No. 00-1747

In the Supreme Court of the United States

WEST INDIES TRANSPORT CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in an action for a writ of execution under the Federal Debt Collection Procedure Act of 1990, a district court may reconsider the validity of the underlying restitution order.

2. Whether a district court has authority to order restitution under 18 U.S.C. 3663(a) (1994 & Supp. V 1999) based on a conviction under 18 U.S.C. 2.

3. Whether the United States is a victim of the offenses committed by petitioners and therefore eligible to receive restitution under 18 U.S.C. 3663(a) (1994 & Supp. V 1999).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The opinion of the district court (Pet. App. 3-15) is reported at 57 F. Supp. 2d 198. An opinion of the district court addressing preliminary issues (Pet. App. 38-55) is reported at 35 F. Supp. 2d 450. The opinion of the district court denying reconsideration (Pet. App. 16-37) is unreported. An earlier opinion of the court of appeals affirming petitioners' convictions and sentences (Pet. App. 56-96) is reported at 127 F.3d 299.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2000. On March 9, 2001, Justice Souter extended the time within which to file a petition for a

writ of certiorari to and including May 18, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Oelsner was the chief operating officer of petitioners West Indies Transport Co., Inc. and WIT Equipment Co., Inc. Pet. App. 58. Petitioners operated a dry dock, ship repair facility, and barge towing company in Krum Bay, St. Thomas. *Ibid.* Petitioners imported foreign laborers for construction work under the guise of hiring foreign crewmen and then paid them below minimum wages. *Ibid.* Petitioners also housed employees and conducted drydock operations on a pier they constructed without a federally required permit. *Ibid.* In addition, petitioners intentionally discharged several different pollutants into navigable waters. *Id.* at 59. To dispose of waste generated by their operations, petitioners engaged in midnight ocean dumping runs. *Ibid.* Petitioners never obtained a permit for any of their pollution discharges. *Ibid.*

After a jury trial, petitioners were convicted of violating the Clean Water Act, 33 U.S.C. 1311(a), 1319(c)(2)(A); the Rivers and Harbor Appropriation Act, 33 U.S.C. 403, 406; and the Ocean Dumping Act, 33 U.S.C. 1411(a)(1), 1415(b)(1). Pet. App. 4 n.1. Petitioners were also convicted of conspiracy to defraud the United States and misuse of visas. *Ibid.* In connection with the convictions under the Clean Water Act and Ocean Dumping Act, petitioners were also convicted as aiders and abettors under 18 U.S.C. 2. *Ibid.*

Pursuant to 18 U.S.C. 3663(a) (1994 & Supp. V 1999), the district court ordered petitioners to pay restitution to the United States in order to offset the costs of

cleaning up the environmental damage they caused. Section 3663(a) provides, in relevant part, that "[t]he court, when sentencing a defendant convicted of an offense under this title, * * * may order * * * that the defendant make restitution to any victim of such offense." Petitioners' convictions as aiders and abettors under 18 U.S.C. 2 of environmental crimes committed under Title 33 served as the foundation for the restitution orders.

The court ordered petitioner Oelsner to pay $1,440,450 in restitution; it ordered petitioner West Indies to pay $1,440,450 in restitution; and it ordered petitioner WIT to pay $1,530,500. Pet. App. 18, 19 n.3. Each judgment specified that restitution payments made by any one of the petitioners would be applied to reduce the amount of restitution owed by the other petitioners. *Id.* at 18-19, n.2 & n.3. All three judgments contained identical lists of vessels and real estate that were subject to liens. *Id.* at 19. The vessel Wittug was included in the list. *Ibid.*

2. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 56-96. The court rejected petitioners' contention that the district court erred in ordering restitution for Title 33 offenses. *Id.* at 88. The court of appeals stated that each Title 33 offense also charged a violation of 18 U.S.C. 2, and that restitution is authorized for violation of 18 U.S.C. 2. *Ibid.* This Court denied certiorari. 522 U.S. 1052 (1998) (No. 97- 931).

