

No. _____

In the
Supreme Court of the United States

MICHAEL LIEBERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
mc@heggelaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

- 1) What relief is available to a criminal defendant under the All Writs Act?
- 2) How, and when, may a district court amend a restitution order imposed as part of sentencing on a criminal defendant?

PARTIES TO THE PROCEEDINGS

Petitioner was the defendant in the United States District Court and the appellant in the United States Court of Appeals. Respondent was the plaintiff in the District Court and the appellee in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Michael Lieberman petition this Court for a writ of certiorari to review the Opinions of the Court of Appeals and District Court entered in this action.

OPINIONS BELOW

The April 28, 2020 Opinion of the United States Court of Appeals for the Third Circuit is unpublished and appears at Appendix A. The June 21, 2019 Memorandum and Order of the United States District Court for the District of New Jersey is unpublished and appears at Appendix B. The April 26, 2017 Order of the United States District Court for the District of New Jersey is unpublished and appears at Appendix C. The September 18, 2015 Order of the United States District Court for the District of New Jersey is unpublished and appears at Appendix D.

JURISDICTION

The Opinion of the United States Court of Appeals was entered on April 28, 2020. App. 1. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 1651(a) ("The All Writs Act"), provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

18 U.S.C.A. § 3664 provides in part:

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

(1) such a sentence can subsequently be--

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

STATEMENT OF THE CASE

In 2015, Petitioner Lieberman pleaded guilty to one count of wire fraud in violation of 18 U.S.C.A. § 1343, arising from the embezzlement of more than \$1.5 million from his former employer, Credit Agricole Corporate and Investment Bank. The District Court sentenced Lieberman to 37 months of imprisonment and two years of supervised release per the plea agreement.

Also as part of the sentence imposed, the District Court ordered Lieberman to pay approximately \$1.6 million in restitution to the United States Treasury for distribution to Credit Agricole – the identified victim as being owed the restitution. No appeal was filed.

Two years later, in 2017, another entity, the National Union Fire Insurance Company of Pittsburgh, Pennsylvania, contacted the District Court and said that “due to its insurance payment to and an accompanying assignment agreement with” the named victim, Credit Agricole, National Union now “was the proper beneficiary of \$1.4 million of the restitution” that had been ordered in Mr. Lieberman’s criminal

sentence. National Union asked the District Court to substitute itself (National Union) for Credit Agricole as the identified victim and payee of \$1.4 million in restitution. By Order entered April 27, 2017, the District Court granted National Union's request and substituted National Union for Credit Agricole as the victim and payee of \$1.4 million of the restitution that Lieberman has been ordered to pay as part of the sentence imposed on him two years earlier.

Lieberman challenged the District Court's action. Filing a *pro se* application under the All Writs Act, 28 U.S.C.A. § 1651, Lieberman contended that "[t]he only way[] to amend a final order of restitution" is set forth in 18 U.S.C.A. § 3664(o) – grounds that were not implicated by National Union's application. No other source of federal law empowered the District Court to change the identity of the victim two years after sentencing was imposed. Fed. R. Crim. P. 35 allows correction of a sentence but only within 14 days of its imposition and only when the error "resulted from arithmetical, technical, or other clear error..." 18 U.S.C.A. § 3742 concerns an appeal of a sentence. 18 U.S.C.A. § 3664(d)(5) pertains to victim losses that the district court cannot ascertain at the sentencing hearing. 18 U.S.C.A. § 3572 concerns adjustment of payment of fines. 18 U.S.C.A. § 3613A and 3614 concern a defendant's default on payment of a fine or restitution ordered. 18 U.S.C.A. § 3565 pertains to a defendant's violation of his probation. 18 U.S.C.A. § 3664(k) involves a material change in the defendant's ability to pay restitution. None of these grounds were implicated in National Union's application, Lieberman

contended in challenging the District Court's Order amending the identity of the victim.

The District Court denied relief to Lieberman, however. The court treated Lieberman's application as a motion for reconsideration, not as a request for relief under the All Writs Act as Lieberman had presented it. The court said that any motion for reconsideration was time barred. The court ruled, further, that its amendment of the victim "was proper" per the Mandatory Victim Restitution Act (MVRA) which "requires the court to order that restitution be paid to a person who 'provided or is obligated to provide compensation' to a victim, including 'insurance or any other source,' except that 'the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.'" (Appx. B, *citing* 18 U.S.C.A. § 3664(j)(1)).

