

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM CHRISTOPHER HOGAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,

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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in sentencing Petitioner by adding one point to his criminal history score based on a Texas State shop lifting conviction. Petitioner urges that there is a conflict between rulings from the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit. U.S. Supreme Court R. 10.

TABLE OF CONTENTS

	<u>Page</u>
Question Presented for Review	1
Table of Contents	2
Table of Authorities	3
Opinion Below	5
Jurisdiction	5
Constitutional and Statutory Provisions Involved	5
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	10
Prayer for Relief	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
UNITED STATES SUPREME COURT	
<u>Calder v. Bull</u> , 390 Dall. (3 U.S.) 381 (1798).....	9
<u>Kimbrough v. United States</u> , 552 U.S. 85 (2007).....	7
<u>Puckett v. United States</u> , 556 U.S. 129 (2009).....	7
<u>United States v. Olano</u> , 507 U.S. 725 (1993).....	7
UNITED STATES COURT OF APPEALS	
<u>United States v. Gadison</u> , 8 F.3d 186 (5 th Cir. 1993).....	8
<u>United States v. Hardeman</u> , 933 F.3d 278 (5 th Cir. 1991).....	8
<u>United States v. Lamm</u> , 392 F.3d 130 (5 th Cir. 2009).....	7,8
<u>United States v. Lopez-Pastrana</u> , 244 F.3d 1025 (9 th Cir. 2001)	7, 8, 9
STATE	
<u>Byrd v. State</u> , 336 S.W.3d 242 (Tex.Crim.App. 2011).....	9
CONSTITUTION	
U.S.Const., Amend V.....	5
STATUTES	
<u>Federal</u>	
U.S.S.G. sec. 4A1.1.....	7
U.S.S.G. sec. 4A1.2.....	7
U.S.S.G. sec. 4A1.2(c)(1).....	7

U.S.S.G. sec. 4A1.2(c)(2).....	7
--------------------------------	---

Texas

Tex.PenalCodeAnn. art. 31.02 (Vernon 2017).....	9
---	---

Tex.PenalCodeAnn. art. 31.03(e)(1) (Vernon 2017).....	9
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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM CHRISTOPHER HOGAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, WILLIAM CHRISTOPHER HOGAN, Appellant in the United States Court of Appeals for the Fifth Circuit and the Defendant in Case No. MO-17-CR-55, submits this Petition for Writ of Certiorari and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 05 2018.

OPINION BELOW

On July 19, 2018, the United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the District Court's sentence rendered against Petitioner. A copy of the Opinion is attached as Appendix A.

The District Court's Criminal Judgment is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code sec. 1254(a).

Petitioner requests that the United States Supreme Court exercise judicial discretion in granting review based on a decision of one Court of Appeals on an important matter conflicts with the decision of another Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part to the case *sub judice*:

No person...shall be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to the charge of Conspiracy to Possess with Intent to Distribute Five Grams or more of Actual Methamphetamine in the United States District Court for the Western District of Texas.

Thereafter, the District Court sentenced Petitioner to 77 months incarceration in the United States Bureau of Prisons and five years of supervised release post-release.

Prior to sentencing, the United States Probation Department in Midland, Texas produced a pre-sentence investigation report, also known as a PSIR. The PSIR had a base offense level calculation, and then a criminal history calculation. For the criminal history score, the PSIR recommended one criminal history point based on a Texas shoplifting conviction. The one point increased his criminal history score from "13" to "14".

At the sentencing hearing, counsel for Petitioner, then the Defendant, objected to the one point increase, based on a contra case from the United States Court of Appeals for the Ninth Circuit. That objection was overruled.

Hogan filed a Notice of Appeal on October 20, 2017 (ROA.14) to the United States

Court of Appeals for the Fifth Circuit. The United States Court of Appeals affirmed the underlying decision on July 19, 2018.

REASON FOR GRANTING THE WRIT

The District Court decision, adding one point to the criminal history score, based on a Texas shoplifting conviction involves a conflict between two United States Courts of Appeal, United States v. Lamm, 392 F.3d 130 (5th Cir. 2004) and United States v. Lopez-Pastrana, 244 F.3d 1025 (9th Cir. 2001).

A question of law involved in a sentencing determination is reviewed *de novo*. Kim-brough v. United States, 552 U.S. 85 (2007). The Sentencing Reform Act is an attempt to provide uniform treatment of similarly-situated defendants. United States v. Olano, 507 U.S. 725 (1993); Puckett v. United States, 556 U.S. 129, 135 (2009). The deprivation of liberty implicates constitutional protection. See Calder v. Bull, 390 Dall. (3 U.S.) 386 (1798).

In Petitioner's case, the PSIR addressed the shoplifting charge in paragraph 47. It provided that there was a conviction on June 12, 2008, for "Theft Less than \$50.00" from the Municipal Court of the City of Odessa, Texas. The PSIR provides that "the defendant Pled nolo contendere to the offense and was assessed a \$365 fine."

