

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FRASIEL L. HUGHEY, Petitioner v.

UNITED STATES

CASE NO: 89-5691

PLACE: Washington, D.C.

DATE: March 27, 1990

PAGES: 1 thru 43

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRASIEL L. HUGHEY, :

4 Petitioner :

5 v. : No. 89-5691

6 UNITED STATES, :

7 - - - - -x

8 Washington, D.C.

9 Tuesday, March 27, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:12 a.m.

13 APPEARANCES:

14 LUCIEN B. CAMPBELL, ESQ., San Antonio, Texas; on behalf of
15 the Petitioner.

16 AMY L. WAX, ESQ., Assistant to the Solicitor General,
17 Department of Justice, Washington, D.C.; pro hac vice
18 on behalf of the Respondent.

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1 He filed a timely written objection to that
2 notice, pursuant to local procedure. At the sentencing
3 hearing information presented was that the total losses on
4 the Godfrey credit card, which was the subject of the
5 count of conviction, was about \$10,000, speaking in round
6 numbers, and the issuing bank, MBank, suffered overall
7 losses of about \$90,000.

8 Over the Petitioner's renewed objection that
9 such a restitution order would exceed both the limits of
10 the law, and his ability to pay, the court sentenced him
11 to pay \$90,000 in restitution within five years after
12 expiration of an eight-year term of imprisonment.

13 Now, in this case we turn first, as we expect
14 the Court will, to the plain language of the statute. It
15 is reproduced in our opening brief in the appendix at page
16 A-1. Turning here I see that Section 3579 provides that
17 the court when sentencing a defendant convicted of an
18 offense --

19 QUESTION: Just where are you reading from, Mr.
20 Campbell?

21 MR. CAMPBELL: I'm in my opening brief at
22 appendix page A-1, Your Honor.

23 QUESTION: Whereabouts on page A-1?

24 MR. CAMPBELL: Section 3579(a)(1) --

25 QUESTION: Okay.

1 MR. CAMPBELL: -- order of restitution, provides
2 that the court when sentencing a defendant convicted of an
3 offense, and the language pertinent to this case is "may
4 order that the defendant make restitution to any victim of
5 such offense."

6 Now, this part says who pays -- the defendant,
7 and who receives -- a victim of such offense. And the
8 Respondent has agreed with us that that language means a
9 victim of the offense of conviction in 3579(a)(1).

10 Now, going forward in the statute --

11 QUESTION: 3579 doesn't say how much -- how much
12 restitution.

13 MR. CAMPBELL: That's correct, Your Honor. We
14 go to --

15 QUESTION: Yeah, but now you have to get the
16 3580, I guess.

17 MR. CAMPBELL: Well, I believe that we would go
18 next to 3579(b). Subsection (b), which begins on our page
19 A-1 and extends over to A-2 --

20 QUESTION: Uh-huh.

21 MR. CAMPBELL: -- sets out the covered losses
22 and remedies. In fact, there are three of them. Property
23 loss, bodily injury, funeral expense when death results.
24 The one that governs this case is set out on appendix page
25 A-1, the same page I was reading from; (b)(1) governs

1 property loss. It provides that in the case of an offense
2 resulting in loss of property of a victim of the offense,
3 the order may require that such defendant return the
4 property to the owner of the property or pay the value of
5 the property.

6 Now, because they is simply nothing to suggest
7 that the meaning of the term "the offense" shifts in some
8 way in the statute from subsection to another, we say that
9 3579(b)(1) authorizes the court to order return of the
10 property taken in the offense, and does not authorize
11 anything more than that.

12 Now, the government relies in large measure on
13 Section 3580(a), reproduced at appendix pages A-4 and A-5
14 in our brief. We rely on it also because we believe that
15 it supports our reading of this statute. It says that the
16 court shall consider the amount of the loss sustained by
17 any victim as a result of the offense. Here again, with
18 nothing to indicate that the offense means anything
19 different from what it meant back in 3579.

20 Now, the government would argue that the
21 catchall language at the end of 3580(a) must mean that the
22 court has authority to order restitution beyond the
23 offense of conviction. What this section does is say that
24 the court shall consider loss sustained by the victim as a
25 result of the offense, certain factors bearing on the

1 defendant's ability to pay and such other factors as the
2 court deems appropriate.