... the restitution statute and the MVRA appear to be in conflict. Under the specificity canon of statutory construction, "a 'narrow, precise, and specific' statutory provision is not overridden by another provision 'covering a more generalized spectrum.'" Cazun v. Attorney Gen. United States, 856 F.3d 249, 264 (3d Cir. 2017) (*quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976)); *see also Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts* 183 (2012).

National Union's original written submission requesting substitution (ECF No. 24) included

an attached “Assignment and Release,” whereby National Union, Credit Agricole’s insurer, made a payment of \$1,390,823 (the full amount less the deductible of \$250,000). (ECF No. 24 at Ex. B). Judge Cooper’s order therefore brought the restitution order in compliance with the MVRA, which imposed a more narrow, precise, and specific requirement. As such, reconsideration of the Court’s prior order is not warranted here. [Appx. B]

Lieberman appealed, arguing (in his *pro se* brief to the Court of Appeals, Appx. E) that the District Court erred by treating his motion as a motion for reconsideration rather than as a petition for relief under the All Writs Act, and that the District Court’s decision was substantively “wrong” because, “[t]he Court’s original restitution order, entered September 18, 2015, can only be amended in a specific set of circumstances, none of which apply here. There is no legal basis for the amendment as entered.” Despite those arguments, the Court of Appeals considered only Lieberman’s argument to be “that we should remand for the District Court to address the merits in the first instance” then denied that relief, stating, “we will affirm on the ground that Lieberman has waived any challenge to the District Court’s denial of his motion on the merits.” (Appx. A)

REASONS FOR GRANTING THE PETITION

A. The Court should clarify the scope of relief available to criminal defendants under the All Writs Act.

The All Writs Act provides in relevant part that “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). This Court has stressed that the Act is “a residual source of authority to issue writs that are not otherwise covered by statute.” Pennsylvania Bureau of Correction v. U.S. Marshals Serv., 474 U.S. 34, 43, 106 S. Ct. 355, 88 L. Ed. 2d 189 (1985). The Act empowers a court in its “sound judgment” to issue orders necessary “to achieve the rational ends of law” and “the ends of justice entrusted to it.” United States v. New York Tel. Co., 434 U.S. 159, 172, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977).

The Court should grant this Petition to clarify that requests for relief like Mr. Lieberman made in his criminal case – to correct the District Court’s improper change of the identity of the “victim” owed restitution – is within the relief available under the All Writs Act. As the Court has said, lower courts must apply the All Writs Act “flexibly in conformity with” its principles. Id. at 173; accord United States v. Catoggio, 698 F.3d 64, 67 (2d Cir. 2012) (“[C]ourts have significant flexibility in exercising their authority under the Act.”).

The Court should affirm decisions construing the Act broadly and flexibly. For instance, In New York Tel. Co., 434 U.S. 159, this Court held that courts have

authority under the All Writs Act to issue supplemental orders to third parties to facilitate the execution of search warrants, stressing, “[t]he power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice.” Id. at 174; cf. In re U.S. for an Order Directing a Provider of Comm’n Servs. to Provide Tech. Assistance to Agents of the U.S. Drug Enf’t Admin., 128 F. Supp. 3d 478 (D.P.R. 2015) (granting government’s request pursuant to the All Writs Act for technical assistance from provider of electronic communication services to provide information, facilities, and technical assistance to facilitate the consensual recording of all electronic communication to and from a particular mobile phone); United States v. Fricosu, 841 F. Supp. 2d 1232, 1238 (D. Colo. 2012) (order issued under All Writs Act requiring defendant to provide password to encrypted computer seized pursuant to a search warrant).

