

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALEJANDRO AMOR — PETITIONER
vs.

UNITED STATES OF AMERICA
ex rel. JUAN PENA — RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alejandro Amor

(Your Name)

FPC Pensacola

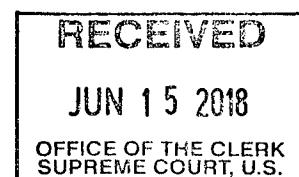
(Address)

P.O. Box 3949, Pensacola, FL 32516

(City, State, Zip code)

N/A

(Phone Number)



QUESTIONS PRESENTED

- I. Whether the False Claims Act 31 U.S.C. 3729-33 (FCA), estoppel provision violates the Seventh Amendment of the Constitution.
- II. Whether as a result of the Mandatory Victims Restitution Act an order of Restitution in a criminal proceeding is *res judicata* as to damages in a civil proceeding arising out of the same facts.
- III. Whether the False Claims Act penalties are subject to Eighth Amendment Excessive Fines scrutiny as a result of this Honorable Court's determination that, FCA penalties are punitive in nature. Furthermore, the Petitioner asks this Court to resolve the Circuit split.
- IV. Whether the term "proceeding" in the False Claims Act encompasses any stage of the investigation in order for the action to be barred per 31 U.S.C. 3730(e)(3).
- V. Whether a judgment resulting out of a False Claims Act (31 U.S.C. 3729-33) action, after restitution has been imposed in a criminal proceeding arising out of the same relevant conduct and act, is subject to Double Jeopardy scrutiny and as an independent matter, also violates the Election of Remedies Doctrine.
- VI. Whether the district court can summarily grant damages without a judicial determination of materiality in implied certification and causation in a False Claims Act case.
- VII. Whether a criminal conviction which does not charge fraud or false statement estops a defendant from denying the essential elements of a False Claims Act 31 U.S.C. 3729-33 action.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____
 has been designated for publication but is not yet reported; or;
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at 2017 U.S. Dist. LEXIS 21268;
 has been designated for publication but is not yet reported; or;
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or;
 has been designated for publication but is not yet reported; or;
 is unpublished.

The opinion of the _____ court
appears at Appendix _____ to the petition and is
 reported at _____; or;
 has been designated for publication but is not yet reported; or;
 is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was November 9, 2017

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 16, 2018, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT SEVENTH OF THE CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT EIGHTH OF THE CONSTITUTION

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

AMENDMENT FOURTEENTH OF THE CONSTITUTION - DUE PROCESS

CLAUSE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction equal protection of the laws.

TITLE 31 U.S.C. 3731(e)

Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense in any action which involved the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

TITLE 31 U.S.C. 3730(e)(3)

In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party.

TITLE 18 U.S.C. 3663(B)

- (i) The court, in determining whether to order restitution under this section, shall consider --(I) the amount of the loss sustained by each victim as a result of the offense; and (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.
- (ii) To the extent that court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweigh the need to provide restitution to any victims, the court may decline to make such an order.

TITLE 18 U.S.C. 3664(f)(1)(A)

In each order of restitution, 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 for the economic circumstances of the defendant.

TITLE 18 U.S.C. 3664(e)

Any dispute as to the amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents shall be on

the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be on the party designated by the court as justice requires.

TITLE 18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 18 U.S.C. 641

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain knowing it to have been embezzled, stolen, purloined or converted--

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of the property in the aggregate, combining amounts from all counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word "value" means face par or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari arises out of the dismissal of the Petitioner's Appeal to the Eleventh Circuit, without the Appeals Court having the benefit of the Appellant's Brief. The Eleventh Circuit ruled that appeal was frivolous prior to the Defendant having the opportunity to submit the Brief and without knowledge of the issues which the Defendant was raising on appeal. The action arises out of the False Claims Act (FCA) and raises questions as to current circuit split, constitutional issues, whether the lower court had subject matter jurisdiction, the question of what actually constitutes a claim, statutory interpretation and long term public policy question.

The Petitioner was the owner of a post-secondary private institution, the subject of an investigation (Program Review) by the United States Department of Education (ED), followed by a criminal investigation that ultimately led to a conviction, then by a False Claims Act complaint. The three separate government actions were the result of the same alleged conduct and acts. The government alleged that the school's employees at the behest of the Petitioner told students to misrepresent their secondary educational status on the Free Application for Student Financial Aid (FAFSA).

The Petitioner nor the school had any direct control as to the content or the submission of the FAFSA. The school had four participation agreements with ED.