3 I think I should respond to this because the
4 government places considerable reliance on that catchall
5 phrase in 3588 expanding the plain language of 3579.

6 I would note, first, that 3580 is a procedural
7 section. It is so titled, it's called Procedure for
8 Issuing Order of Restitution. Its content is largely
9 procedural. By its terms, I believe it applies only after
10 the court has decided that restitution is already covered
11 under Section 3579, the section that is more substantive.

12 It says page A-4), "the court, in determining
13 whether the order restitution under Section 3579 of this
14 title, and the amount of such restitution." I believe
15 this means that unless the court has already determined
16 that restitution is covered under Section 3579, then the
17 court does not reach 3580(a).

18 Now, I think it's also significant that the
19 government is asking a general catchall phrase to expand
20 other specific provisions of the statute. We say that
21 3579(b) -- (b)(1) property loss, is very specific in
22 authorizing the remedy in the case of an offense resulting
23 in loss of property, to return that property or pay its
24 value. And it simply cannot be the duty that the
25 government would assign to it of expanding a specific

1 provision.

2 Now, while the statute has no --

3 QUESTION: Can't you also derive some comfort
4 from the ejusdem generis rule, or the noscitur a sociis --
5 whatever you want to call it -- that the catchall phrase
6 does not -- is thought to be limited to the same types of
7 things that the earlier parts of the clause are contained?

8 MR. CAMPBELL: Yes, Mr. Chief Justice. We do
9 rely on that rule. It would first be taken to refer to
10 items of the same character in the list which precede it.
11 That is, the loss sustained by the victim of the offense
12 and factors bearing on the defendant's ability to pay.

13 But even if it is read to have more general
14 application beyond that list in which it appears, then we
15 say that it applies to the authority expressly conferred
16 in this statute to order partial restitution or no
17 restitution. And because it so clearly refers to that, it
18 cannot support the government's meaning of expanding
19 authority. And I'm referring back to 3579(a)(2) on
20 Appendix Page A-1, which says that if the court does not
21 order restitution or orders only partial restitution, the
22 court shall state the reasons.

23 So this statute specifically contemplates that
24 in a proper case a court may order only partial
25 restitution or no restitution. In the language of 35 --

1 QUESTION: Mr. Campbell, what -- what if the
2 charge were of a conspiracy or a scheme to defraud?

3 MR. CAMPBELL: Your Honor, that is the rule that
4 the Ninth Circuit seems to have adopted, and throughout
5 this case we have not challenged that rule because we
6 don't believe that it applies to this case.

7 QUESTION: Well, I -- I -- it may not. What
8 would your view be about that?

9 MR. CAMPBELL: I can -- I can --

10 QUESTION: Then does that broaden the range of
11 possible victims and amounts of restitution?

12 MR. CAMPBELL: It certainly would have that
13 practical effect, Justice O'Connor, but I -- I see some
14 support to that rule because I can certainly can
15 understand that in an offense such as mail fraud, a
16 particular scheme to defraud is an element of that
17 defense. And for a person to stand guilty of mail fraud,
18 for example, that person must be proven guilty of that
19 larger scheme.

20 So, we have not challenged that rule, and I see
21 some support for it.

22 QUESTION: Do you suppose that a defendant could
23 agree to pay a larger sum of restitution than you would
24 argue for in this case if -- if it had been part of a plea
25 agreement?

1 MR. CAMPBELL: A defendant may certainly agree
2 to do that, Justice O'Connor. We note that the respondent
3 seems to assert that there's no admissions exception. The
4 courts -- the courts of appeals have frequently applied
5 such an exception. There is no doubt that it could be
6 enforced as part of a plea bargain.

7 QUESTION: Uh-huh.

8 MR. CAMPBELL: And Respondent alludes to that in
9 their brief. In other words, if a defendant entered into
10 a plea agreement calling for him to make total restitution
11 beyond the offense of conviction and willfully failed to
12 follow through on that plea agreement, he would be a peril
13 of the government reinstating dismissed counts, for
14 example.

15 So even if there is no admissions exception that
16 would make such an order of restitution fully enforceable
17 under this statute, it is certainly enforceable in other
18 ways.

19 QUESTION: Could -- could -- could the court
20 order payment for these other counts, maybe even to other
21 banks as a condition of probation?