In the area of restitution, the All Writs Act has been held to empower courts to issue writs as needed to support Federal Debt Collection Procedure Act remedies to enforce judgments, including criminal restitution judgments, 18 U.S.C.A. § 3613(a). See Dolan v. United States, 560 U.S. 605, 130 S. Ct. 2533, 177 L. Ed. 2d 108 (2010) (citing All Writs Acts as possible means of redress by a defendant seeking a timely restitution order); United States v. Yielding, 657 F.3d 722 (8th Cir. 2011) (“sentencing court has

jurisdiction to enforce its restitution order and may use the All Writs Act, when necessary and appropriate, to prevent the restitution debtor from frustrating collection of the restitution debt.”)

Some district courts have employed the All Writs Act to vacate otherwise valid federal criminal convictions as a means of avoiding unjust immigration consequences, see, e.g., United States v. Javanmard, 767 F. Supp. 1109, 1112 (D. Kan. 1991) (vacating defendant’s conviction pursuant to the All Writs Act).

Yet there is conflict among lower courts. Some Circuits, including the Second and Ninth Circuits, have ruled that the All Writs Act does not grant federal courts any independent basis on which to grant relief from a criminal conviction. See United States v. Table, 166 F.3d 505 (2d Cir. 1999) (district court lacked jurisdiction under the All Writs Act to vacate a valid conviction for conspiracy and making false statements to the INS, despite a finding that the non-citizen was an upstanding and exemplary member of the community); United States v. Bravo-Diaz, 312 F.3d 995 (9th Cir. 2002); Doe v. I.N.S., 120 F.3d 200 (9th Cir. 1997).

We respectfully ask the Court to grant this Petition here in order to clarify application of the All Writs Act and resolve the uncertainty in lower courts on the scope of relief available under the Act.

B. The Court should clarify how and when a District Court may amend a restitution order imposed as part of sentencing in a criminal case.

A district court's power to order restitution *must* be conferred by statute. Hughey v. United States, 495 U.S. 411, 415–16, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990); cf. United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991) (“Federal court have no inherent power to order restitution. Such authority must be conferred by Congress.”)

Once the sentencing judge imposes a defendant's sentence, the district court authority to revisit the sentence must derive from a specific statute or rule also. United States v. Goode, 342 F.3d 741, 743 (7th Cir. 2003). This includes a restitution order imposed as part of the criminal sentence. Id.

In this case, the District Court (then affirmed on appeal) said that the “more specific” provisions of the MVRA permitted changing the identity of the “victim” two years after the sentence was imposed on Mr. Lieberman. Most lower federal courts have reasoned that a district court may modify a mandatory restitution order imposed as part of a defendant's sentence, however, only through the means specified in 18 U.S.C.A. § 3664(o).

In United States v. Wyss, 744 F.3d 1214 (10th Cir. 2014), for instance, the Tenth Circuit considered whether 18 U.S.C.A. § 3563(c), which allows a district court to modify a defendant's conditions of probation, permitted modification of a mandatory restitution

order imposed on the defendant as a condition of probation. Wyss, 744 F.3d at 1215. The Court of Appeals explained that 18 U.S.C.A. § 3664(o) alone “provides the means by which an order of restitution may be altered.” Id. at 1217. Because none of the 18 U.S.C.A. § 3664(o) circumstances applied in the application before the district court, the Court of Appeals held that the defendant’s restitution obligation could not be altered, and the alteration the district court made was not authorized by 18 U.S.C.A. § 3563(c). Id. at 1218.

The Fourth Circuit addressed the same issue in United States v. Grant, 715 F.3d 552 (4th Cir. 2013), noting it was “extremely skeptical that Congress intended that granting district courts the general authority to modify probation provisions would allow courts to bypass the much more specific scheme Congress created concerning modification of restitution.” Grant, 715 F.3d at 558.

This Court should grant this Petition to clarify that a district court may not modify a mandatory order of restitution imposed as part of a defendant’s sentence unless one of the circumstances set forth in § 3664(o) applies. In Mr. Lieberman’s case here, none of the circumstances set forth in § 3664(o) applied when the District Court purported to change the identity of the “victim,” and no other source of authority, the Court should clarify, empowered the district court to enter its order: Defendant’s sentence was not “corrected” under Fed. R. Crim. Pr. 35; it was not “appealed and modified,” 18 U.S.C.A. § 3664(o)(1)(B); it was not “amended” upon discovery of additional losses by the

victim, 18 U.S.C.A. § 3664(o)(1)(C); it was not “adjusted” based on the defendant’s economic circumstances, 18 U.S.C.A. § 3664(o)(1)(D); defendant was not being “resentenced” based on his failure to pay or some other violation of his probation, 18 U.S.C.A. § 3664(o)(2).