The PSIR provides:

Attorney representation is unknown. Investigative records reflect Odessa Police Department officers were dispatched to a Wal-Mart in reference to a theft. Upon arrival, officers contacted the loss prevention officer who stated he observed the subject, later identified as the defendant, take a price tag off a shirt, put the shirt on, and walk out of the store without paying for th item. The price of the shirt was \$7.50.

Petitioner objected to the one point addition to the criminal history score (ROA. 136). The District Court overruled the objection (ROA. 137-138).

Under the United States Sentencing Guidelines, a defendant is assessed criminal history points based on the length of his prior sentences. Three points are assessed for sentences of imprisonment exceeding 13 months; two points, for sentences of at least sixty days; and one point, for any other sentence, up to a total of four points. U.S.S.G. sec. 4A1.1.

Sentences for all felony offenses are counted under these rules. U.S.S.G. sec. 4A1.2.

Sentences for misdemeanors and petty offenses are counted unless the prior offense is excluded by sec. 4A1.2(c)(1) or sec. 4A1.2(c)(2). Section 4A1.2 lists 15 offenses that are counted only if the sentence imposed was term of probation of at least one year or a term of imprisonment of at least 30 days, or if the offense was “similar” to the instant offense. One of these offenses is for an “Insufficient funds check”. U.S.S.G. sec. 4A1.2.

The United States Court of Appeals for the Fifth Circuit relied upon United States v. Lamm, 392 F.3d 130 (5th Cir. 2004) in affirming the District Court. In Lamm the Fifth Circuit held that the offense of shoplifting was not exempted and was not similar to the insufficient funds check exclusion.

Previously, the Fifth Circuit in United States v. Gadison, 8 F.3d 186 (5th Cir. 1993), found the Texas state offense of theft by check was exempted as similar to the exclusion for insufficient funds check.

The Fifth Circuit uses a multifactor test to determine similarity. United States v. Hardeman, 933 F.3d 278, 281 (5th Cir. 1991). Under that test, the Fifth Circuit applies:

A common sense approach which relies on all possible factors of similarity, including a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

Hardeman, 933 F.2d at 281.

The Fifth Circuit has held that the question of offense similarity is fact specific. Lamm, 392 F.3d at 361. In the decision below, the Court of Appeals failed to address that the State of Texas consolidated the Texas Theft Statute. Tex.PenalCode Ann. Sec. 31.02 (Vernon 2017). Under the Texas Penal Code, a theft is committed if a person unlawfully appropriates property with intent to deprive the owner of property. Byrd v. State, 336 S.W.3d 242, 250 (Tex.Crim.App. 2011). Theft, as defined by Texas Penal Code, constitutes a single offense superseding the separate offense previously known species of theft.

Petitioner's offense was a Class C misdemeanor, the lowest specie under Texas state Law. Tex.PenalCode Ann. Sec. 31.03(e)(1). There was no jail time, only a fine and Petitioner was not represented by counsel.

Petitioner's case fits the facts of United States v. Lopez-Pastrana, 244 F.3d 1025 (9th Cir. 2001). In Lopez-Pastrana, the defendant was convicted under a Reno, Nevada municipal Code for shoplifting a \$19.00 wallet from a department store. Lopez-Pastrana was fined \$200.00 and ordered to do 16 hours of community service.

The Ninth Circuit held that the shoplifting conviction is exempted from counting because It was similar to the offense of insufficient funds check. The Ninth Circuit noted that the Shoplifting and insufficient check were punished under the same provisions in Nevada law.

Accordingly, there is a conflict between the Fifth Circuit decision in Lamm and the Ninth Circuit decision in Lopez-Pastrana. Petitioner asks the United States Supreme Court exercise Its judicial discretion and grant this Petition for Writ of Certiorari.

CONCLUSION


For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted and prays that the Order Revoking Supervised Release be reversed, and the decreed requiring participation in Lifetime Recoveries be vacated and the Petitioner be released from custody.

PRAYER FOR RELIEF

Petitioner, WILLIAM CHRISTOPHER HOGAN, requests that the Petition for Writ of Certiorari be granted for the reasons stated and that the conviction entered against him be vacated and this case remanded for consideration of the motion to set aside jury verdict, and such other relief to which Petitioner would be entitled to receive in law or in equity.

