amount in monthly increments over the next year and kept the rest. ABI/Acordia did not miss the money because Aulenta was overbilling Rosemont, so ABI/Acordia's books balanced. Petitioner failed to report as taxable income much of his ill-gotten gains. Pet. App. 1-2; Gov't C.A. Br. 3-18, 32.

2. Petitioner and Aulenta were indicted on charges of wire fraud, money laundering, conspiracy to commit money laundering, conspiracy to defraud the United States, and tax evasion. Pet. C.A. Supp. App. 1-54. The indictment alleged that Aulenta, as president of ABI/Acordia, owed that agency a fiduciary duty of loyalty and that one aspect of the fraudulent scheme was to deprive ABI/Acordia of Aulenta's honest services. Pet. App. 3; Pet. C.A. Supp. App. 2. The money laundering counts charged petitioner and Aulenta with engaging in financial transactions with the proceeds of their fraud on ABI/Acordia. Pet. App. 3; Pet. C.A. Supp. App. 11-31.

Aulenta pleaded guilty to money laundering and conspiracy to commit money laundering. He was sentenced to 20 months of imprisonment and ordered to pay restitution to ABI/Acordia. Pet. App. 5-6, 12; Gov't C.A. Br. 1-2.

Following a jury trial, petitioner was convicted of conspiracy to commit money laundering, various instances of money laundering, conspiracy to defraud the United States, and filing false tax returns. Pet. App. 9-10. Petitioner was sentenced to 36 months of imprisonment and ordered to pay various costs, fines, and restitution, including restitution to ABI/Acordia. *Id.* at 5, 10-11.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1-8. The court rejected petitioner's contention that a fraudulent scheme to deprive someone of another's honest services cannot serve

as the predicate offense for a money laundering conviction. *Id*. at 3-4. The court reasoned that the money laundering statute, 18 U.S.C. 1956, "makes it a crime to engage in financial transactions with the proceeds of 'specified unlawful activity.'" Pet. App. 3. Section 1956(c)(7)(A) defines the phrase "specified unlawful activity" to include "any act or activity constituting an offense listed in section 1961(1) of this title." The list of offenses in 18 U.S.C. 1961(1) includes mail fraud (18 U.S.C. 1341 (2000 & Supp. III 2003)) and wire fraud (18 U.S.C. 1343 (2000 & Supp. III 2003)). The court explained that, although the list in Section 1961(1) does not include 18 U.S.C. 1346, which defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services," that is immaterial: Section 1346 "does not create a separate crime" but merely defines the scope of the fraudulent schemes criminalized by Sections 1341 and 1343. Pet. App. 3. "The scheme to defraud itself violates § 1341, which is a listed predicate offense for the money-laundering statute." *Id.* at 4.

The court further rejected petitioner's argument that "honest services" mail or wire fraud cannot be a predicate offense for money laundering because it does not produce any "proceeds" that can be laundered. Pet. App. 4. The court agreed that there must be "proceeds" for there to be money laundering and that depriving one's employer of honest services "need not yield 'proceeds.'" *Ibid*. The court reasoned, however, that when the offense "*does* create proceeds, which are laundered to hide detection, it is sensible to treat them the same as any other proceeds of mail or wire fraud." *Ibid*. Here, the court concluded, "Aulenta deprived ABI/Acordia of both his honest services and the firm's money; the cash, which he shared with [petitioner], was 'proceeds' that the two could (and did) launder to disguise the money's origin." *Ibid.*

The court was also unpersuaded by petitioner's contention that his sentence was unreasonably high as compared to the sentence received by Aulenta. Pet. App. 5-8. The court noted that petitioner's 36-month sentence fell within the range of 33 to 41 months recommended by the Sentencing Guidelines, and that "sentences within the Guideline range are presumptively but not conclusively reasonable." *Id.* at. 5-6. The court explained that Aulenta was sentenced to only 20 months of imprisonment because he received a reduction under Sentencing Guidelines § 5K1.1 for assisting the prosecution by testifying against petitioner. Pet. App. 5-6. The court concluded that the difference between Aulenta's sentence and petitioner's did not make petitioner's sentence unreasonable because "a sentencing *difference* is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation." *Id.* at 6-7.