National Union, in the courts below, cited United States v. Turner, 312 F.3d 1137 (9th Cir. 2002) in support of the District Court’s amendment of the victim’s identity, but in Turner the Court of Appeals stressed the limited statutory authority to modify an “earlier restitution order.” “A court may reduce restitution if it finds that a defendant’s economic circumstances have changed. 18 U.S.C.A. § 3664(k). It may increase restitution on petition by the victim. 18 U.S.C.A. § 3664(d)(5). It may also resentence a defendant upon a finding that the defendant has defaulted upon his restitution obligation. 18 U.S.C.A. § 3613A, 3614. None of these are present here,” the Court noted. “Without a finding that Turner had defaulted upon his restitution obligation, the district court was limited to the four modifications set forth in 18 U.S.C.A. § 3583(e), each of which are inapplicable here.”

The Government in Mr. Lieberman’s case below argued that the District Court had authority to make non-substantive changes to the restitution order pursuant to Fed. R. Crim. P. 36. But Rule 36 only empowers a court to “correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.” Fed. R. Crim. P. 36. Changing the identity

of the victim named in the sentencing imposed on the criminal defendant is not a non-substantive change within this Rule, and such a construction would contradict the Court's holding in Hughey, 495 U.S. at 415–16, that a district court's power to order restitution must be conferred by statute. This too needs clarification, we submit, as some lower courts have indeed held that Fed. R. Crim. P. 36 provides such authority to a district court, see, e.g., United States v. Portillo, 363 F.3d 1161, 1165 (11th Cir. 2004)) (relying on Fed. R. Crim. P. 36 to authorize district court to substitute “proper” victims in defendant's judgment of sentence).

Likewise, with regard to Fed. R. Crim. P. 35, the Court should clarify that the reference in 18 U.S.C.A. § 3664(o)(1)(A) to Rule 35 does not include substantive changes to restitution – these are not “corrections” within the meaning of Rule 35. Rule 35, entitled “Correcting or Reducing a Sentence,” contains two subsections that address different means by which a court can modify a defendant's sentence. Rule 35(a), subtitled “Correcting Clear Error,” allows the court to “correct a sentence that resulted from arithmetical, technical, or other clear error.” Rule 35(b), subtitled “Reducing a Sentence for Substantial Assistance,” allows the court to “reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.” 18 U.S.C.A. § 3664(o) refers only to correcting a restitution sentence under Rule 35; this does not include changing the identify of the “victim” two years after sentence was imposed based on National Union's claim that it was assigned the actual victim's interest. A Rule 35(b)

reduction does not constitute a correction because it has nothing to do with alleged errors in the original sentence imposed.

Granting Certiorari in this matter would also enable the Court to address whether this implicates a jurisdictional question. Most courts that have addressed the question have decided that “the question before us does not implicate the district court’s subject matter jurisdiction.” Wyss, 744 F.3d at 1217; United States v. Puentes, 803 F.3d 597, 607–09 (11th Cir. 2015); Grant, 715 F.3d at 558. Instead, it implicates “the district court[’s] lack[] [of] statutory authority to order a belated reduction in Defendant’s restitution” Wyss, 744 F.3d at 1217. The Court can clarify whether district courts have subject-matter jurisdiction to consider a motion to correct, modify, amend, or adjust restitution consistent with 18 U.S.C.A. § 3664(o) regardless of whether the movant is in fact statutorily eligible for such relief. See United States v. Ceballos, 302 F.3d 679, 692 (7th Cir. 2002) (explaining “judges and legislators sometimes use the term jurisdiction to erroneously refer to a court’s authority to issue a specific type of remedy, rather than to the court’s subject-matter jurisdiction”); United States v. Taylor, 778 F.3d 667, 669–71 (7th Cir. 2015) (holding district court had jurisdiction—meaning the power to adjudicate—a motion for a reduced term of imprisonment though it was without the authority to grant the motion because the defendant did not satisfy the statutory criteria for relief).

