No. 04-1632

In the Supreme Court of the United States

ROBERT S. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether prejudgment interest may be awarded as part of a restitution order under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A.

2. Whether, under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, the district court abused its discretion in establishing the date of loss for embezzled stocks by reference to the date when the victim would have sold the stocks but for the defendant's fraud.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

In the Supreme Court of the United States

No. 04-1632

ROBERT S. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 393 F.3d 1044. The memorandum opinion (Pet. App. 35-39) and restitution order (Pet. App. 40-43) of the district court are unreported.

JURISDICTION

The court of appeals entered its judgment on December 30, 2004. A petition for rehearing was denied on March 2, 2005 (Pet. App. 44). The petition for a writ of certiorari was filed on May 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Northern District of California, petitioner was convicted of two counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of insider trading, in violation of 15 U.S.C. 78j(b). He was sentenced to 66 months of imprisonment and was ordered to pay $27,397,206.84 in restitution to the victim of his crimes. Pursuant to his plea agreement, petitioner waived his right to appeal, but he nevertheless appealed the restitution order. The court of appeals affirmed that order in part and reversed and remanded in part.

1. The Mandatory Victims Restitution Act of 1996 (Restitution Act), Pub. L. No. 104-132, Title II, 110 Stat. 1227, made victim restitution a mandatory component of the sentence for many federal crimes and provided for enhanced post-conviction enforcement of such orders by the federal government. 18 U.S.C. 3663A; 18 U.S.C. 3664 (2000 & Supp. II 2002). The Restitution Act directs 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). With respect to property, loss is determined as "the greater of * * * the value of the property on the date of the * * * loss * * * or * * * the value of the property on the date of sentencing." 18 U.S.C. 3663A(b)(1)(B)(i). Losses may include "lost income" and "expenses incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4). Disputes respecting restitution are resolved by the district court by a preponderance of the

evidence, with the government bearing the burden of proving the loss. 18 U.S.C. 3664(e).

2. From September 1995 to April 2001, petitioner was employed by Cisco Systems. From late 1997 until April 2001, petitioner obtained stock certificates from companies in which Cisco had acquired an interest and, instead of depositing those certificates with Cisco's treasury department, petitioner transferred them to his personal brokerage accounts. Petitioner then sold the embezzled securities and used the money to make stock trades using information gained from his insider position with Cisco. Pet. App. 3-4. In addition, petitioner instigated a $15 million loan by Cisco to Spanlink, a start-up company to which petitioner, posing as a venture capitalist, previously had loaned $5 million of embezzled funds from Cisco. Petitioner had received 50,000 shares of Spanlink preferred stock as security for that $5 million loan. After Spanlink received the $15 million loan from Cisco, petitioner redeemed his stock for $10 million, netting a $5 million profit. *Id.* at 4. In April 2001, Cisco discovered petitioner's embezzlement. Despite petitioner's deliberate effort to destroy computer records of his transactions, Cisco was able to identify five different embezzlements during petitioner's five years with the company, which together had cost Cisco more than $13 million in losses. *Id.* at 4-5.

3. Petitioner pleaded guilty to two counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of insider trading, in violation of 15 U.S.C. 78j(b). He also agreed to one count of criminal forfeiture, under 18 U.S.C. 982. Pet. App. 5. Under the plea agreement, petitioner agreed to forfeit the amounts alleged in the forfeiture count, and to pay restitution totaling $14,114,372.38 to Cisco and $343,173.40 to the govern-

ment. The government reserved the right in the plea agreement to argue for additional restitution for the value Cisco lost when it could not sell certain stocks, investigation costs, and prejudgment interest. *Ibid.* Petitioner also agreed to waive his right to appeal his "convictions, the judgment, and orders of the Court." *Ibid.*

The district court sentenced petitioner to 66 months of imprisonment and ordered petitioner to pay $27,397,206.84 in restitution under the Restitution Act. Pet. App. 5-6. That order included prejudgment interest. *Id.* at 6.