In the criminal proceeding the district court determined that the victim was ED, Petitioner/Defendant was sentenced to 97 months of incarceration, ordered to pay a \$15,000 fine, ordered to pay restitution of \$1.9 million based on the Mandatory Victims Restitution Act and ordered to forfeit \$1.9 million in substitute assets. In a separate proceeding, after the conviction (currently under appeal), a different district court awarded summary judgment to the government in the False Claims Act case as a result of the FCA estoppel provisions, disregarded the ruling

as to damages in the criminal proceeding, failed to adjudicate causation and materiality, and awarded the government \$12,389,295 plus fines of \$10,164,000.

The Petitioner asserts that 1) the FCA estoppel provision violates the Seventh Amendment, 2) that pursuant to the MVRA the amount of restitution determined in a criminal proceeding is *res judicata* as to loss, 3) that FCA penalties are subject to Eighth Amendment Excessive Fines scrutiny and circuit split should be resolved, 4) that the district court did not have subject matter jurisdiction as a result the ongoing “proceeding” by the government, 5) that a judgment in an FCA action after restitution has been imposed in a criminal proceeding is subject to Double Jeopardy scrutiny, 6) that a Defendant’s Due Process is violated when the district court awarded summary judgment without a judicial determination of materiality as to implied certification and causation in an FCA action, and 7) that a Defendant cannot be estopped from a Defense as a result of a criminal conviction that did not charge fraud or false statement.

REASONS FOR GRANTING THE PETITION

FCA ESTOPPEL PROVISION IS UNCONSTITUTIONAL

I. The petitioner contends that the False Claims Act Collateral Estoppel provision (31 U.S.C. 3731(e)) is unconstitutional as a result of the Seventh Amendment and without the benefit of a jury determination of damages, a subsequent violation of the Defendants Seventh Amendment Rights.

The Seventh Amendment demands that facts common to legal and equitable claims be adjudicated by a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 510-11 (1959); *17 Lytle v. Household Mfg.*, 494 U.S. 545 (1990). The Seventh Amendment provides that:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment could not be any clearer that "...the right of trial by jury shall be preserved..." The False Claims Act violates the Seventh Amendment and estopps Defendants that have been convicted of filing a false claim with the benefit of a jury trial and damage determination by the jury. For this reason this Honorable Court should grant a Writ of Certiorari.

Additionally, as a result of the FCA estoppel provision the district court in the civil proceeding should have either been bound to the damages as determined in the criminal proceeding or alternatively the Defendant was entitled for a jury determination as to damages if they occurred.

RESTITUTION IS RES JUDICATA OF DAMAGES IN FCA ACTION

II. Petitioner contends that based on the Mandatory Victims Restitution Act (18 U.S.C. 3663A) (MVRA) an order of restitution in a criminal proceeding is a judicial determination of damages in a civil proceeding as to the losses sustained by the alleged victims of the alleged crime. The MVRA mandates that a victim of a crime be made whole by the alleged perpetrator, thus logic would dictate that restitution is indeed a judicial determination of damages. The Eleventh Circuit's position based on precedential law that preceded the enactment of the MVRA is that the restitution is not a judicial determination of damage and thus this Honorable Court should grant the Writ for Certiorari. In the criminal proceeding of the *United States v. Amor* (12-cr-20750-LENARD/GOODMAN) the sentencing judge made factual findings as to the total amount of the government's loss, pursuant the Mandatory Victims Restitution Act, 18 U.S.C. 3663A (specifically 18 U.S.C. 3664(F)(1)(A)) and entered a final judgment in the amount of \$1.9 million as to restitution. In the False Claims Act (FCA) case a different district court judge, without the benefit of any new evidence or hearings, arrived at a different factual finding of damages based on the record of the criminal proceeding. The judge in the FCA action disregarded the prior judicial determination and arrived at a loss of over twice the amount determined in the criminal proceeding. The position of the district court in the FCA action and the Eleventh Circuit is that restitution is not a judicial determination of damages. See *United States v. Anghaie*, 633 Fed. Appx. 514 (11th Cir. 2015); citing *United States v. Barnette*, 10 F.3d 1553, 1556 (11th Cir. 1994).

Prior to enactment of the MVRA restitution was controlled by the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3663. The VWPA allowed a district judge to craft a restitution order based on a number of factors, which included the Defendant's ability to pay restitution. 18 U.S.C. 3663(B)(i)&(ii).

The primary and overarching purpose of the MVRA 18 U.S.C. 3663A, enacted in 1996, is to make victims of crime whole, to fully compensate these victims for

their losses and to restore these victims to their original states of well-being. *United States v. Collins*, 854 F.3d 1324 (11th Cir. 2017).