In sum, the Court should grant this Petition to address and clarify a district court’s authority to

modify a restitution order entered in a defendant's criminal case – here, two years after the sentence, including the restitution order, was imposed on Mr. Lieberman. The Court should stress that federal courts “have authority to order restitution solely pursuant to statute.” United States v. Anderson, 545 F.3d 1072, 1077 (D.C. Cir. 2008) (citing Bok, 156 F.3d at 166); United States v. Gottesman, 122 F.3d 150, 151 (2d Cir. 1997) (“‘Federal courts have no inherent power to order restitution. Such authority must be conferred by Congress through statute.’” There is a “‘specific and detailed [statutory] scheme addressing the issuance ... of restitution orders arising out of criminal prosecution.’” United States v. Martinez, 812 F.3d 1200, 1204 (10th Cir. 2015) (quoting Wyss, 744 F.3d at 1217).

18 U.S.C.A. § 3664(o) “provides the means by which an order of restitution may be” substantively “altered.” Wyss, 744 F.3d at 1217. Those means are as follows: an order of restitution may be corrected within fourteen days after sentencing for “arithmetical, technical, or other clear errors,” Fed. R. Crim. P. 35(a); 18 U.S.C.A. § 3664(o)(1)(A). It may be modified or corrected on appeal under section 3742, 18 U.S.C.A. § 3664(o)(1)(A). It may be amended under 18 U.S.C.A. § 3664(d)(5) because losses were not ascertainable at the time of sentencing, 18 U.S.C.A. § 3664(o)(1)(C). The manner in which restitution must be paid may be adjusted under 18 U.S.C.A. § 3664(k), 18 U.S.C.A. § 3664(o)(1)(D). The rate at which a defendant must make payments may be accelerated on default under 18 U.S.C.A. § 3572, 18 U.S.C.A. § 3664(o)(1)(D). Under sections 3565 and 3614, a court may resentence or

revoke the probation of a defendant who violates his probation conditions, 18 U.S.C.A. § 3664(o)(2). If none of these grounds apply, the district court is not empowered to modify a restitution order imposed as part of a defendant’s sentence. There is no “general” grant of authority for a district court to modify a restitution order – in this case – two years after the sentence was imposed. See, e.g., Wyss, 744 F.3d at 1219 (“specific statutory provisions prevail over more general provisions’ absent clear congressional intent to the contrary”).

The Court should affirm the holdings of lower courts concluding that 18 U.S.C.A. § 3664(o) sets forth the only sources of authority to modify a restitution order, Wyss, 744 F.3d 1214 (18 U.S.C.A. § 3563(c) does not authorize a district court to modify a restitution order because 18 U.S.C.A. § 3664(o) provides sole bases for doing so); Grant, 715 F.3d at 558 (noting Congress’s stated purpose to “replace an existing patchwork of different rules governing orders of restitution under various Federal criminal statutes with one consistent procedure” and noting court “extremely skeptical that Congress intended that granting district courts the general authority to modify probation provisions would allow courts to bypass the much more specific scheme Congress created concerning modification of restitution, essentially rendering the scheme a nullity in a wide range of cases”) (*quoting* S. REP. 104-179, 12 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924)); United States v. Serrapio, 754 F.3d 1312 (11th Cir. 2014) (noting section 3653(c) “does not provide carte blanche for a district court to change all aspects of the probationary sentence it originally imposed”); United

States v. Hamburger, 414 F. Supp. 2d 219, 224–225 (E.D.N.Y. 2006) (finding court was “without authority to reduce its restitution order as a modification of the terms of probation” and thus denying defendant’s motion under 18 U.S.C.A. § 3563(c)). Congress created a detailed scheme authorizing a particular condition of a defendant’s sentence—restitution—and delineated limited circumstances in which a court could modify the condition. 18 U.S.C.A. § 3664(o) provides that a sentence with a restitution order is a final judgment and the restitution order may be modified only under Section 3664(o)’s specific grounds.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
mc@heggelaw.com

Counsel for Petitioner

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