3. The United States applied for a writ of execution on the vessel Wittug under the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. 3001 *et seq.* The FDCPA establishes "the exclusive civil procedures for the United States * * * to recover a judgment on a debt." 28 U.S.C. 3001(a)(1). A judgment includes a

judgment issued in a criminal proceeding, and a debt includes "an amount that is owing to the United States on account of" an order of "restitution." 28 U.S.C. 3002(3)(B), 3002(8). The FDCPA permits the enforcement of a judgment by writ of execution. 28 U.S.C. 3203(c). A judgment debtor may move to quash the writ and obtain a hearing on that motion. 28 U.S.C. 3202(d). Except in the case of a default judgment, the FDCPA limits the issues that may be addressed at the hearing to "the probable validity of any claim of exemption by the judgment debtor" and "compliance with any statutory requirement for the issuance of the post-judgment remedy." 28 U.S.C. 3202(d)(1) and (2). When there is a default judgment, a debtor may also challenge "the probable validity of the claim for the debt which is merged in the judgment," and "the existence of good cause for setting aside such judgment." 28 U.S.C. 3202(d)(3).

Petitioners filed a motion to quash the writ of execution and to obtain a hearing on that motion. Pet. App. 19. The district court granted petitioners' request for a hearing on two claims—that the amount of restitution should be reduced to reflect petitioners' remedial efforts, and that petitioners did not own the Wittug. *Id.* at 43-44. The court held that it would not entertain petitioners' challenges to the validity of the underlying judgment awarding restitution. The court explained that, under the FDCA, "a challenge to the validity of a judgment exceeds the scope of a hearing on a writ." *Id.* at 44.

After the hearing, the district court denied petitioners' request to reduce the amount of restitution, and rejected petitioners' argument that they did not own the Wittug. Pet. App. 7-9. The court authorized

the United States to execute judgment by levying on the Wittug. *Id.* at 15.

Petitioners then filed a second motion to quash, arguing, *inter alia*, that their offenses did not have a clear victim and that restitution therefore should be limited to the amount of their fines. Pet. App. 23. The district court refused to consider that contention on the grounds that (1) the court of appeals' mandate affirming the restitution award foreclosed consideration of that issue, (2) petitioners waived the issue by failing to present it on direct appeal, and (3) petitioners waived the issue by failing to raise it in their first motion to quash. *Id.* at 28-29.

4. In an unreported opinion, the court of appeals affirmed. Pet. App. 1-2. The court of appeals stated that "the district court acted in full conformity with our prior opinion." *Id.* at 2.

ARGUMENT

Petitioners contend (Pet. 14-16) that the lower courts erred in failing to reconsider the validity of the underlying judgment awarding restitution. Petitioners further contend (Pet. 17-20) that the underlying restitution award is illegal because an offense under 18 U.S.C. 2 may not serve as the basis for an award of restitution and the United States is not eligible to receive restitution. The FDCPA precludes consideration of petitioners' challenges to the restitution award, and petitioners failed to raise their challenges to the award in a timely manner in any event. Petitioners' contentions therefore do not warrant review.

1. When the United States seeks a writ of execution under the FDCPA, a judgment debtor may seek to quash the writ and may obtain a hearing on that motion. 28 U.S.C. 3202(d). Unless there has been a default

judgment, however, the sole issues that may be addressed at the hearing are "the probable validity of any claim of exemption by the judgment debtor" and "compliance with any statutory requirement for the issuance of the post judgment remedy." 28 U.S.C. 3202(d)(1) and (2). Where, as here, the judgment is fully litigated, a debtor may not assert "the probable validity of the claim for the debt which is merged in the judgment, or "the existence of good cause for setting aside such judgment." 28 U.S.C. 3202(d)(3).

Petitioners' contentions (Pet. 17-20) that a conviction under 18 U.S.C. 2 does not authorize an award of restitution and that the United States is not a victim of petitioners' crime both directly challenge the validity of the underlying judgment awarding restitution. Neither contention raises a "claim of exemption" or lack of "compliance" with a "statutory requirement for issuance" of a writ. Thus, under the express terms of the FDCPA, the district court had no authority to consider petitioners' contentions.

Petitioners argue (Pet. 15) that traditional law of the case principles permit reconsideration of an earlier decided issue when the initial decision is clearly erroneous and the failure to reconsider would work a manifest injustice. The FDCPA, however, does not incorporate traditional law of the case principles. Absent a default judgment, it absolutely bars reconsideration of the underlying judgment. 28 U.S.C. 3202(d)(3). Nor is there any inconsistency between the operation of the FDCPA and traditional law of the case principles. Law of the case rules govern reconsideration of an issue during the course of a "single continuing lawsuit." *DeVilla* v. *Schriver*, 245 F.3d 192, 194 (2d Cir. 2001). The filing of a writ of execution under the FDCPA involves the filing of new "action or proceeding" to collect a debt;

it is not a continuation of the criminal prosecution that resulted in the judgment on which the writ is based. 28 U.S.C. 3202(b). Thus, the FDCPA forecloses consideration of petitioners' challenges to the restitution order, and law of the case principles do not suggest otherwise.

