

No. _____

In the Supreme Court of the United States

October Term, 2019

ROBERTO TRINIDAD DEL CARPIO FRESCAS, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
Chief of Appeals
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether this Court should clarify what “reliable evidence” means for establishing, by a preponderance of the evidence, the amount of restitution under the Mandatory Victim’s Restitution Act, 18 U.S.C. § 3663A.

No. _____

In the Supreme Court of the United States

October Term, 2019

ROBERTO TRINIDAD DEL CARPIO FRESCAS, Petitioner,

v.

UNITED STATES OF AMERICA

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

Petitioner Roberto Trinidad Del Carpio Frescas asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 20, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.....	1
CONSTITUTIONAL PROVISION INVOLVED	1
FEDERAL STATUTE INVOLVED.....	1
STATEMENT	1
REASONS FOR GRANTING THE WRIT	9
<p style="padding-left: 40px;">The Court should grant certiorari to clarify what is reliable evidence for the purposes of the amount of restitution under the Mandatory Victim’s Restitution Act, 18 U.S.C. § 3663A. ..9</p>	
CONCLUSION.....	14
APPENDIX A <i>United States v. Del Carpio Frescas</i> , 932 F.3d 324 (5th Cir. July 29, 2019)	
APPENDIX B 18 U.S.C. § 3663A	

TABLE OF AUTHORITIES

Cases

<i>United States v. Beydoun</i> , 469 F.3d 102 (5th Cir. 2006).....	9
<i>United States v. Boccagna</i> , 450 F.3d 107 (2d Cir. 2006)	10
<i>United States v. Burks</i> , 678 F.3d 1190 (10th Cir. 2012).....	12
<i>United States v. Cavallo</i> , 790 F.3d 1202 (11th Cir. 2015).....	14
<i>United States v. Chalupnik</i> , 514 F.3d 748 (8th Cir. 2008).....	12
<i>United States v. Coriaty</i> , 300 F.3d 244 (2d Cir. 2002)	10
<i>United States v. Del Carpio Frescas</i> , 932 F.3d 324 (5th Cir. 2019).....	7, 8
<i>United States v. Fu Sheng Kuo</i> , 620 F.3d 1158 (9th Cir. 2010).....	11
<i>United States v. Garcia-Sanchez</i> , 189 F.3d 1143 (9th Cir. 1999).....	11
<i>United States v. Hairston</i> , 888 F.2d 1349 (11th Cir. 1989).....	13
<i>United States v. Heckel</i> , 570 F.3d 791 (7th Cir. 2009).....	11
<i>United States v. Huff</i> , 609 F.3d 1240 (11th Cir. 2010).....	14
<i>United States v. Lopez</i> , 503 F. App'x 147 (3d Cir. 2012)	11

<i>United States v. Panice</i> , 598 F.3d 426 (7th Cir. 2010).....	11
<i>United States v. Qurashi</i> , 634 F.3d 699 (2d Cir. 2011)	9
<i>United States v. Rhodes</i> , 330 F.3d 949 (7th Cir. 2003).....	12
<i>United States v. Salas-Fernandez</i> , 620 F.3d 45 (1st Cir. 2010)	11
<i>United States v. Scher</i> , 601 F.3d 408 (5th Cir. 2010).....	10
<i>United States v. Sharma</i> , 703 F.3d 318 (5th Cir. 2012).....	9
<i>United States v. Sheinbaum</i> , 136 F.3d 443 (5th Cir. 1998).....	10
<i>United States v. Waknine</i> , 543 F.3d 546 (9th Cir. 2008).....	11
Constitutional Provision	
U.S. Const., amend. V.....	1
Statutes	
18 U.S.C. § 1343.....	3
18 U.S.C. § 1957.....	3
18 U.S.C. § 3663(e).....	13
Mandatory Victim’s Restitution Act, 18 U.S.C. § 3663A	i, 1, 9, 10, 13
18 U.S.C. § 3663A(a)(1)	9
18 U.S.C. § 3663A(a)(2)	9

18 U.S.C. § 3663A(b).....	9
18 U.S.C. § 3663A(b)(1)(B)	10
18 U.S.C. § 3663A(c)(1).....	9
18 U.S.C. § 3664(e).....	10, 11
28 U.S.C. § 1254(1)	1

Rules

Sup. Ct. R. 13.1	1
------------------------	---

OPINION BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Del Carpio Frescas*, 932 F.3d 324 (5th Cir. 2019), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Petitioner’s case on July 29, 2019. This petition is filed within 90 days after entry of the judgment. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law”

FEDERAL STATUTE INVOLVED

The text of the Mandatory Victim’s Restitution Act, 18 U.S.C. § 3663A, is reproduced in Appendix B.

