

No. __-_____

In the

Supreme Court of the United States

JULISA TOLENTINO,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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Whether this Court should grant certiorari, vacate the judgment below, and the remand for reconsideration in the event that the defendant in the forthcoming case of *United States v. Leal*, No. 16-11330 (5th Cir.) prevails in the court below and secures a published opinion?

PARTIES TO THE PROCEEDING

Julisa Tolentino is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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Appendix B: Judgment and Opinion of the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Julisa Tolentino, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence was entered February 15, 2018, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Tolentino*, 766 Fed. Appx. 121 (5th Cir. April 3, 2019)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTION

The opinion and order of the United States Court of Appeals for the Fifth Circuit affirming the sentence were issued on April 3, 2019. [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 3663 of Title 18 provides in relevant part:

(a)

(1)

(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(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 the court determines that the complication and prolongation of the

sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

Section 3663A of Title 18 provides in relevant part:

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.

(2) For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an

offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

STATEMENT OF THE CASE

A. District Court Proceedings

1. Charge and Plea

Petitioner Julisa Tolentino pleaded guilty to one count of assisting in the preparation of a false tax return in violation of 26 U.S.C. §7206(2). *See* (Record in the Court of Appeals, at 12-15). She admitted that on February 13, 2012, she prepared a client's tax return, falsely claiming several thousand extra dollars in deductions and credits. *See* (Record in the Court of Appeals, at 14). Ms. Tolentino entered into a plea agreement, but did not waive her right of appeal. *See* (Record in the Court of Appeals, at 102-108). Relevant here, the plea agreement contained two provisions related to restitution. First, it admonished the defendant regarding the potential restitution that might be a part of the sentence:

The maximum penalties the Court can impose are as follows:

e. restitution to victims or to the community, which may be mandatory under the law, and which the defendant agrees may include restitution arising from all relevant conduct, not limited to that arising from the offenses of conviction alone...

(Record in the Court of Appeals, at 103)

Second, it contained an affirmative agreement to certain restitution beyond the offense of conviction:

Pursuant to 18 U.S.C. § 3663(a)(1), (3) and § 3663A, the Defendant agrees to pay restitution for losses resulting from all of *her* criminal conduct involving the preparing and filing of false and fraudulent tax returns, and understands that restitution will not be limited to losses stemming from the offense of conviction alone. The actual amount of

restitution shall be determined by the Court. The Defendant agrees that she shall be jointly and severable liable for payment of all restitution.

(Record in the Court of Appeals, at 104)(emphasis added).

2. Presentence Litigation

A Presentence Report (PSR) calculated a 36 month term of imprisonment, *see* (Record in the Court of Appeals, at 126), though the court would ultimately vary downward to just six months in prison, *see* (Record in the Court of Appeals, at 90). The Guideline calculation stemmed from Probation's decision to assess more than two million dollars in intended loss. *See* (Record in the Court of Appeals, at 116). It reached this conclusion by adding up falsely claimed education credits for three years. *See* (Record in the Court of Appeals, at 116). Specifically, it added all of the fraudulent credits on any tax return filed by anyone at Ms. Tolentino's company. *See* (Record in the Court of Appeals, at 116). It used this method even though Probation agreed that she did not prepare all of the returns herself. *See* (Record in the Court of Appeals, at 116). Further, she made no more than \$76,000 in these three years, while the operation's owners – at least one of whom may be a fugitive, *see* (Record in the Court of Appeals, at 36) – made nearly a million dollars, *see* (Record in the Court of Appeals, at 146). This remuneration represented three years of salary and a ten thousand dollar bonus for preparing a large number of returns. *See* (Record in the Court of Appeals, at 146). Although the PSR calculated an intended loss of more than two

million dollars, it suggested a restitution of just \$37,217. *See* (Record in the Court of Appeals, at 127).