The court also rejected petitioner's claim that the district court erred in ordering him to pay restitution to ABI/Acordia. Pet. App. 5. Petitioner argued that ABI/Acordia was not a victim entitled to restitution because it had no legal right to the money that it had overcharged Rosemont and those overcharges equaled or exceeded the amount by which it had been defrauded by petitioner and Aulenta. The court disagreed, reasoning that although ABI/Acordia "was not entitled to this money *vis-à-vis* Rosemont," it "ha[d] rights superior to those of Aulenta and [petitioner]." *Ibid.* The court further reasoned that "[o]nce [petitioner] reimburses [ABI/Acordia, it] will be able to repay Rosemont. Instead of determining the ultimate incidence of costs created by criminal activity, judges should direct restitution to the immediate victim; other persons' rights in the funds then may be sorted out under normal rules of contract and property law." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-15) that a scheme to deprive someone of honest services cannot qualify as a predicate offense for a money laundering conviction. The court below correctly rejected that contention, and its ruling does not conflict with any decision of this Court or of any other court of appeals. This Court's review of the issue is therefore not warranted.

a. The money laundering statutes, 18 U.S.C. 1956 (2000 & Supp. III 2003) and 18 U.S.C. 1957, proscribe engaging in financial transactions with the proceeds of "specified unlawful activity." The statutes define the phrase "specified unlawful activity" to include "any act or activity constituting an offense listed in section 1961(1) of this title." 18 U.S.C. 1956(c)(7)(A), 1957(f)(3). The offenses listed in 18 U.S.C. 1961(1) (2000 & Supp. III 2003) include both mail fraud (18 U.S.C. 1341 (2000 & Supp. III 2003)) and wire fraud (18 U.S.C. 1343 (2000 & Supp. III 2003)). The mail and wire fraud statutes make it unlawful to use mail or wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." See 18 U.S.C. 1341 (2000 & Supp. III 2003); 18 U.S.C. 1343 (2000 & Supp. III 2003).

Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that those fraud statutes prohibited schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the covered intangible rights included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In *McNally*, this Court rejected the "intangible rights" theory and held that the mail fraud statute in its then-existing form reached only schemes that sought to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360. Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 declares that the term "scheme or artifice to defraud," as used in the mail and wire fraud statutes, includes "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

As the court of appeals here correctly concluded, Section 1346 does not create a separate offense but instead elaborates on the scope of the offenses delineated in the mail and wire fraud statutes. Pet. App. 3-4; see *United States* v. *Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (explaining that Section 1346 "defines 'scheme or artifice to defraud'") (quoting 18 U.S.C. 1341 (1994)), cert. denied, 543 U.S. 810 (2004); *United States* v. *Fernandez*, 282 F.3d 500, 506 n.3 (7th Cir.) (same), cert. denied, 537 U.S. 1028 (2002); *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (describing Section 1341 as the "operative offense-declaring statute" and Section 1346 as "a definitional provision"). Section 1346 makes clear that the mail and wire fraud statutes prohibit a "scheme or artifice to defraud" that deprives someone of the right to honest services. See 18 U.S.C. 1346. The money laundering statutes list mail and wire fraud as predicate offenses. 18 U.S.C. 1956(c)(7)(A), 1957(f)(3); see 18 U.S.C. 1961(1) (2000 & Supp. III 2003). Therefore, mail and wire frauds that are carried out by depriving someone of honest services are predicate offenses for money laundering.

b. Petitioner cites (Pet. 12-13) various cases that stand for the uncontested proposition that only offenses listed in 18 U.S.C. 1961(1) (such as mail and wire fraud) may serve as predicate offenses for the money laundering and RICO statutes. But, as explained above, that proposition is fully consistent with the court of appeals' conclusion that "honest services" mail and wire frauds may serve as predicate offenses for money laundering. Petitioner cites no case, and we are aware of none, that holds to the contrary.