STATEMENT

A jury found Roberto Trinidad Del Carpio Frescas guilty of 24 counts of wire fraud and 10 counts of money laundering. The district court sentenced Del Carpio to a total of 235 months’ imprisonment on the wire fraud counts and ordered him to pay \$5,402,661 in restitution.

1. The investigation. Detective Nichole Ramm, a certified fraud examiner with the El Paso Police Department, began an investigation of Del Carpio after Luz Martinez filed a complaint. Along with interviewing Martinez, Detective Ramm spoke with over 100 people, most of whom were from Chihuahua, Mexico. The general complaint was “theft” and that “they had invested money that they did not believe had been invested.” Some of them were able to produce documentation of the money they had invested. That documentation showed investments around \$6,500,000.00. It appeared to be a Ponzi scheme.

To help determine whether it was a Ponzi scheme, the El Paso Police Department reached out to U.S. Secret Service Agent Brian Cummings. While the police department interviewed the investors, Cummings focused on interacting with the banks, issuing subpoenas, and analyzing the cash flow. Del Carpio’s bank records were subpoenaed from three different banks: Wells Fargo, Bank of America, and JP Morgan Chase. The investigators analyzed the bank records to determine what money had come in, when it had come in, and where the money went. They also were looking to see whether the money was being filtered through investors, to establish that it was a Ponzi scheme.

To determine whether Del Carpio was actually investing any of the money, the investigators subpoenaed records from four brokerage firms. They analyzed the brokerage firm accounts to determine what funds were deposited, withdrawn, and traded. The investigators also examined the brokerage applications to see whether Del Carpio declared that he used the accounts to trade other people's money. On each application, Del Carpio indicated that he was investing only his own money.

2. The indictment. As a result of the investigation, Del Carpio was indicted on 25 wire fraud counts, in violation of 18 U.S.C. § 1343, and 10 money laundering counts, in violation of 18 U.S.C. § 1957. The Government alleged that, from August 10, 2010, to January 7, 2012, Del Carpio knowingly devised a scheme to defraud and obtain property from individuals by convincing them to give him their money to invest and promising significantly higher returns than normal. Del Carpio pleaded not guilty and went to trial before a jury.

3. The jury trial. At trial, Detective Ramm and Agent Cummings testified. Ramm testified about obtaining records, talking to investor victims, and researching Del Carpio's businesses. Ramm verified that Del Carpio was not a licensed broker or financial advisor in the United States. Agent Cummings testified about his

analysis of the bank and brokerage records. Cummings saw funds moving back and forth between Del Carpio's bank accounts and trading accounts. Through his analysis, Cummings believed that, of the \$6.5 million invested, around \$1.7 million in investor money went from the bank accounts to the trading accounts, and that about \$1.5 million was lost in trades. Both investigators testified that Del Carpio was involved with several banks in Mexico, including Banco Monex and Scotiabank. The investigators did not get documents from the banks in Mexico because U.S. subpoenas are not honored there. The Government introduced the bank records from Del Carpio's accounts with Wells Fargo, JP Morgan Chase, and Bank of America.

A number of individuals from Chihuahua, Mexico, testified about their investments with Del Carpio. Some began investing with Del Carpio because friends had recommended him. Others had met Del Carpio through a training at his office in El Paso in which he claimed to be a successful investor. The investors named in Counts 1 to 22 of the indictment identified the wire transfers they had made to Del Carpio's U.S. bank accounts. Some of the investors had also sent money to Del Carpio's Mexican bank accounts. Many of the investors testified that they received contracts from Del Carpio guaranteeing that their investment was

risk free and promising monthly rates of return of 7% to 15%. Most received some returns on their investments. Some of these individuals were included in the indictment and some were not.

Among the investors to testify was Luz Martinez Rivera. She was a retired teacher who invested \$165,000 with Del Carpio. She withdrew money from her Mexican bank account and deposited the money into Del Carpio's account at Wells Fargo Bank in El Paso. Luz Martinez testified that she never received a single payment on her investment. Her son Cesar Robles Martinez, an attorney, testified that his mother also had a Wells Fargo account but he was not aware that his mother had received \$27,000 from Del Carpio into that account.

The jury found Del Carpio guilty on all 34 counts.

