No.

IN THE SUPREME COURT OF THE UNITED STATES

ROSS ANTHONY FARCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
walt@wfkplaw.com
Attorney for Petitioner

THE QUESTION PRESENTED

"Federal courts cannot order restitution in a criminal case without a statutory basis." *United States v. Lachowski,* 405 F.3d 696, 698 (8th Cir. 2005).

The Victim and Witness Protection Act, 18 U.S.C. §3663, authorizes a court to order a defendant convicted of an offense described in Title 18 of the Criminal Code to pay restitution resulting from "damage to or loss or destruction of property of a victim of the offense."

When petitioner joined the Army in 2017 his application stated he had no mental health history. Shortly after he reported for basic training he got into an altercation with another recruit, and was discharged. Two years later in an unrelated case his medical records fell into the hands of federal authorities. They showed he had been in regular contact with a psychiatrist since 2011.

Petitioner pled guilty to making a false statement in a matter within the jurisdiction of an executive agency of the government. 18 U.S.C. § 1001(a)(2). The district court ordered restitution to the Army in the amount of $17,832, which the Army claimed was the cost to recruit and train a typical recruit for 36 days, the length of time petitioner was in the Army.

The question presented is whether petitioner's offense of making a false statement about his mental health history resulted in "damage to or loss or destruction of property" of the Army.

LIST OF PARTIES

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

RELATED CASES

There are no related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

STATUTES

RULES OF COURT

TREATISES

OTHER RESOURCES

IN THE UNITED STATES SUPREME COURT

ROSS ANTHONY FARCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Ross Anthony Farca petitions this court for a writ of certiorari to the Court of Appeals for the Ninth Circuit, which upheld the district court's order for him to make restitution to the United States Army in the amount of $17,832 following his conviction for making a false statement when he applied to join the Army.

THE ORDERS BELOW

The memorandum decision of the Court of Appeals affirming the district court's award of restitution appears at App. A-1, and is unpublished. The order denying a Petition for Rehearing and Rehearing En Banc appears at App. A-5, and is unpublished.

JURISDICTION

The district court had jurisdiction of Petitioner's criminal case pursuant to 28 U.S.C. § 3231 as an offense against the laws of the United States.

The Court of Appeals had jurisdiction of the appeal from a final judgment of a district court pursuant to 28 U.S.C. § 1291.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1) as a petition to review a decision by a court of appeals.

The Court of Appeals decision affirming the order of restitution was entered on October 20, 2021. Appendix, p. App. 1. The order denying the Petition for Rehearing and Rehearing En Banc was entered December 2, 2021. Appendix, p. App. 5. This petition is filed within 90 days of that denial, and is timely pursuant to Rule 13.1 of the rules of this Court.

THE STATUTE INVOLVED

The Victim and Witness Protection Act provides, in pertinent part:

18 U.S.C. § 3663. Order of restitution

(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) The order may 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, impractical, or inadequate, pay an amount equal to 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 the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

BACKGROUND

"It is well-established that a federal court may not order restitution except when authorized by statute." *United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998); see also *United States v. Gutierrez-Avascal,* 542 F.3d 495, 497 (5th Cir. 2008) ["A federal court cannot order restitution except when authorized by statute" (citation omitted)].

Congress first authorized courts in 1925 to order restitution as a part of probation. See Cortney E. Lollar, *What Is Criminal Restitution*?, 100 Iowa L. Rev. 93, 96 n.5 (2014). It was not until 1982 that Congress passed, and President Reagan signed, the Victim and Witness Protection Act (VWPA) codified at Title 18 §3663, which gives the sentencing court discretion to impose an order of restitution for a conviction of an offense under Title 18 and certain other enumerated statutes. *United States v. Koutsostamatis*, 956 F. 3d 301, 303 (5th Cir. 2020) [tracing development of the law of restitution].

In 1996 Congress passed the Mandatory Victims Restitution Act (MVRA), which required mandatory, not discretionary, restitution in cases involving certain specified crimes, including crimes of violence, an offense against property, tampering with consumer products, or theft

of medical products.[1] Pub. L. No. 104-132, Title II, §§ 201-211, 110 Stat. 1214 (1996), codified at 18 U.S.C. § 3663A(c)(1). *United States v. Koutsostamatis*, *supra* 956 F. 3d at 304; *United States v. Papagno*, 639 F.3d 1093, 1096 (D.C. Cir. 2011).