Petitioner argues that "honest services" mail or wire fraud cannot be the basis for a money laundering conviction because "'honest services' cannot constitute 'money,' 'property' or 'proceeds' capable of being laundered in a financial transaction." Pet. 13. As the court of appeals explained, that argument is incorrect. See Pet. App. 4. It is true that money laundering must involve "proceeds" from a predicate offense. See 18 U.S.C. 1956 (2000 & Supp. III 2003), 1957. And it is also true that "honest services" mail or wire fraud is illegal whether or not it causes economic or pecuniary harm to the victim. See, *e.g.*, *United States* v. *Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004). But "honest services" mail and wire frauds frequently do cause a pecuniary loss to the victims and generate proceeds for the perpetrators. As the court of appeals aptly observed, "when the offense *does* create proceeds, which are laundered to hide detection," there is no reason to treat them differently from "any other proceeds of mail or wire fraud." Pet. App. 4.

In this case, petitioner's deprivation of honest services did generate proceeds. His fraudulent scheme deprived ABI/Acordia not only of Aulenta's honest services but also of money—the cash that Aulenta shared with petitioner. As the indictment charged, "[i]t was part of the scheme that [petitioner] used his position as an officer of [one of his corporations] and [Aulenta] used his position as president of ABI/Acordia of Illinois to defraud ABI/Acordia of approximately $288,670 through sham transactions." Pet. C.A. Supp. App. 2. The court of appeals correctly concluded that the $288,670 "was 'proceeds' that the two could (and did) launder to disguise the money's origin." Pet. App. 4.[1]

2. Petitioner also argues (Pet. 15-18) that, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable, and that he was entitled to a reduction in his sentence in order to avoid a sentencing disparity with co-conspirator Aulenta. The court of appeals correctly concluded otherwise, and this Court's review of that conclusion is not warranted.

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[1] Petitioner's reliance (Pet. 14-15) on *United States* v. *Walters*, 997 F.2d 1219 (7th Cir. 1993), and *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989), is misplaced. Neither of those decisions involved the scope of the money laundering statutes and both of the decisions predated the enactment of Section 1346.

a. Since *Booker*, several courts of appeals have held that a sentence within a properly calculated Guidelines range is "presumptively reasonable" on appellate review. See, *e.g.*, *United States* v. *Terrell*, 445 F.3d 1261, 1264-1265 (10th Cir. 2006); *United States* v. *Johnson*, 445 F.3d 339, 341-344 (4th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Those courts have relied on a variety of reasons, including that the Guidelines (1) incorporate the factors that 18 U.S.C. 3553(a) (2000 & Supp. III 2003) commands district courts to consider when imposing sentence, see, *e.g.*, *Terrell*, 445 F.3d at 1265 (noting that "the Guidelines are generally an accurate application of the factors listed in § 3553(a)"); (2) are the product of extensive study and revision, reflecting the considered judgment of experts, Congress, and sentencing judges across the country, see, *e.g.*, *Mykytiuk*, 415 F.3d at 607 ("The Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses."); and (3) yield sentences that are based on comprehensive, individualized fact-finding, see, *e.g.*, *Johnson*, 445 F.3d at 343-344 (observing that fact-finding under the Guidelines is "individualized," "extensive," and "designed to give the sentencing court a comprehensive overview of the defendant").

b. Although the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a Guidelines sentence is presumptively reasonable on appellate review, the First, Second, Third, and Eleventh Circuits have not. Petitioner contends (Pet. 16-17) that this

Court should grant review to resolve that disagreement, but there is no present need for the Court to resolve any tension that may exist among the courts of appeals on the issue.