22 MR. CAMPBELL: Your Honor, the courts are not
23 clear over whether the old Federal Probation Act continued
24 in effect after the enactment of the Victim and Witness
25 Protection Act. In other words, during the period of time

1 when both were facially in effect some of the courts so
2 held at that time, even when both of these laws were in
3 place side by side, that where a court imposed probation
4 it could -- it did have greater flexibility in imposing
5 conditions of -- restitution as a condition of probation.

6 QUESTION: Of course, then there wouldn't be a
7 judgement under this section in the sense of --

8 MR. CAMPBELL: No, Your Honor it would not be --

9 QUESTION: It would be a different type of
10 order.

11 MR. CAMPBELL: It would not carry the
12 enforcement provisions, for example.

13 QUESTION: Mr. Campbell, help me out with one
14 respect. In 3580 at the top of page 85 of your brief, is
15 the phrase "sustained by any victim, as a result of the
16 offense." On your theory, why shouldn't that be the
17 victim as a result of the offense? Can you explain the
18 word, the use of the word "any"?

19 MR. CAMPBELL: I believe, Justice Blackmun, that
20 it's clear from the statute as a whole that there may be
21 more than one victim of the offense of conviction, even
22 though the statute would limit a recovery to a victim of
23 the offense of conviction that there may be more than one
24 victim.

25 QUESTION: (Inaudible) rather than any.

1 QUESTION: What about the possibility that there
2 would be no victim? Driving so as to endanger or
3 something of that sort. I mean I assume there are
4 offenses that don't have any particular victim. So -- so
5 you would say "any" to cover the case where there isn't
6 any.

7 MR. CAMPBELL: If there -- that certainly --
8 that's certainly one view Justice --

9 QUESTION: Treason. I suppose there's no
10 identifiable victim of treason.

11 MR. CAMPBELL: That's certainly correct. In our
12 further interpretation of Section 3580(a) we believe that
13 instead of expanding the substantive reach of this statute
14 it would reach other factors that the court would consider
15 in deciding whether to order partial restitution or no
16 restitution.

17 And two of those that I see are specifically
18 mentioned in the statute. 3579(d) on appendix page A-2
19 says that if the court finds that it would unduly
20 complicate or prolong the sentencing proceeding to fashion
21 an order of restitution, the court may order no
22 restitution. That's certainly a factor that the Court
23 might consider.

24 3579(e)(1) up at the top of page A-3, the court
25 shall not impose restitution for a loss for which the

1 victim has received or is to receive compensation, except
2 that in the interest of justice the court may order
3 restitution to the person compensating, thus, introducing
4 a new test -- interest of justice.

5 In addition, this is not a statutory factor, but
6 an obvious factor, is that in a multi-defendant case I can
7 certainly imagine the court considering how to apportion
8 restitution. In other words, considering whether to
9 apportion it on relative ability to pay, relative
10 culpability, relative gain or some combination of factors.

11 And all of these are factors that the court
12 might well consider under 3580(a) that go to imposing
13 partial or no restitution, and have nothing to do with
14 imposing restitution beyond the count of conviction.

15 So, I simply don't see how the catchall can
16 carry the burden that the government would assign to it.
17 This is a case where we suggest that the unambiguous
18 language of the statute limits restitution to the offense
19 of conviction and the Court should so hold.

20 Now, if the Court should find some ambiguity,
21 then it would be proper to resort to customary rules of
22 statutory construction.

23 Turning first to the legislative history, I
24 believe that the Court will find an extraordinarily
25 explicit record that directly supports the petitioner's

1 interpretation. At the same time, this record does not
2 contain any suggestion to support Respondent's expansive
3 reading of this statute.

4 The first thing that we would look at is H.R.
5 6915 in the 96th Congress, 1980, a progenitor or
6 forerunner of the 1982 VWPA. We've reproduced the
7 pertinent parts in our reply brief at appendix pages 2 and
8 3. It will be seen that Section 3331 was the analog or
9 forerunner of our substantive Section 3579, a defendant
10 who has found guilty of an offense may be sentenced to
11 make restitution to a victim of the offense.