4. The sentencing hearing. The district court heard evidence on Del Carpio's objections. During the hearing, Detective Ramm testified that there were more than 100 victims of the fraud scheme. She described the scheme as "a friends and family network" in which people other than Del Carpio and his associates spread the word about the beneficial investments and unknowingly furthered the fraudulent scheme. Four investors, but not Luz Martinez, testified for the government. The investors, along with victim impact statements, described the substantial financial hardship suffered

because of the fraud scheme. The district court sentenced Del Carpio to a total of 235 months' imprisonment.

5. The restitution hearing. The district court held an evidentiary hearing on restitution. Detective Ramm explained that, during the investigation, she had created document folders for each individual investor who was claiming a loss. In response to questions by defense counsel, Ramm testified that she was unaware of any Wells Fargo account belonging to Luz Martinez.

Mike Petron, a certified public accountant and fraud examiner, testified about his restitution calculations. Petron examined three sets of documents: 1) the investor document folders provided by Detective Ramm; 2) the records from Del Carpio's bank accounts with Wells Fargo, Bank of America, and JP Morgan Chase; and 3) the documents provided by defense counsel. He examined these records to calculate the amount of loss for each investor, taking into account any investment returns they received. In determining both the investments and the returns, Petron counted only those transactions verified by third-party documentation, namely bank records. Petron determined that Del Carpio owed \$5,402,661 in restitution.

Del Carpio objected to the recommended amount, arguing that Petron should have credited five payments he had made to Luz

Martinez of \$4,470 each. His supporting documentation consisted of screenshots of five emails from Banco Monex to Del Carpio verifying the transfer of money to Luz Martinez's Wells Fargo Bank account. Petron did not include this amount in the returns to investors. The district court accepted the recommended restitution amount of \$5,402,661 in restitution.

On appeal, Del Carpio challenged the sufficiency of the evidence on numerous wire fraud and money laundering counts. The Fifth Circuit held that the evidence was sufficient. *United States v. Del Carpio Frescas*, 932 F.3d 324, 328–31 (5th Cir. 2019) Del Carpio also challenged his sentence, arguing that the district court plainly erred in calculating the Guidelines range. The Fifth Circuit agreed and remanded the case for resentencing. *Id.* at 331–33. Finally, Del Carpio challenged the restitution order, arguing that the district court had erred by failing to reduce the amount for additional payments he had made to some of the investors. The district court had rejected Del Carpio's evidence because it did not consist of third-party documentation, namely bank records, but instead screenshots of emails from a Mexican bank, Banco Monex. The Fifth Circuit affirmed the restitution order, holding, among other

things, that “the district court did not abuse its discretion by demanding bank documentation rather than email screenshots[.]” *Id.* at 331.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to clarify what is reliable evidence for the purposes of the amount of restitution under the Mandatory Victim’s Restitution Act, 18 U.S.C. § 3663A.

The Mandatory Victim’s Restitution Act (MVRA), 18 U.S.C. § 3663A, authorizes restitution to a victim directly and proximately harmed by a defendant’s offense of conviction. 18 U.S.C. § 3663A(a)(1), (a)(2), (c)(1). The purpose of restitution under the MVRA is to compensate victims for losses, not to punish the defendant for ill-gotten gains. *United States v. Beydown*, 469 F.3d 102, 108 (5th Cir. 2006). A restitution award greater than the victim’s actual loss exceeds the MVRA’s statutory maximum. *Id.* at 107. An excessive restitution cannot be excused by harmless error; every dollar must be supported by record evidence. *United States v. Sharma*, 703 F.3d 318, 323 (5th Cir. 2012).

The MVRA provides a formula for calculating a defendant’s restitution amount. *See* 18 U.S.C. § 3663A(b). The “primary and overarching goal of the MVRA is to make victims of crime whole”: to “compensate these victims for their losses and to restore the[m] to their original state of well-being.” *United States v. Qurashi*, 634 F.3d 699, 703 (2d Cir. 2011) (internal quotation marks omitted). To fulfill this objective without “award[ing] the victim a windfall, i.e., more in restitution than he actually lost,” the MVRA caps the

restitution award at the actual “amount of the victim’s loss.” *United States v. Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006); *see also United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (“Unlike loss calculations, a court’s power to order restitution is limited to actual loss.”). In the case of offenses involving monetary loss, that amount equals the greater of the value of the property lost less the value of any part of the property that is returned. 18 U.S.C. § 3663A(b)(1)(B).