Respectfully submitted,

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Midland, TX 79701
432-570-4014

By: 
Steve Hershberger
Texas State Bar # 09543950

Attorney for Petitioner

APPENDIX A

(Opinion of the United States Court of Appeals, for the Fifth Circuit)

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

No. 17-50954
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
July 19, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM CHRISTOPHER HOGAN,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:17-CR-55-1

Before BENAVIDES, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

William Christopher Hogan pleaded guilty to conspiracy to possess with intent to distribute five grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(B). The district court sentenced Hogan to 77 months of imprisonment, followed by five years of supervised release. Hogan appeals only his sentence and argues that he should not have received a criminal history point for his prior Texas shoplifting conviction

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 17-50954

because it is similar to the listed excludable offense of “insufficient funds check” under U.S.S.G. § 4A1.2(c)(1). We review the district court’s application of the Sentencing Guidelines de novo. *United States v. Lamm*, 392 F.3d 130, 131 (5th Cir. 2004).

As Hogan acknowledges, we held in *Lamm* that the Texas offense of shoplifting is not similar to the listed excludable offense of insufficient funds check. 392 F.3d at 134. We explained that shoplifting posed a risk of physical confrontation, especially “if the offender is apprehended during the attempted theft.” *Id.* The offense of insufficient funds check posed a much lower risk of a physical confrontation “because the perpetrator is not present when the victim realizes that he has been victimized.” *Id.* at 133-34 (quoting *United States v. Spaulding*, 339 F.3d 20, 22 (1st Cir. 2003)). The potential for physical confrontation, we reasoned, made the offenses “meaningfully different.” *Id.* at 134.

Hogan makes no argument as to why his shoplifting offense is distinguishable from that considered in *Lamm*, nor does he explain why we should revisit our decision in *Lamm*. It is well-established that one panel of this court may not overrule or ignore the decision of a previous panel. *United States v. Ruiz*, 180 F.3d 675, 676 (5th Cir. 1999).

The judgment of the district court is AFFIRMED.

APPENDIX B

(Criminal Judgment, United States District Court for the Western District
of Texas, Midland Division)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

UNITED STATES OF AMERICA

v.

WILLIAM CHRISTOPHER HOGAN

Case Number: 7:17-CR-00055-RAJ(1)

USM Number: 87277-380

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, WILLIAM CHRISTOPHER HOGAN, was represented by Steve Hershberger, Esq.

The defendant pled guilty to Count(s) One of the Indictment on July 19, 2017. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846	Conspiracy to Possess with Intent to	03/12/2017	One
21 U.S.C. § 841(b)(1)(B)	Distribute 5 Grams or More of		
21 U.S.C. § 841(a)(1)	Actual Methamphetamine		

As pronounced on October 10, 2017, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 13th day of October, 2017.


Robert Junell
Senior United States District Judge

DEFENDANT: WILLIAM CHRISTOPHER HOGAN
CASE NUMBER: 7:17-CR-00055-RAJ(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **Seventy seven (77) months as to count one** with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at F. C. I. Springfield.

That if eligible, the defendant participate in the 500 – Hour Intensive Drug Abuse Education Program.

That the defendant participate in the Bureau of Prisons' Inmate Job Training Program while incarcerated.

That the defendant participate in a mental health program while incarcerated.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: WILLIAM CHRISTOPHER HOGAN
CASE NUMBER: 7:17-CR-00055-RAJ(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years**.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall abstain from the use of all intoxicants, including alcohol, marijuana, synthetic marijuana, and bath salts, during the term of supervision.

The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The program may include testing and examination during and after program completion to determine if the defendant has reverted to the use of drugs. The probation officer shall supervise the participation in the program (provider, location, modality, duration, intensity, etc.). During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant shall pay the costs of such treatment if financially able.

The defendant shall not be permitted to reside any place where firearms are possessed or stored.

The defendant shall participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, shall supervise participation in the program (provider, location, modality, duration, intensity, etc.). The defendant shall pay the costs of such treatment if financially able.

The defendant shall have no contact with his co-defendant, whether by phone, e-mail, fax, letter or in person, during the term of supervision.

DEFENDANT: WILLIAM CHRISTOPHER HOGAN
CASE NUMBER: 7:17-CR-00055-RAJ(1)

CONDITIONS OF PROBATION AND SUPERVISED RELEASE
(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

- [1] The defendant shall not commit another federal, state, or local crime during the term of supervision.
- [2] The defendant shall not unlawfully possess a controlled substance.
- [3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- [4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- [5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- [6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- [7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- [8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- [9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- [1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- [2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- [3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- [4] The defendant shall answer truthfully the questions asked by the probation officer.
- [5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

DEFENDANT: WILLIAM CHRISTOPHER HOGAN
CASE NUMBER: 7:17-CR-00055-RAJ(1)

- [6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.
- [7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- [8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- [9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- [10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- [11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- [12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- [13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- [14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
- [15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- [16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- [17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

DEFENDANT: WILLIAM CHRISTOPHER HOGAN
CASE NUMBER: 7:17-CR-00055-RAJ(1)

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 East Wall, Room 222, Midland, TX 79701. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$.00	\$.00

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.