Both sides objected. The government objected to the restitution finding. *See* (Record in the Court of Appeals, at 130). It argued that the plea agreement called for a restitution amount “equal to the tax loss attributable to the defendant, as determined by the Court.” (Record in the Court of Appeals, at 130).

The defense objected to three issues: 1) Probation’s intended loss determination, 2) Probation’s determination that Ms. Tolentino had received even \$76,000, and, 3) Probation’s failure to award a minor role reduction. *See* (Record in the Court of Appeals, at 132-155). In support of the intended loss challenge, the defense argued that returns prepared and filed by other employees were not properly attributable to Ms. Tolentino as relevant conduct. *See* (Record in the Court of Appeals, at 132-138). In this regard, she noted the radical discrepancy between her reward and that of the company’s owners. *See* (Record in the Court of Appeals, at 134). In response to the government’s objection, the defense argued that the original \$37,217 restitution figure was “consistent with the findings in the government’s investigation” (Record in the Court of Appeals, at 164).

Probation accepted all of the government’s objections and rejected all defense objections that might have affected the Guidelines. *See* (Record in the Court of

Appeals, at 167-170). It therefore incorporated the intended loss figure into its restitution calculations. *See* (ROA.167-168).

3. Sentencing

At sentencing, the court overruled the defendant's objections, including her relevant conduct objection. *See* (Record in the Court of Appeals, at 77-78). It provided some reasoning in support its finding that other employee's tax preparations represented "jointly undertaken criminal activity." *See* (Record in the Court of Appeals, at 77-78). In this regard, the district court noted the similarity of the filings by the defendant and others at the company, specifically, the fact that they all claimed similar credits. *See* (Record in the Court of Appeals, at 77-78). The court imposed \$2,312,561.00 in restitution to the IRS, jointly and severally with the owners of the tax return companies. *See* (Record in the Court of Appeals, at 91).

B. Proceedings in the Court of Appeals

Petitioner appealed, challenging the restitution award on two grounds. First, she noted that the district court used intended loss rather than actual loss to determine the restitution award. She contended that the actual loss would be significantly less than the intended loss because it would exclude any payments ultimately made by the taxpayers.

Second, she contended that the district court went beyond the amounts agreed to in the plea agreement. Specifically, it assessed restitution on the basis of loss that was not caused by the defendant's conduct, even though the plea agreement limited

the restitution to the results of “her conduct.” Further, she argued that some of the loss did not stem from relevant conduct.

She maintained that these claims were preserved by PSR objection, but argued in the alternative that any restitution amount unsupported by competent record evidence constitutes an illegal sentence in excess of the statutory maximum, citing *United States v. Chemical & Metal Industries, Inc.*, 677 F.3d 750, 752 (5th Cir. 2012).

The court of appeals affirmed. It began by holding that plain error review applied to Petitioner’s claim that the district erred by using intended loss rather than actual loss. In this regard, it limited *Chem. & Metal Indus.* to cases involving no victim loss at all. It said:

Tolentino urges us to apply de novo review to the issue of the amount of loss because this case concerns the legality of a restitution order. *See United States v. Arledge*, 553 F.3d 881, 897 (5th Cir. 2008). We have held that ordering restitution without competent record evidence of a loss is an illegal sentence, an argument we review de novo. *See United States v. Chem. & Metal Indus.*, 677 F.3d 750, 752 (5th Cir. 2012). In that case, though, there was no evidence of any loss to the victim, and restitution should not have been awarded at all. *Id.* Tolentino does not argue that. Instead, she claims the amount is wrong. The cited precedent is not our guide.

[Appendix B, at p.5]. Applying this standard of review, it rejected the challenge to the loss amount because Petitioner did not present rebuttal evidence to the PSR. *See* [Appendix B, at p.7].