Under the MVRA, the government bears the burden to demonstrate the amount of loss sustained by a victim. 18 U.S.C. § 3664(e). The defendant bears the burden of demonstrating his/her financial resources and financial needs. *Id.* The burden of demonstrating other matters shall be on “the party designated by the [sentencing] court as justice requires.” *Id.* If the sentencing court so designates, the defendant may have the burden to show entitlement to an offset against the amount of actual loss. *See United States v. Sheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998) (defendant is in best position and has incentive to lower his restitution order). The defendant must present rebuttal evidence showing that the restitution calculation is inaccurate. *United States v. Scher*, 601 F.3d 408, 413 (5th Cir. 2010). When the defendant creates a real doubt over the accuracy of the proposed restitution amount, the government has

the burden of demonstrating its reliability. *United States v. Panice*, 598 F.3d 426, 439–40 (7th Cir. 2010) (citing *United States v. Heckel*, 570 F.3d 791, 795–96 (7th Cir. 2009)). A dispute over the proper amount of restitution is to be resolved by the sentencing court by a preponderance of the evidence. 18 U.S.C. § 3664(e). The preponderance standard requires “evidence that possesses ‘sufficient indicia of reliability to support its probable accuracy.’” *United States v. Wankine*, 543 F.3d 546, 557 (9th Cir. 2008) (quoting *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1148–49 (9th Cir. 1999)).

What type of evidence is reliable for purposes of determining the amount of restitution? Courts have held that the government need only provide a modicum of reliable evidence, in meeting its burden of establishing the amount of loss. *See United States v. Salas-Fernandez*, 620 F.3d 45, 48 (1st Cir. 2010) (presentence report restitution amount divided by number of defendants); *United States v. Lopez*, 503 F. App’x 147, 149 (3d Cir. 2012) (government spreadsheet and unsworn letter by victim sufficient). Victim affidavits supplied by the government are generally a sufficient basis for restitution. *See United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1167 (9th Cir. 2010). Speculation, by the government or the defendant, cannot support the amount of restitution. *See United*

States v. Chalupnik, 514 F.3d 748, 754–55 (8th Cir. 2008) (government); *United States v. Burks*, 678 F.3d 1190, 1198–99 (10th Cir. 2012) (defendant). The Seventh Circuit has held that offset evidence will not be credited in the absence of “documented proof.” *United States v. Rhodes*, 330 F.3d 949, 953–54 (7th Cir. 2003).

Here, Del Carpio presented “documented proof” that the restitution amount was excessive because it failed to credit returns in the amount of \$22,350.00 to one of the investors, Luz Martinez. Del Carpio provided screenshots of five emails from Banco Monex confirming payments made to Luz Martinez’s Wells Fargo account. At trial, Luz Martinez’s son, Cesar Martinez, confirmed that she had such an account, although he did not know whether his mother had received any returns from Del Carpio to that account. The emails were from an email address @monex.com.mx. There was testimony that Del Carpio had a Banco Monex account in Mexico. The emails confirmed that deposits had been made from Del Carpio’s Banco Monex account. Some of the other investor victims testified to having received returns from the Monex account. The emails also confirmed that the deposit was received by the destination bank of Wells Fargo and the beneficiary was Luz Elva Martinez Rivera. For purposes of restitution, these emails contained sufficient reliability to prove these returns by a preponderance of

the evidence or, at the least, to raise a clear doubt so as to shift the burden to the government to prove its restitution amount was reliable.

But the Fifth Circuit held that, because the emails did not constitute “bank documentation,” the district court did not err in refusing to consider them. Neither 3663A nor 3663(e) requires third-party or “bank documentation” for proving the amount of restitution. All that is required is a sufficient indicia of reliability. Here, the emails had a sufficient indicia of reliability—the screenshot was made by the defendant’s attorney, the information in the emails was detailed as to the banks, the amounts, and the dates of the returns, and information was corroborated by testimony at trial. *See United States v. Hairston*, 888 F.2d 1349, 1354 (11th Cir. 1989) (hearsay evidence in letter by bank’s attorney was sufficiently reliable for restitution order where letter contained substantial details and was substantially corroborated by evidence at trial).

It cannot be that the government need only prove the amount of restitution by a modicum of reliable evidence while the defendant must meet a higher standard for rebuttal evidence. The purpose of restitution “is not [] to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible,

are made whole for their losses.” *United States v. Cavallo*, 790 F.3d 1202, 1238–39 (11th Cir. 2015) (quoting *United States v. Huff*, 609 F.3d 1240, 1249 (11th Cir. 2010)). This Court should grant certiorari to clarify what “reliable evidence” means for purposes of restitution.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Judy Fulmer Madewell
JUDY FULMER MADEWELL
Chief of Appeals

Counsel of Record for Petitioner

DATED: October 28, 2019.