The MVRA places the burden on the government to prove the victim's loss by a preponderance of the evidence. 18 U.S.C. 3664(e). FCA damages must be measured by the amount wrongfully paid to satisfy the false claims. See *United States v. Aerodex*, 469 F.2d 1003 (5th Cir. 1972); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966).

The government in the criminal proceeding proved the victim's loss by a preponderance of evidence pursuant to 18 U.S.C. 3664(e). Based on the plain statutory construction and plain language of the MVRA the amount of restitution ordered, in a judgment, by the district judge in a criminal proceeding therefore, is a judicial determination of damages and precludes re-litigation of the issue under the doctrine of *res judicata*.

Petitioner asserts that determination of loss as mandated by the MVRA is *res judicata* and the Eleventh Circuit's reliance on pre-MVRA enactment case law is a miscarriage of justice, is opposed to public policy and defies Congressional intent. For such reasons Petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari.

EXCESSIVE FINE SCRUTINY OF FCA FINES-CIRCUIT SPLIT

III. In light of this Honorable Court's *Vermont Agency of Nat'l Res., v. United States ex rel. Stevens*, 529 U.S. 765 (2000) there is a split between the Circuits as to whether False Claims Act penalties are remedial and thus not subject to Excessive Fine Scrutiny or whether the fines are punitive and subject to scrutiny.

In *United States v. NEC Corp.*, 11 F.3d 136 137, (11th Cir. 1993) the Eleventh Circuit held that *qui tam* provisions are "remedial" and remedial penalties are not

subject to excessive fine scrutiny. see *Cole v. U.S. Dept. of Agric. A.S.C.S.*, 133 F.3d 803, 807 (11th Cir. 1998). The District Court in the instant case, *United States v. Fast Train II Corp.*, 12-civ-21431-COKE/TORRES, relied on the aforementioned case to arrive at the conclusion that FCA penalties are not subject to Excessive Fine scrutiny.

Most Circuits have followed this Honorable Court's reasoning in *Vermont Agency of Nat'l Res.*, including the Second, Seventh, Eighth and Ninth in determining that FCA penalties are subject to the Excessive Fine scrutiny. *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699 (7th Cir. 2014); “[W]e agree with the Ninth Circuit that FCA penalties are punitive in nature and therefore fall within the reach of the Excessive Fines Clause.” *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2002), *United States v. Eghbal*, 548 F.3d 1281 (9th Cir. 2008).

The above examples serve to illustrated confusion as to whether the FCA fines are subject to Excessive Fines clause of the Eighth Amendment and therefore Petitioner asks this Court to address the question and resolve Circuit split.

MEANING OF “PROCEEDING” – CIRCUIT SPLIT

IV. This Honorable Court has suggested that the meaning of “proceeding” depends upon its statutory context. The law is unsettled and there is split as to what constitutes a “civil money penalty proceeding” in the False Claims Act. In the instant case the lower Court opined that the phrase is open to interpretation. Whether the district court has jurisdiction pursuant to the bar imposed in the False Claims Act hinges on the meaning of “proceeding”, thus this Honorable Court should resolve lack of interpretation and split by the lower courts.

Presumably Congress enacted 31 U.S.C. 3730(e)(3) as a result of the election of remedies doctrine. Congress enacted the False Claims Act in order to bring to light fraud upon the government fisc. Once the government is aware of the alleged

fraud and is acting to recover the false claims the district court lacks subject matter jurisdiction pursuant the FCA. Certain circuits have determined that the initiation of any investigation by agency subjected to the alleged fraud meets that plain language reading and statutory construction removing subject matter jurisdiction per 31 U.S.C. 3730(e)(3). See *Found. For Cont. Ltd. v. G&M E. Constr., Inc.*, 259 F. Supp. 2d 329 (D.N.J., April 29, 2003)

In the instant case the district court arrived at a conclusion that “proceeding” required a monetary demand from the Defendant and the Eleventh Circuit has dismissed the Petitioner’s appeal as frivolous. The Petitioner purports that Congress’ intent was to bar FCA action once the transactions were subject of an “administrative money penalty proceeding.” Based on the incongruity created by different interpretations of the terms “proceeding” in the FCA and the long term public policy implications this Honorable Court should address the question as to what is a “proceeding” in 31 U.S.C. 3730(e)(3).

VIOLATION OF DOUBLE JEOPARDY

V. In the instant case the government sought three distinct avenues of recovery and punishment arising out of the same alleged criminal conduct and was awarded restitution, damages and fines. The Defendant argues subsequent government action after recovery is subject to Double Jeopardy scrutiny, violates the Eighth Amendment Excessive Fines Clause, the Fourteenth Amendment Due Process Clause and the Election of Remedies Doctrine.