It also rejected the claim that the plea agreement did not authorize the restitution judgment. This claim, too, was review for plain error. It again adopted a

limited view of *Chem. & Metal Indus.*, which it did not think applied to questions regarding the interpretation of a plea agreement:

Our first issue is determining the standard of review. We restate our earlier summary of Tolentino’s district court objections. After the district court declared the amount of restitution at sentencing, her counsel only “reurge[d] the objections as set out in the pleadings.” In those pleadings, Tolentino had agreed with the initial PSR that the restitution of \$37,217 was “consistent with the findings in the government’s investigation.” Counsel’s references to this earlier pleading fall short. Regardless of whether that total was consistent with the investigation, Tolentino never objected to the amount of restitution the district court had just declared she owed. Tolentino’s objection was not “sufficient to put the government and the district court on notice” of an objection to the scope of the plea agreement. *United States v. Hearns*, 845 F.3d 641, 649 (5th Cir. 2017).

Even though the issue is a new one on appeal, Tolentino argues that when Section 3663(a)(3) is the source of a district court’s authority, imposing restitution beyond a defendant’s agreement makes a sentence illegal. Therefore, we should give *de novo* review because that is the standard to review whether a sentence exceeds the statutory maximum. *See Chem. & Metal Indus.*, 677 F.3d at 752. The Government responds that plain-error review applies because Tolentino did not challenge the amount of restitution in district court. *See United States v. De Leon*, 728 F.3d 500, 507 (5th Cir. 2013).

[Appendix B, at pp.8-9].

The court then noted that different portions of the plea agreement tended to point in different directions on the question of whether Petitioner could be made to pay restitution for other people’s criminal conduct. *See* [Appendix B, at p.10][“Whether the better interpretation of this agreement should limit restitution by reference only to Tolentino’s own conduct or instead could include the relevant conduct of others need not be determined on our plain-error review. It is enough to

say that the choice between the two is subject to reasonable dispute.”] As such, it found no plain error. *See* [Appendix B, at p.10].

Nor did it find clear or obvious error in the district court’s conclusion that all of the restitution stemmed from “relevant conduct” within the meaning of the Sentencing Guidelines and plea agreement. *See* [Appendix B, at p.12]. It notably did not find that either of Petitioner’s claims arising from the plea agreement was wrong, only that neither was *plainly* correct. *See* [Appendix B, at pp.8-12].

REASONS FOR GRANTING THE PETITION

THERE IS A REASONABLE PROBABILITY OF A DIFFERENT RESULT IF THE DEFENDANT IN THE FORTHCOMING CASE OF *UNITED STATES v. LEAL*, No. 16-11330 (5TH CIR.) PREVAILS IN THE COURT BELOW IN A PUBLISHED OPINION.

In *United States v. Chemical & Metal Industries, Inc.* 667 F.3d 750 (5th Cir. 2012), the court below held that a court may not impose “a restitution order that exceeds the victim's losses,” and that any such sentence amounted to an illegal sentence. *Chem. & Metal Indus., Inc.*, 677 F.3d at 752. Accordingly, it held that a sentence in excess of such losses represented a sentence “exceeding the statutory maximum,” and that it survived an appeal waiver with an exception for such sentences. *See id.*

The implications of *Chem. & Metal Indus., Inc.* on the appeal of restitution awards in the Fifth Circuit are manifold. Many plea agreements contain appeal waivers with exceptions for sentences in excess of the statutory maximum. Further, the court below has consistently held that illegal sentences must be reversed irrespective of preservation. *See United States v. Del Barrio*, 427 F.3d 280, 282 (5th Cir. 2005); *United States v. Sias*, 227 F.3d 244, 246 (5th Cir. 2000); *United States v. Vera*, 542 F.3d 457, 459 (5th Cir. 2008); *United States v. Thomas*, 2010 U.S. App. LEXIS 5041 (5th Cir. Mar. 10, 2010); *United States v. Moreland*, 253 Fed. Appx. 412, 413 (5th Cir. 2007)(unpublished). And the restitution statutes – 18 U.S.C. §3663, 18 U.S. §3663A, and the statutes that reference them (e.g. 18 U.S.C. §3583(d)) – contain many limitations on restitution apart from the requirement that victims must bear

some loss to trigger an obligation. Those statutes require that restitution be limited to the extent of loss, *see* 18 U.S.C. §§3663(a)(2), 3663(b)(1)(B), 18 U.S.C. §§3663A(a)(2), 3663A(b)(1)(B), and that it be limited to the offense of conviction, barring a plea agreement, *see* 18 U.S.C. §3663(c)(2) , 18 U.S.C. 3663A(c)(2)..