2. Review is also unwarranted in this case because petitioners failed to properly present their challenges to the restitution order below. In the criminal proceedings against them, petitioners opposed restitution on the ground that a restitution order may not be based on a violation of 18 U.S.C. 2. The court of appeals rejected that contention, holding that restitution is authorized for violations of 18 U.S.C. 2. Pet. App. 88. In opposing the writ of execution, however, petitioners did not urge either the district court or the court of appeals to reconsider that ruling. Nor did either court reconsider that issue sua sponte. Because petitioners did not ask for reconsideration of the ruling that 18 U.S.C. 2 may serve as the basis for a restitution order below, and the courts did not consider that issue on their own, that question is not properly presented here. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

Similarly, petitioners did not assert that the United States is not eligible to receive restitution until they filed their *second* motion opposing the writ. Pet. App. 29. At that juncture, the district court refused to consider the issue, explaining that petitioners had "waived" the issue by failing to raise it in their first motion to quash. *Id.* at 29 n.9. The court of appeals similarly did not consider that issue. *Id.* at 1-2. Because petitioner failed to present the question whether the United States is eligible to receive restitution in a

timely manner, and the courts below did not consider it, that issue is also not properly presented here.

3. On the merits, petitioners contend (Pet. 17-20) that the district court lacked authority to award restitution because petitioners committed offenses under Title 33 and not under Title 18. In its decision affirming petitioners' convictions, the court of appeals rejected that contention. It stated that "[e]ach Tile 33 offense also charged a violation of 18 U.S.C. § 2," and that "[r]estitution is authorized for violation of 18 U.S.C. § 2." Pet. App. 88.

Petitioners contend (Pet. 19) the court of appeals' holding that a conviction under 18 U.S.C. 2 may serve as the basis for a restitution order conflicts with the decisions in *United States* v. *Minneman*, 143 F.3d 274, 283-284 (7th Cir. 1998), cert. denied, 526 U.S. 1006 (1999), and *United States* v. *Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992). There is, however, no conflict. Those cases hold that a conviction for a conspiracy in violation of 18 U.S.C. 371 may serve as the basis for a restitution order, even when the underlying substantive offense is not a Title 18 offense. *Ibid.* Neither case addresses whether a conviction for aiding and abetting in violation of 18 U.S.C. 2 may serve as the basis for a restitution order when the underlying offense is not a Title 18 offense.

In *United States* v. *Snider*, 957 F.2d 703, 706 (1992), a case not cited by petitioners, the Ninth Circuit held that 18 U.S.C. 2 may not serve as the foundation for a restitution order. The court summarily concluded that "Section 2 does not establish 'an offense' of which a defendant may be convicted; it merely determines which offenders may be punished as principals." *Ibid.* Because of the procedural considerations discussed above, this case does not provide an appropriate vehicle

for resolving the conflict between the Ninth and the Third Circuits on the question whether 18 U.S.C. 2 may serve as the basis for an award of restitution. In particular, because the FDCPA precludes consideration of that issue in the present context, and petitioners waived the claim by not raising it below in any event, review of that issue is not warranted here.

Finally, petitioners err in contending (Pet. 19) that the United States is not a "victim" of their environmental crimes. The Victim Witness and Protection Act of 1982 (VMPA) defines a "victim" as "any person directly and proximately harmed" by the defendant's criminal conduct. 18 U.S.C. 3663(a)(2) (1994 & Supp. V 1999). The Act does not create any exception for governmental victims. The courts of appeals have therefore uniformly held that governmental entities can be victims under the VWPA. *United States* v. *Martin*, 128 F.3d 1188, 1191 (7th Cir. 1997) (citing decisions from seven circuits). As one of those courts has explained, the VWPA "makes no distinction between an out-of-pocket government and a victimized private person." *United States* v. *Dudley*, 739 F.2d 175, 177 (4th Cir. 1984).

The United States also satisfies the definition of a victim here. The Coast Guard was required to bear the costs of cleaning up the environmental damage caused by petitioners' crimes. The Coast Guard was therefore "directly and proximately harmed" by [petitioners'] criminal conduct. 18 U.S.C. 3663(a)(2) (1994 & Supp. V 1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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