12 And 3332, nature of a sentence, is the analog of
13 3579(b)(1), which gives the covered loss and remedy in the
14 property loss case. A defendant may be sentenced in the
15 case of an offense resulting in loss of property, to
16 return such property or pay its value.

17 Now, Congress used that type of language in
18 1980, and what is perhaps more important is what Congress
19 understood that that language meant. In the accompanying
20 committee report, also reproduced in our reply brief,
21 appendix page 9, Congress said of that section,
22 "Restitution may only be imposed with respect to damages
23 established by the conviction. Restitution cannot be
24 imposed for damages caused by the conduct in charges that
25 are dismissed."

1 QUESTION: Now, what is the relevancy of these
2 provisions to the provisions that we're interpreting, Mr.
3 Campbell?

4 MR. CAMPBELL: The relevance that I see, Mr.
5 Chief Justice, is that the language is functionally
6 identical to what Congress ultimately passed in 1982 in
7 the VWPA. And this shows Congress' understanding of what
8 that language would accomplish. And the record shows
9 nothing that -- to show that Congress changed course in
10 that two-year period.

11 When Congress enacted the VWPA in 1982, there
12 was a significant expansion from existing law. And that
13 is it freed the restitution order from conditions of
14 probation. And Congress used very express language when
15 it when it did that in 3579. So the court may order
16 restitution in addition to or in lieu of any other penalty
17 authorized by law.

18 And at the same time in the Senate Judiciary
19 Committee report accompanying that, it explained what it
20 had done. It said Section 3579(a) expands current law by
21 authorizing an order of restitution independent of a
22 condition of probation. Nowhere did it say that they
23 expanded current law by permitting restitution beyond the
24 offense of conviction.

25 In that report, the Senate report accompanying

1 the VWPA when it was enacted, shows that Congress was
2 fully aware that the existing Federal Probation Act
3 limited restitution to the offense of conviction. The
4 report quoted it. But nowhere in the section of the
5 Senate report problems of current law, or anywhere in that
6 report, did the committee say that it is a problem of this
7 law that it limits it to the offense of conviction.

8 And I would suggest that it is simply
9 inconceivable that Congress would bring about so major a
10 change in the Federal Criminal Law, as Respondent urges,
11 without accounting for it in the legislative history.

12 The next item in the history we believe is
13 significant is the 1986 Amendment of Section 3579. In
14 that year as part of a technical amendments bill, Congress
15 amended 3579(a)(1) in one respect so that the last phrase
16 read instead of restitution to any victim of the offense,
17 it said any victim of such offense. And the accompanying
18 report said that the purpose of the amendment was to
19 clarify that any victim of such offense referred back to
20 the offense of conviction.

21 And as well, that report cited to an earlier
22 report, a year earlier, that said explicitly that the VWPA
23 limited restitution to the offense of conviction.

24 QUESTION: And the language that is in -- in
25 effect that governs your client's case is the word "the"

1 or the word "such"?

2 MR. CAMPBELL: The word "the offense," the word
3 "such offense," and the fact that it carries through with
4 the same meaning in (b)(1).

5 QUESTION: Yeah, but didn't Congress change in
6 '86 -- change from "the" to "such"?

7 MR. CAMPBELL: Yes, Your Honor.

8 QUESTION: And does that '86 amendment govern
9 your client's case or not?

10 MR. CAMPBELL: We take the position that it
11 does, Your Honor. When Congress amended the statute in
12 1986 it -- it said this amendment will take effect upon
13 enactment, which was after commission of the offense in
14 this case but prior to sentencing in this case.

15 And Congress also took pains to say that no
16 substantive change was intended by that amendment. No
17 change in the meaning of the statute was intended. So I
18 see no reason why the congressional intent cannot be --
19 cannot be given effect.

20 QUESTION: And if there is no difference in the
21 meaning -- between such and the, then it's immaterial
22 obviously whether it governs your client's case or not.

23 MR. CAMPBELL: It -- it is only significant if
24 the -- if the Court has need to resort to the legislative
25 history accompanying the '86 amendment. We believe that

1. the meaning is the same in 1982 and 1986, and under either
2 version the result needs to be the same in this case. The
3 only significance would be the weight to be given to the
4 legislative history of the 1986 Amendment.

5 So, to -- to recap briefly this legislative
6 history, for the better part of this century, since the
7 Federal Probation Act of 1925, Congress had said that
8 restitution is limited to the offense of conviction.