The language of the 1996 Act is similar, although not identical, to the 1982 Act, and courts often look to cases interpreting one when interpreting the other. *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004).

Under both Acts, the four categories of losses which justify restitution are:

(i) damage to or loss or destruction of property, 18 U.S.C. § 3663(b)(1); 18 U.S.C. § 3663A(b)(1);

(ii) bodily injury including the cost of medical care, psychiatric and psychological care, physical and occupational rehabilitation, and the victim's lost income, 18 U.S.C. § 3663(b)(2); 18 U.S.C. § 3663A(b)(2);

(iii) if the bodily injury results in death, the cost of funeral and related services, 18 U.S.C. § 3663(b)(3); 18 U.S.C. § 3663A(b)(4); and

(iv)the victim's expenses incurred during participation in the investigation or prosecution of the offense, U.S.C. § 3663(b)(4); 18 U.S.C. § 3663A(b)(4).

3 C. Wright, A. Leipold, P. Henning, & S. Welling, *Federal Practice & Procedure: Criminal* § 546 at p. 245 (4th ed. 2011).

---

[1] In 2008 Congress granted courts additional discretionary authority to order restitution to victims of identity theft. 18 U.S.C. § 3663(b)(6).

STATEMENT OF THE CASE

The Charge

An indictment filed December 3, 2019 in the District Court for the Northern District of California charged that petitioner Ross Farca "did willfully and knowingly make materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the United States Office of Personnel Management National Background Investigations Bureau, an agency of the Executive Branch of the Government of the United States, by knowingly and willfully making materially false, fictitious, and fraudulent statements and representations concerning a material fact, in that defendant ROSS ANTHONY FARCA, falsely certified on an Electronic Questionnaire for Investigations Processing that in the last seven years he had not consulted with a health care professional regarding an emotional or mental health condition, when in fact he had.

"All in violation of Title 18, United States Code, Section 1001 (a)(2)." 1-ER-168-169.[2]

The Underlying Facts

The Presentence Investigation Report at p. 4-5, Paragraphs 5-15, summarizes the facts giving rise to the charge, as provided by the U.S. Attorney.

On June 22, 2017 petitioner went to an Army Recruitment Center in Mountain View, California, where he submitted an application to join the Army. The application included Form F-86, an online background check. The form asked whether, within the last seven years, the

[2] Reference is to the Excerpts of Record filed in the Court of Appeals.

applicant had consulted with a health care professional regarding an emotional or mental health condition. The "No" box was checked.

Petitioner was accepted as an army recruit and on August 28, 2017 he reported for basic training at Fort Benning, Georgia. A few days later he was involved in an altercation with another recruit, and he was referred to a psychiatric unit for approximately 12 days for a mental health evaluation. On October 3, 2017 he was discharged. He had been in the Army some 36 days.

On June 10, 2019 petitioner was arrested on an unrelated matter by the Concord (Calif.) Police Department, assisted by the FBI. In connection with their investigation of that case, the FBI obtained copies of appellant's medical records from Kaiser Medical Group and the Regional Center of the East Bay, an organization that provides community integration and treatment services. Those records showed that petitioner had been diagnosed with autistic disorder and had been in regular contact with a psychiatrist at Kaiser since 2011.

The Plea and Sentence

On April 9, 2020 petitioner pled guilty to making a false statement to a government agency. There was no plea agreement. 1-ER-163.

On May 28, 2020 petitioner was sentenced to the custody of the Bureau of Prisons "for a term of time served," together with three years of supervised release, 1-ER-59, plus a $100 special assessment. 1-ER-62.

The court also ordered that petitioner pay restitution to the United States Army in the amount of $17,832. 1-ER-62. According to the Army's Victim Impact Statement form, the Army suffered a financial loss for what it costs for "recruiting and training" a typical recruit,

which the Army stated was $493 per day, totaling $17,832 for the 36 days petitioner was in the Army.[3] See Victim Impact Statement for Corporate Victims (attached to Presentence Report), p. 1.

The Appeal

Petitioner appealed. The Court of Appeals affirmed the order of restitution, stating, "The costs of recruiting and training Farca are covered by the VWPA," because a district court may award restitution for a violation of Title 18 if the offense "result[s] in damage to or loss or destruction of property," App. 3, and here the Army lost "the value of its investment" in training Farca. App. 4.