First, it is far from clear that the standards employed by the First, Second, Third, and Eleventh Circuits are materially different from a presumption of reasonableness, such that there will be different results in cases with similarly situated defendants. The Eleventh Circuit has said that a Guidelines sentence is "ordinarily" reasonable, *United States* v. *Talley*, 431 F.3d 784, 788 (2005); the Third Circuit has said that a sentence within the Guidelines range is "more likely" to be reasonable than a sentence outside the range, *United States* v. *Cooper*, 437 F.3d 324, 332 (2006); the Second Circuit has said that a Guidelines sentence will be reasonable "in the overwhelming majority of cases," *United States* v. *Fernandez*, 443 F.3d 19, 27 (2006); and the First Circuit has said that the Guidelines "continue * * * to be an important consideration * * * on appeal," *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (2006) (en banc). In each of those cases, moreover, the court of appeals found that the Guidelines sentence at issue was reasonable. See *Fernandez*, 443 F.3d at 34; *Jiménez-Beltre*, 440 F.3d at 519-520; *Cooper*, 437 F.3d at 332; *Talley*, 431 F.3d at 788. Whatever the differences in terminology, therefore, there is universal agreement that a sentence within a properly calculated Guidelines range will usually be reasonable.

Second, *Booker* has been the law for only 18 months, and the courts of appeals are just beginning to evaluate post-*Booker* sentences. Accordingly, even if there were material differences in the standards applied by the courts of appeals in reviewing sentences for unreasonableness, it would be premature for this Court to address the issue. The lower courts are still in the early stages of developing and refining the standards governing the imposition and review of post-*Booker* sentences and, as those courts themselves recognize, those standards are continuing to evolve. See, *e.g.*, *Jiménez-Beltre*, 440 F.3d at 521 (Torruella, J., concurring) ("As the case law develops, the standards we announce today will evolve."); *United States* v. *Castro-Juarez*, 425 F.3d 430, 431 (7th Cir. 2005) (evaluation of the "reasonableness" of a sentence is "a process that continues to evolve in our decisions applying *Booker*"); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) (the meaning of reasonableness and the procedures to be employed by the courts will "evolve on a case-by-case basis").

c. On February 21, 2006, this Court granted a writ of certiorari in *Cunningham* v. *California*, No. 05-6551, to decide whether California's Determinate Sentencing Law violates the Sixth and Fourteenth Amendments by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant. The petition in this case need not be held pending the disposition of *Cunningham*, however, because the federal Guidelines system is unlike the California sentencing scheme at issue in that case.

Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower term, a middle term, and an upper term. See *People* v. *Black*, 113 P.3d 534, 538 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2005). California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime," Cal. Penal Code § 1170(b) (West 2004), and a rule issued under the law provides that a court may impose the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b) (2006). Aggravating and mitigating circumstances may be established by a preponderance of the evidence, *ibid.*, and, in determining the "relevant facts," the court may consider "the record in the case, the probation officer's report, other reports including * * * statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, * * * and any further evidence introduced at the sentencing hearing," Cal. Penal Code § 1170(b) (West 2004).

Unlike the California law, which is "worded in mandatory language," *Black*, 113 P.3d at 544, the federal sentencing system, as modified by *Booker*, is not a determinate sentencing law. The federal Guidelines are "effectively advisory," *Booker*, 543 U.S. at 245, and federal sentences are ultimately based on the factors in 18 U.S.C. 3553(a) (2000 & Supp. III 2003).

d. Petitioner's claim that his particular sentence was unreasonable (Pet. 17-18) also does not warrant this Court's review. The court of appeals correctly rejected petitioner's contention that there was an unwarranted disparity between his 36-month sentence and the 20-month sentence received by his co-conspirator Aulenta. See Pet. App. 5-8. Section 3553(a)(6) requires that sentencing courts consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). But, as the court of appeals explained, a difference in sentences is not an "unwarranted" disparity if it "is justified by legitimate considerations, such as rewards for cooperation." Pet. App. 6-7. Aulenta's sentence was justifiably lower than petitioner's because Aulenta cooperated with the government by testifying against petitioner. *Ibid.* Petitioner did not provide any comparable assistance. Moreover, the proper basis for assessing whether there is unwarranted disparity under Section 3553(a)(6) is by comparisons not to the sentence imposed on a co-defendant in a particular case but to the class of similarly situated offenders nationwide. See *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006) ("Congress' goal of equality primarily envisions a national norm.").