As a result of the Mandatory Victims Restitution Act of 1996 (MVRA) codified as 18 U.S.C. 3663(a) and the accompanying judgment as to restitution in the criminal proceeding the government has been made whole. Yet, the government sought and obtained an additional judgment of over \$22 million from the Petitioner without affording the Defendant basic rights guaranteed by the Fifth, Eighth and

Fourteenth Amendments of the Constitution. The subsequent actions of the government can only be categorized a punitive and not remedial.

This Honorable Court in *United States v. Halper*, 490 U.S. 435 (1989) found it unconscionable and a violation of the Double Jeopardy Clause that the government sought an additional punishment of over eight times the government's loss. In the instant case the government has been made whole as a result of the restitution and forfeiture order yet the government was awarded 1,500 times the amount of punishment (a fine of \$15,000) already imposed by the lower court in the criminal proceeding. The Defendant in the FCA case was denied the opportunity to present evidence to counter the government's unsupported losses, even though the government has been made whole.

The Petitioner prays that this Honorable Court address the Constitutional questions of whether successive actions by the government, once a government is whole, which do not allow a Defendant to present a defense or is afforded the opportunity to present evidence as to damages violates the Defendant's Fifth, Eighth and Fourteenth Amendments.

FCA LIABILITY WITHOUT CAUSATION

VI. A party that certifies compliance with federal payment conditions should bear no liability under the False Claims Act (FCA) for payment requests submitted to the government by a third party without causation. In the instant case, prospective students completed the Federal Application for Federal Student Aid (FAFSA) at will, without the Defendant controlling the content or submission of the claim. The FAFSA is the de facto claim of the fisc and is submitted by the student. The Petitioner certified compliance with applicable regulations through four Program Participation Agreements. If liability arises it should be as the result of the four PPAs not the number of FAFSAs submitted by student.

In the Eleventh Circuit the issues as to FCA liability without proximate or “but-for” causation is unsettled. See *United States v. Everglades College*, 855 F.3d 1279 (11th Cir. 2017) (“[A] proposition that is not settled in this Circuit; whether an educational institution that has falsely certified compliance with federal payment conditions can be liable under the FCA for financial-aid requests submitted by its student”). The Seventh Circuit created a conflict among the circuits by holding in that the FCA requires a “but-for” causation test rather than a proximate causation test. *United States v. Luce*, 873 F.3d 999 (7th Cir. 2017); quoting *United States v. First National Bank of Cicero*, 957 F.2d 1362 (7th Cir. 1992).

Without the benefit of any evidence the district court in the FCA action made a different judicial determination, than the one in the criminal proceeding, and fined the Defendant for every FAFSA submitted by students, even though the Defendants had no control over the submission. The district court in the criminal proceeding determined that only 8% of the FAFSAs contained misrepresentations by students. Yet, the district court in the FCA action made a determination that since the school certified compliance with applicable regulations the school was subject to an \$11,000 fine for each and every FAFSA (972) submitted by students, plus fines of \$11,000 for the four participation agreements.

Without consideration and irrespective of this Honorable Court’s *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) decision which mandates that lower Court undertake a rigorous materiality inquiry, the district court failed to conduct the materiality inquiry. Furthermore there remains confusion among the circuits as to the issue of causation. Petitioner respectfully asks this Honorable Court to address the question and eliminate confusion among the circuits.

FCA ESTOPPEL PROVISION

VII. Irrespective whether the FCA estoppel provision violates the Constitution's Seventh Amendment, the FCA's estoppel provision requires a defendant to have been convicted of either fraud or false claims. The lower Court expanded without authority the FCA's estoppel provision, to preclude the Petitioner from defending the FCA claim.

The general conspiracy statute (18 U.S.C. 371) prohibits two types of conspiracies; "commit any offense" and defraud the United States. See *United States v. Levinson*, 405 F.2d 971, 977 (6th Cir. 1968) cert denied, 395 U.S. 958 (1969). In the instant case the district court awarded the government summary judgement as a result of the defendant being convicted of 18 U.S.C. 371 and subsequent counts of 18 U.S.C. 641. It is well established that a case of simple theft is not coterminous with fraud.

Given that Congress passed an accompanying statute that explicitly covers fraud, it cannot be the case that Congress intended 641 to be interpreted so broadly. The elements required for a conviction of 18 U.S.C. 641 does not include fraud. The lower court's baseless expansion of the estoppel provisions of the FCA deny the Defendant's Fourteenth Amendment Due Process rights, of being able to defend the action of the sovereign.

The unwarranted and unjust expansion of the applicability of the FCA's estoppel provision by the Eleventh Circuit require this Honorable Court's Determination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Pro Se - Incarcerated

Date: 05/07/2018