REASONS FOR GRANTING THE PETITION

Since the adoption of the Victim and Witness Protection Act in 1982, restitution has become an increasingly important consideration in federal criminal cases. A review of the federal criminal restitution process for fiscal years 2014 through 2016 by the United States Government Accountability Office showed that restitution was ordered for 33,158 offenders during that period, which means that restitution was (and likely will be) a potential issue in approximately 10,000 cases per year. *Federal Criminal Restitution, Report to Congressional Committees* (GAO, 2018). The study also showed that as of the end of fiscal year 2016, $100 billion out of $110 billion in previously ordered restitution had been identified by the United States Attorneys Offices as uncollectible due to the offenders' inability to pay. Nevertheless, a restitution order is enforceable for 20

[3] We calculate $493 times 36 to be $17,748.

years, and will act as a lien in favor of the United States against all property owned by the defendant.

The decision in the case at bench is unpublished, but today unpublished decisions are readily available on the internet. Up until now lost income and the non-productive cost of doing business have uniformly been held not to be recoverable as damage to "property." But would the decision here cause a district judge looking for guidance to think that a loss of the Army's "value of its investment" in training Farca was little different from *any* loss of income, because the victim has an "investment" in his source of income?

This court has often and with great emphasis said that the doctrine of stare decisis is of fundamental importance to the rule of law, particularly in the area of statutory interpretation, where legislative power is implicated. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). The doctrine represents an important social policy, ensures continuity in law and the need to satisfy reasonable expectations of courts and litigants, and is essential to the stability of the law. The decision in the case at bar creates conflict that undermines that stability.

Supreme Court Rule 10 describes appropriate considerations when deciding whether to grant certiorari, and they include conflicts with a decision of another court of appeals and conflicts with relevant decisions of this Court—considerations which reflect the importance of consistency in the law. As we point out below (and as we pointed out in our briefing to the panel), the decision in this case is in conflict with decisions of other courts relating to similar subject matter. When an issue arises 10,000 times a year, it is an important issue. Whether a defendant will incur a sizable debt from a restitution order may, absent this Court's intervention,

depend on where the defendant's case is heard. Within the Ninth Circuit itself, where this decision conflicts with other decisions of the court, the outcome may depend on what panel of judges hears the appeal. The law should not tolerate such inconsistencies.

1.
The Cost of Training a Typical Recruit Is a Mathematical Calculation. It Is Not "Property."

The Court of Appeals' Memorandum Decision relied on *United States v. Luis*, 765 F.3d 1061, 1065-1066 (9th Cir. 2014), a case which applied the Mandatory Victim Restitution Act (MVRA), not the Victim and Witness Protection Act (VWPA). The Memorandum goes on to say that a "pecuniary loss" is an "offense against property" and states that the Army "lost the value of its investment" it put into Farca's training. App. 4.

In *Luis* the defendant was convicted of conspiracy to engage in monetary transactions in "criminally derived property," knowing "the property involved in a financial transaction" represented the proceeds of unlawful activity, in violation of 18 U.S.C. § 1956(h) and §1957, for his part in the purchase of two parcels of real property with fraudulently obtained loans. The applicable restitution statute in *Luis* was the MVRA, 18 U.S.C. § 3663A, which requires a district court to order restitution when a defendant commits an "offense against property," a term not found in the VWPA. The appellate court in *Luis* held that because Luis's crimes infringed on the property interests of the mortgagees, they were offenses against property. *Id*. at 1063.

Even if a "pecuniary loss" were always an "offense against property," as the Court of Appeals in our case seems to say it is, App. 4, that would have no bearing on petitioner's offense, because the term

"offense against property" appears only in the MVRA, not the VWPA. The question in our case is whether petitioner's false statement on his application was an offense "resulting in damage to or loss or destruction of property." 18 U.S.C. § 3663(b)(1).

The very crimes in *Luis* themselves—crimes involving monetary transactions "in criminally derived property," 18 U.S.C. § 1957(a)—show they were offenses "against property," but that is of little assistance in determining whether the cost for recruiting and training a typical recruit is "property." Mortgagees have a property interest in the real property they have a lien on, and one can point to actual physical parcels of their property whose value suffered a loss from Luis's fraud.

But what "property" owned by the Army was damaged by petitioner's false statement about his mental health history? Before there can be an infringement "on a victim's property interest" (see App. 3), there must be property that the victim has an interest in. The "cost of training" as recruit is not property. It embodies no physical existence. It cannot be touched. It is merely a number that was calculated by dividing the Army's total cost of training it's recruits by the total number of its recruits. The resulting number is not property or a "property interest" owned by the Army. It may be viewed as a consequential damage, but the VWPA does not authorize restitution for consequential damages.