The restitution amount also reflected a disputed date-of-loss calculation for stocks embezzled by petitioner that otherwise would have been sold by Cisco. Pet. App. 6. As part of his scheme, petitioner embezzled 154,525 shares of stock held by Cisco in Terayon, another technology company, sold them, and deposited the proceeds into a personal account. *Id.* at 9. Between July 21, 1999, and March 6, 2001, Cisco had sold all of the Terayon shares over which it still had control. During that time period, the price of Terayon stock fluctuated from $46 per share in 1999, to a high of $285.26 per share in 2000, to $5.47 per share in March 2001, the date Cisco liquidated the last of the shares it held. The district court found that the "date of loss" for purposes of valuing the Terayon shares embezzled by petitioner was the date on which it could reasonably be inferred that Cisco would have sold the shares if petitioner had not embezzled them. *Id.* at 10. The court assumed that the embezzled shares would have been sold gradually during the period in which Cisco sold all the other shares and thus used the average daily closing price during that period as an approximation of Cisco's loss. Applying

that measure, the court found that the value of the embezzled Terayon shares was $12,593,902.23. *Ibid.*

4. a. The court of appeals affirmed the restitution order in relevant part, and reversed and remanded in part. Pet. App. 1-34. The court first held that, notwithstanding petitioner's waiver of his right to appeal, he retained the right to appeal the contested restitution amounts. *Id.* at 6-7.

The court rejected petitioner's argument that the district court had incorrectly found the date of loss for the Terayon shares. The court of appeals reasoned that the "district court reasonably construed the loss to Cisco concerning the Terayon stock to be its inability to liquidate the stock between July 21, 1999, and March 6, 2001, and therefore the 'date of the loss' to be each possible date within that particular period." Pet. App. 14. The court explained that, because Cisco lacked knowledge of petitioner's activities, it was unable to liquidate the embezzled Terayon shares throughout this period and it thus was appropriate for petitioner to bear the risk associated with the fluctuations in Terayon's share value. *Id.* at 14-15. In the court's view, the district court "sensibly concluded" that "limiting the restitution amount to the value of the shares on the date Gordon secretly stole them would underestimate Cisco's loss." *Id.* at 15. The court thus concluded that, while the district court was not required to calculate the date of loss in that manner, "the district court did not abuse its discretion in doing so." *Id.* at 16.

The court of appeals also rejected petitioner's challenge to the award of prejudgment interest on the dollar value of the stocks that would have been sold. Pet. App. 22-25. Following the decisions of numerous other courts, the court of appeals concluded that the Restitu-

tion Act "authorizes restitution for a victim's *actual* losses" and that "[f]oregone interest is one aspect of the victim's actual loss." *Id.* at 23 (quoting *United States* v. *Smith*, 944 F.2d 618, 626 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992)).*

b. Judge Fernandez dissented in relevant part. Pet. App. 27-34. He would have valued the stolen shares on the date of embezzlement, rather than the date of financial loss, and would not have awarded prejudgment interest on the stock value. *Id.* at 28-29, 31-32.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that the court of appeals erred in permitting the district court to include prejudgment interest in the calculation of loss for the stock Cisco would have sold had it not been embezzled by petitioner. That claim does not warrant this Court's review.

Contrary to petitioner's argument (Pet. 16-18), there is no conflict in the circuits. Quite the contrary, the courts of appeals (including many cited by petitioner, Pet. 16) have consistently upheld the award of prejudgment interest for losses associated with income-producing assets, under both the Restitution Act and its immediate predecessor, the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663. See, *e.g.*, *United States* v. *Morgan*, 376 F.3d 1002, 1014 (9th Cir. 2004) (restitution

* With respect to embezzled stock that likely would not have been sold by Cisco, however, the court of appeals overturned the award of prejudgment interest. Pet. App. 25-26. The court reasoned that, "[b]ecause it is too speculative to conclude that Cisco would have liquidated these securities and placed the cash proceeds in an interest bearing account or used them for some other productive purpose, prejudgment interest on these securities cannot constitute an 'actual loss' to the victim." *Id.* at 26.

includes prejudgment interest, contractual interest, and finance charges); *United States* v. *Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (prejudgment interest award upheld "to make up for the loss of the funds' capacity to grow"); *Government of the Virgin Islands* v. *Davis*, 43 F.3d 41, 47 (3d Cir. 1994), cert. denied, 515 U.S. 1123 (1995); *United States* v. *Hoyle*, 33 F.3d 415, 420 (4th Cir. 1994), cert. denied, 513 U.S. 1133 (1995); *United States* v. *Patty*, 992 F.2d 1045, 1050 (10th Cir. 1993) (prejudgment interest is "especially" appropriate when "the victim is a financial institution"); *United States* v. *Rochester*, 898 F.2d 971, 983 (5th Cir. 1990).