Congress expressly contemplated that defendants would receive different sentences based on differences in the extent to which they cooperate with law enforcement. See 28 U.S.C. 994(n) (directing that the Sentencing Commission "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"). See *United States* v. *Duhon*, 440 F.3d 711, 720 (5th Cir. 2006) ("sentencing disparity produced by substantial assistance departures was intended by Congress and is thus not a proper sentencing consideration under section 3553(a)(6)"); *United States* v. *Nichols*, 376 F.3d 440, 443 (5th Cir. 2004) (disparities based on substantial assistance are justified), cert. denied, 543 U.S. 1055 (2005).

3. Petitioner also contends (Pet. 18-21) that the district court erred in ordering him to pay restitution be-

cause ABI/Acordia, the direct victim of his fraud, obtained the money that he stole from it by overcharging the City of Rosemont for its services. The court below correctly rejected that contention, and further review is not warranted.

The Mandatory Victims Restitution Act of 1996 (MVRA) requires that the district court, as part of the sentence for specified offenses, "order restitution * * * in the full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), for any "offense against property * * * in which an identifiable victim or victims has suffered a * * * pecuniary loss," 18 U.S.C. 3663A(c)(1)(A)(ii) and (B). The MVRA defines "victim" to include those "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663A(a)(2).

As part of petitioner's and Aulenta's fraudulent scheme, Aulenta caused ABI/Acordia to make payments from its Premium Fund Trust Account to Aulenta, petitioner, and various companies owned by petitioner—payments that Aulenta was not authorized to make. As a result, ABI/Acordia suffered a direct loss of $288,670, the amount of those unauthorized payments. Pet. App. 1. ABI/Acordia therefore suffered a "pecuniary loss" and is a "victim" entitled to restitution under the MVRA.

Petitioner contends that ABI/Acordia did not suffer a pecuniary loss because it obtained as much money as petitioner and Aulenta stole from it by overcharging the City of Rosemont for insurance premiums. The fact that the City of Rosemont might have a claim against ABI/Acordia for the overcharges, however, does not alter the fact that ABI/Acordia suffered a direct pecuniary loss that is compensable under the MVRA. As the court below correctly observed: "Once [petitioner] reimburses [ABI/Acordia, it] will be able to repay Rosemont. Instead of determining the ultimate incidence of costs created by criminal activity, judges should direct restitution to the immediate victim; other persons' rights in the funds then may be sorted out under normal rules of contract and property law." Pet. App. 5.[2]

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[2] The cases on which petitioner relies (Pet. 20) do not assist him. As petitioner himself acknowledges, the court in *United States* v. *Randle*, 324 F.3d 550, 557 n.4 (7th Cir. 2003), expressly declined to address the issue that petitioner presses here. In *United States* v. *Shepard*, 269 F.3d 884 (7th Cir. 2001), the defendant fraudulently obtained employment as a hospital social worker, moved into a patient's home, and drained the patient's bank account. The hospital paid $165,000 to settle a lawsuit brought by the patient. The court of appeals held that the hospital was not a direct victim entitled to restitution because the hospital's loss "was derivative of [the patient's loss]." *Id.* at 886. Here, by contrast, ABI/Acordia was the direct victim because petitioner and Aulenta stole ABI/Acordia's money from its Premium Fund Trust Account.

In *United States* v. *Martinez*, 978 F. Supp. 1442 (D.N.M. 1997), the district court declined to award restitution to a casino from whom the defendant had stolen money because the operation of the casino was unlawful. The court acknowledged that the casino was entitled to restitution under the plain language of the MVRA but declined to make an award because the court believed that a restitution award would be "patently absurd." *Id.* at 1453. Whatever the merits of that decision, there is no suggestion in this case that ABI/Acordia's business was unlawful. Moreover, a conflict between the decision of the court of appeals in this case and a district court decision would not be a basis for this Court to grant a writ of certiorari. See Sup. Ct. R. 10; Robert L. Stern et al., *Supreme Court Practice* 237 (8th ed. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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