2.
The Ninth Circuit's Decision Is in Conflict With Other Decisions of the Courts of Appeals on the Same Matter.

Not only is the *Luis* decision inapplicable to the facts of our case, the decision in this case, finding that the cost to train a recruit is damage to a property interest, is in conflict with other Court of Appeals decisions which disallow restitution for consequential damages.

In *United States v. Hicks*, 997 F.2d 594, 600 (9th Cir. 1993), for example, the Court of Appeals reversed an award of restitution for the cost of psychological counseling and lost productivity for employees of the Internal Revenue Service (who sustained no physical injuries) after the defendant used explosives to attack several IRS buildings. The court reasoned that the VWPA allows restitution for the cost of counseling if the victims suffered bodily injury, but the part of the statute allowing restitution for property damage does not.

In *United States v. Brock-Davis*, 504 F.3d 991, 996, 1002 (9th Cir. 2007) the court distinguished between property damage and consequential damages when it allowed restitution under the MVRA for the cost to clean up a motel room the defendant had used as a meth lab, but denied restitution for rental income lost during the cleanup period, stating "lost revenue is a consequential damage" excluded by the statute.

The Ninth Circuit in these cases did not consider the value of the Internal Revenue Service's "investment" in its employees, or a motel owner's "investment" in a motel room, to be "property" entitling them to restitution. Would a three-judge panel re-think those cases after reading the decision in the case at bar?

The panel's decision also conflicts with decisions of courts of appeals in other circuits. In *United States v. Simmons*, 235 F.3d 826, 834 (3d Cir. 2000) the court affirmed a restitution award for the replacement value of home furniture lost due to arson, but reversed an order for restitution for increased insurance premiums from loss of a "no claim discount," concluding that premium discounts do not in any way constitute "the value of property" lost, damaged or destroyed by the offense See also *United States v. Mullins,* 971 F.2d 1138, 1144 (4th

Cir. 1992) [restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees spent to recover property fraudulently acquired by the defendant]; *United States v. Sprouse*, 58 F.Appx. 985, 990 (4th Cir. 2003) [loss of property from defendant setting fire to timber in a National Forest included value of vegetation destroyed, but not the costs to the Forest Service of fire suppression]; *United States v. Mitchell*, 876 F.2d 1178, 1183 (5th Cir. 1989) [restitution order relating to stolen trucks; § 3663(b)(1)'s restitution authorization for loss of property, unlike an offense that results in bodily injury, "contains no authority to order restitution for lost income"]; *United States v. Arvanitis*, *supra* 902 F.2d 489, 497 [restitution for consequential damages, such as legal fees expended to investigate a fraudulent insurance claim, are unavailable under the VWPA].

3.
The Ninth Circuit's Memorandum Decision Conflicts in Principle With This Court's Decision in *Lagos v. United States*.

In addition, the panel's memorandum decision relied on the fact that in the *Luis* case the Ninth Circuit adopted a broad interpretation of the restitution statute. App. 3. However, the memorandum decision overlooked that four years later in *Lagos v. United States*, 584 US __ , 138 S.Ct. 1684, 201 L.Ed. 2d 1 (2018) this Court, noting that the Ninth Circuit had adopted a broad interpretation of a companion subsection of the same restitution statute involving investigation costs, interpreted the statute much more narrowly, effectively abrogating "broad interpretation" cases such as *United States v. Luis*. The Court in *Lagos* pointed out that although a broad reading of the statute would serve

the purpose of ensuring that victims of a crime receive full restitution, the words of the statute itself do not suggest breadth. *Id*. at 1689. There is no question, said the court, that Congress knew how to enact a statute giving the courts power to order restitution for categories of losses more broad than are allowed by the VWPA and MVRA, because in 1994 it enacted at least four such statutes:

> [Sexual Abuse Crimes] 18 U.S.C. § 2248(b)(3): Mandatory restitution for "the full amount of the victim's losses," including lost income and "any other losses suffered by the victim as a proximate result of the offense;"
>
> [Sexual Exploitation of Children] 18 U.S.C. § 2259(c)(2): Mandatory restitution for "the full amount of the victim's losses," including any costs incurred "as a proximate result of the offense involving the victim;"
>
> [Domestic Violence] 18 U.S.C. § 2264(b)(3)(G): Mandatory restitution for "the full amount of the victim's losses," including lost income and "any other losses suffered by the victim as a proximate result of the offense;"
>
> [Telemarketing Fraud] 18 U.S.C. § 2327(b)(7): Mandatory restitution for "all losses suffered by the victim as a proximate result of the offense."