The opinion below, however, held that *Chem. & Metal Indus., Inc.* does not extend to all manner of restitution error. *See* [Appendix B, at pp. 5, 8-9]. According to the opinion below, it is limited solely to cases involving no victim loss at all. *See* [Appendix B, at p.5]. As such, the opinion below did not permit plenary review of unpreserved restitution errors in cases involving some victim loss. *See* [Appendix B, at p.5]. That interpretation of *Chem. & Metal Indus., Inc.* caused the court below to affirm Petitioner's restitution judgment in spite of the fact that it contained no credit for payments to the IRS by taxpayers, which would reduce the actual loss to that entity. *See* [Appendix B, at p.7]. Likewise, that interpretation caused the court below to affirm in spite of serious question about whether restitution for certain relevant conduct was authorized by the plea agreement. *See* [Appendix B, at p. 10].

The court below will shortly decide *United States v. Leal*, No. 16-11330 (5th Cir.). In *Leal*, the defendant alleges that a restitution award for child pornography exceeds the statutory maximum because it encompasses losses not proximately caused by the defendant's own conduct. *See* Appellant's Initial Brief in *United States v. Leal*, No. 16-11330, at pp.15-16 (5th Cir. Filed March 19, 2018) ("Whether or not he has expressly reserved the right to appeal a sentence in excess of the statutory maximum, his waiver of appeal would not prevent him from appealing such a

sentence.”) As such, he contends that his appeal waiver impliedly reserves the right to challenge his restitution judgment as an illegal sentence. *See id.* In the event that *Leal* succeeds and obtains a published opinion, that authority will reverse the chief ground of decision in Petitioner’s case. Specifically, it may create a published authority standing for the proposition that restitution sentences exceeding compensable losses constitute an illegal sentence in excess of the statutory maximum even if the victim bore some loss.

This Court may grant *certiorari*, vacate the judgment below, and remand for reconsideration (GVR) in light of developments following an opinion below when those developments “reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation...” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The most common such development is of course an intervening decision of this Court. But GVR has been deemed appropriate by this Court “in light of a wide range of developments,” including “state supreme court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.” *Lawrence*, 516 U.S. at 167 (citing *Conner v. Simler*, 367 U.S. 486 (1961); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Schmidt v. Espy*, 513 U.S. 801 (1994); *National Labor Relations Bd. v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Louisiana v. Hays*, 512 U.S. 1230

(1994); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971); *Cuffle v. Avenenti*, 498 U.S. 996 (1990), and *Nicholson v. Boles*, 375 U.S. 25 (1963)).

An intervening published decision in *Leal* would fit comfortably within this framework, if it held that *Chem. & Metal Indus., Inc.* is not limited to cases involving no victim loss, or otherwise held that restitution errors other than the total absence of victim loss constitute an illegal sentence in excess of the statutory maximum. Such a decision would overturn the chief ground of decision – the standard of review – and open the merits of the restitution claims to plenary review. Notably, the Court below did not hold that the restitution judgment was correct. *See* [Appendix B, at pp.5-12]. Indeed, it expressed some doubt as to whether the plea agreement authorized the judgment. *See* [Appendix B, at p.10].

CONCLUSION

This Court should hold the instant Petition pending the outcome of *Leal*, and then grant certiorari, vacate the judgment below and remand for reconsideration.

Respectfully submitted this 2nd day of July, 2019,

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