Petitioner's reliance (Pet. 16) on *United States* v. *Rico Industries, Inc.*, 854 F.2d 710 (5th Cir. 1988), cert. denied, 489 U.S. 1078 (1989), and *United States* v. *Sleight*, 808 F.2d 1012 (3d Cir. 1987), is misplaced. The restitution orders in both of those cases were imposed under the Probation Act, 18 U.S.C. 3651 (1982) (repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. II, § 212(a)(1) and (2), 98 Stat. 1987). See *Rico*, 854 F.2d at 714; *Sleight*, 808 F.2d at 1020. *Rico* and *Sleight* denied prejudgment interest under the Probation Act by applying the rule that "[c]riminal penalties do not bear interest." *Rico*, 854 F.2d at 714; see *Sleight*, 808 F.2d at 1020; see also *Rodgers* v. *United States*, 332 U.S. 371, 374-375 (1947). In later decisions, however, the Third and Fifth Circuits have concluded that restitution under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663 "is compensatory rather than punitive," and thus that prejudgment interest is available. See *Davis*, 43 F.3d at 47; *Rochester*, 898 F.2d at 983; accord *Patty*, 992 F.2d at 1050. Neither the Third nor the Fifth Circuits has applied their Probation Act precedents to the Restitution Act. There is, therefore, no con-

flict on the availability of prejudgment interest under the latter statute.

Petitioner argues (Pet. 16-17) that the stocks he embezzled were not sufficiently analogous to the other income-producing assets for which courts have routinely permitted prejudgment interest. In his view, the instruments in those cases were interest-bearing, unlike the embezzled stocks here. Petitioner, however, cites no court of appeals (or even a district court) decision that has drawn that distinction or has denied prejudgment interest under the circumstances presented here. Nor does he explain why this particular form of lost income does not warrant an award of prejudgment interest under the terms of the statute. The Restitution Act specifically commands courts to order restitution in the "full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), and that loss includes "lost income," 18 U.S.C. 3663A(b)(4). Awarding prejudgment interest on income lost because of the theft of valuable assets, like the stocks embezzled here, ensures that the restitution award reflects the "full amount" of the victim's loss of income-generating assets and the "lost income" caused by the crime.

2. Petitioner also seeks (Pet. 21-29) this Court's review of the district court's calculation of the date of loss for the Terayon stocks. The record-bound determination of when Cisco's "loss" of the value of its embezzled stocks occurred does not warrant this Court's review. Petitioner cites no contrary authority interpreting the Restitution Act's "date of the loss" provision with respect to embezzled securities.

Petitioner's contention (Pet. 22-25) that the court could consider only the market value of the shares on the date of embezzlement overlooks that Congress

amended the Victim and Witness Protection Act in 1994 to make clear that restitution awards "in any case" may include an award to "reimburse the victim for lost income," 18 U.S.C. 3663(b)(4). See Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1947. That same provision was carried forward in the Restitution Act. 18 U.S.C. 3663A(b)(4). Almost all of the cases upon which petitioner relies (Pet. 25-26) predate that significant statutory enhancement in the courts' authority to compensate a victim for lost income.

United States v. *Simmonds*, 235 F.3d 826 (3d Cir. 2000) (cited at Pet. 25), is of no help to petitioner. That case, in fact, rejected an exclusive focus on the market value of an asset at the time of the crime. The court held that the restitution order reasonably reflected the later replacement value, rather than market value at the time of the crime, of furniture destroyed in an arson. *Simmonds*, 235 F.3d at 832; see also *United States* v. *Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999) (cited at Pet. 26) (upholding award of replacement value for burned church building).

The court of appeals in *Simmonds* also held that the district court erred in ordering restitution for the loss of discounted insurance policy premiums (*i.e.*, lower premiums) occasioned by the victim's filing of an insurance claim. But that was because the court held that those lost discounts were not "property" that was "damaged[,] lost or destroyed" by the defendants' criminal acts. 235 F.3d at 833. Rather, they reflected indirect, consequential damages, which the Restitution Act does not permit. *Ibid.* Here, by contrast, the district court did not abuse its discretion in concluding that the income lost by Cisco due to petitioner's embezzlement of income-generating stocks both was property and was properly compensable

"lost income" directly caused by petitioner's crimes. In any event, the district court's case-specific calculation of the date of loss for the Terayon stocks in this case—a finding that was sustained by the court of appeals only on the ground that it did not amount to an abuse of discretion, rather than as a rule of law that would control future restitution awards in that circuit, Pet. App. 16—does not present the type of broadly recurring legal question that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

SEPTEMBER 2005