Such statutes, said the Court in *Lagos*, specifically require full restitution for "any . . . losses suffered by the victim as a proximate result of the offense," while the MVRA contains no such language; rather "it specifically lists the kinds of losses and expenses that it covers." *Lagos*, 38 S. Ct. at 1690.

Although the Court in *Lagos* did not specifically address the VWPA, the VWPA, like the MVRA, lists the specific kinds of losses it covers. "It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it

in another." *BPF v. Resolution Trust Corp*., 511 U.S. 531, 537 (1994) [alteration, internal quote marks and citation omitted].

4.
The Memorandum Decision Also Conflicts with Descriptions of "Property" Used by the Army Itself.

The Army considers its "resources" to include property, people, and time. Handbook No. 10-19, *Small Unit Leader's Guide to Command Supply Discipline Program* (Center for Army Lessons Learned, U.S. Army Quartermaster School, Jan. 2010), p. i.

The Army seems to have a regulation for almost everything, and this includes property. Army Regulation 735-5, *Property Accountability Principles* (Department of the Army, 2016) consists of 188 pages of "basic policies for accounting for Army property and accounting for lost, damaged, or destroyed Army property." *Id*., p. i.

The Regulation is evidence that even the Army does not consider the cost to train a typical recruit to be "property."[4] It states, in pertinent part:

> **2–2. Accounting for Army property**
>
> *a.* All property (including historical artifacts, art, flags, organizational property, and associated items) acquired by the Army from any source, whether bought, scrounged, or donated, must be accounted for as prescribed by this regulation and other appropriate ARs. The accounting will be continuous from the time of acquisition until the ultimate consumption or disposal of the property occurs. Supporting documents will be maintained as prescribed by appropriate regulations.

[4] The Army submitted a Victim Impact Statement on a government form and stated it suffered a loss, but it did not assert that petitioner damaged Army property.

> *b.* Property is categorized for financial accounting and reporting purposes as tangible property both real and personal property. Real property consists of lands and permanent structures (see chap 4). Personal property is made up of equipment and other nonexpendable supplies, collectively called nonconsumable supplies, all consumable supplies (see chap 4), and relocatable buildings.
>
> * * *
>
> *d.* All Army property, except real property, will be classified for property accounting purposes as expendable, durable, or nonexpendable.
>
> * * *

Id., at p. 2-3.

CONCLUSION

The memorandum decision reasons that the Army expended money to recruit and train petitioner, with the expectation that after basic training he would perform services for the Army. The court's decision concludes that the Army lost the "value of its investment" in that training when petitioner was discharged after only 36 days, and that was damage to, or loss of, "property." The decision does not thoughtfully distinguish the conflicting decisions cited in petitioner's briefs, or offer insights that might help guide other courts.

As this court pointed out in *Lagos v. United States*, 135 S.Ct. at 1690, Congress has enacted many different restitution statutes with different language, governing different circumstances. Some statutes authorize restitution for "any . . . losses suffered by the victim," but the VWPA contains no such language; it limits restitution to damage to "property." Are the services the Army expected to receive from petitioner in return for its investment in him a kind of "property"? Was the bed in the

barracks the Army provided petitioner property that was "lost" or "damaged"? Is "pecuniary loss" of any kind damage to property?

Perhaps so. But if that was what Congress intended, one wonders why Congress did not simply say restitution can be ordered for any losses suffered by the victims, like it did in the statutes cited by this Court in the *Lagos* decision. How should courts view statements by this Court which say things like, "We would not presume to ascribe this difference to a simple mistake in draftsmanship"? *Russello v. United States*, 464 U. S. 16, 23 (1983).

Rather than leaving such questions unanswered, this court should grant certiorari and allow the parties to address the issue in briefs on the merits. One of the primary purposes of certiorari jurisdiction is to bring about uniformity of decisions on such matters among the federal courts of appeals.

Consistency in court decisions promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

The VWPA does not define "property." Court decisions have denied restitution for anticipated rental income from a damaged motel room that cannot be used, *United States v. Brock-Davis*, *supra* 504 F.3d 991, and have denied restitution for lost income from stolen trucks, *United States v. Mitchell*, *supra* 876 F.2d 1178. Now we have a court decision which says the definition of property includes anticipated services resulting from the victim's training of the offender. If such a broad reading of the statute is a correct statement of the law, this Court should

grant the petition and say so, to resolve the conflict with numerous other court of appeals decisions.

Respectfully submitted,

/s/Walter K. Pyle

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
Attorney for Petitioner

Appendix

Memorandum Decision of the Court of Appeals

2021 U.S.App. LEXIS 31533

October 20, 2021

NOT FOR PUBLICATION

FILED

OCT 20 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROSS ANTHONY FARCA, Defendant-Appellant.	No. 20-10184 D.C. No. 4:19-cr-00643-JST-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted October 18, 2021**
San Francisco, California

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,*** District Judge.

Ross Anthony Farca ("Farca") appeals an order requiring him to pay restitution to the United States Army ("Army") after pleading guilty to making a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

false statement to a government agency in violation of 18 U.S.C. § 1001(a)(2). We have jurisdiction under 28 U.S.C. § 1291. We "review de novo the legality of a restitution order." *United States v. Peterson*, 538 F.3d 1064, 1074 (9th Cir. 2008). We also review de novo whether a defendant has waived his statutory right to appeal. *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997).

Farca answered "No" to a question on an Army background check form asking if he had consulted with a health care professional regarding an emotional or mental health condition in the last seven years. Based partly on this representation, Farca was admitted into the Army. Shortly after his admission, Farca was arrested for an altercation with another recruit and was discharged from the Army for "erroneous enlistment" and "medical condition disqualifying for military service." Farca then pleaded guilty to making a false statement to a government agency in violation of 18 U.S.C. § 1001(a)(2). At sentencing, the district court found the total loss to the Army to be $17,832 and ordered Farca to pay restitution in that amount. Upon review, we affirm the district court's restitution order.

Farca claims the district court exceeded its authority under the Victims and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, and the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663. The Army contends Farca waived his right to appeal because at sentencing he acknowledged that "the Government

certainly has discretion . . . to order restitution under 3663(a)(1)(A) [of the VWPA]." Farca then disputed the amount of restitution to be paid, not the legality of the restitution order itself. In general, "waiver of appeal does not preclude [a] claim that restitution exceeded statutory authority." *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996) (citing *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995)). Thus, even if an appellant has "voluntarily and knowingly waived his general right to appeal, this waiver would not affect his ability to appeal a violation of the VWPA." *See United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999).

The costs of recruiting and training Farca are covered by the VWPA. Under the VWPA, a district court has discretion to order restitution when (1) a defendant is convicted of an offense under Title 18, (2) the offense "result[s] in damage to or loss or destruction of property," and (3) there is a "victim." *See* 18 U.S.C. § 3663(a)(1)(A), (b)(1). The statute defines "victim" as a person "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663(a)(2). The statute does not define "property," however, the Ninth Circuit has adopted a broad interpretation. *See United States v. Luis*, 765 F.3d 1061, 1065-66 (9th Cir. 2014) (defining the phrase "against property" as "infringing on a victim's property interest" in the restitution context); *see also United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007)

(noting that a court "may look to cases decided under the VWPA for guidance in interpreting the MVRA").

Here, Farca made a false statement to a government agency in violation of 18 U.S.C. § 1001(a)(2), thus violating Title 18. The Army expended money to recruit and train Farca and subsequently lost the value of its investment because Farca was not fit to serve. *See Luis*, 765 F.3d at 1066 (holding that a "pecuniary loss" constitutes "an offense against property"). The conduct for which Farca's restitution was ordered, lying on a federal form, was the direct and proximate cause of the Army's loss, and the district court limited restitution to $17,832, the amount expended to train Farca. ("[R]ecruiting and training a student for the course that Mr. Farca attended…equates to $493 per day... Mr. Farca was on active duty 36 days, at a cost of $17,382."). Thus, the restitution order did not "exceed the amount . . . for the offense charged." 18 U.S.C. § 3663.

It is unnecessary to decide if restitution in this case was mandatory because the court had discretion and statutory authority to impose the order under the VWPA.

AFFIRMED.

Appendix

Order
of the Court of Appeals
Denying Rehearing

2021 U.S.App. LEXIS 35648

December 2, 2021

FILED

DEC 2 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROSS ANTHONY FARCA, Defendant-Appellant.	No. 20-10184 D.C. No. 4:19-cr-00643-JST-1 ORDER

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS, District Judge.*

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.