9 The forerunner, a progenitor of this law in
10 1980, Congress said that functionally identical language
11 to what was eventually passed would so limit restitution.
12 When Congress passed the VWPA, it said we have expanded
13 restitution beyond conditions of probation. It did not
14 say we have expanded restitution beyond the offense of
15 conviction. And, finally Congress amended this law in
16 1986 to make it abundantly clear that the offense means
17 the offense of conviction.

18 I believe that where the legislative intent is
19 so plainly expressed, and especially where it is
20 consistent with the plain language of the statute, the
21 petitioner's right to relief is -- is clear. If --

22 QUESTION: Mr. Campbell, may I ask one -- one
23 question? Do you -- do you agree with the court of
24 appeals that the amount is not necessarily limited to the
25 amount specified in the indictment?

1 MR. CAMPBELL: I -- I certainly agree with that,
2 Justice Stevens, because the statute contemplates that
3 there are certain covered losses that are not going to be
4 part of the indictment, such as therapy of a victim, such
5 as lost income in the case of bodily injury.

6 And I think some of the court's went astray and
7 seeing that necessarily they were going to have to look
8 outside the indictment to find some of the covered losses
9 that induced them to look further outside the indictment,
10 further than what the language would bear.

11 QUESTION: But you'd agree, even as strict
12 property law case there was a robbery of a hundred -- an
13 alleged robbery of \$1,000 and the evidence shows it's
14 really \$1,500, they could recover the full \$1,500?

15 MR. CAMPBELL: Provided that it's supported by
16 conviction for that offense. And that was the position
17 that we took in this case where the government alleged
18 only the jurisdictional amount, alleged an amount -- an
19 amount aggregating more than \$1,000. But Petitioner
20 proposed a restitution order of \$10,000, all of the losses
21 on the Hershey Godfrey credit card as being fairly within
22 the compass of this statute.

23 But if any of this analysis should leave any
24 residual ambiguity at this point, then I would refer to
25 the fact that this is a criminal statute, and we're not

1 here to find out what happened to the limitation that the
2 old Federal Probation Act had, but -- but to look at this
3 statute and see what does it expressly authorize, because
4 when we are speaking of criminal penalties for criminal
5 offenses it is a question of what has the Congress
6 expressly authorized.

7 Where the court of appeals found an ambiguity in
8 this language it erred by interpreting the statute
9 expansively against the individual. The court of appeals
10 did not even address or recognize the effect of rule of
11 lenity and in -- in its decision.

12 But this Court has said on many occasions that
13 when it's called upon to choose between two possible
14 meanings of criminal statute, it will require that
15 Congress speak clearly and distinctly before -- before
16 choosing the harsher alternative. And I believe that rule
17 as well guides the Court in this case.

18 If it please the Court, I'd reserve time for
19 rebuttal.

20 CHIEF JUSTICE REHNQUIST: Very well, Mr.
21 Campbell.

22 Ms. Wax.

23 ORAL ARGUMENT OF AMY L. WAX

24 ON BEHALF OF THE RESPONDENT

25 MS. WAX: Thank you, Mr. Chief Justice, and may

1 it please the Court:

2 MS. WAX: The question presented in this case is
3 whether under the Victim and Witness Protection Act of
4 1982 a defendant who is convicted of or pleads guilty to
5 an offense may be sentenced to pay restitution for damage
6 caused by acts for which he has not been found guilty.

7 The answer, we submit, is yes. The Victim and
8 Witness Protection, the VWPA, which authorizes a court to
9 order restitution to any victim of the offense of which a
10 defendant is convicted, mandates full and fair restitution
11 to that victim, restitution that reflects a realistic
12 assessment of the harm to the victim caused by the
13 defendant.

14 Thus, as virtually every lower court to consider
15 the question has held the amount of restitution the
16 defendant may be ordered to pay is not limited to the
17 particular loss from the narrow count of conviction. If
18 the courts were limited to considering only that loss,
19 full and fair restitution to victims of crime would often
20 be impossible.

21 QUESTION: Well, Ms. Wax, certainly the language
22 of the statute seems to tie the amount of restitution to
23 the harm resulting from the offense of conviction.

24 MS. WAX: Well, we believe that each of the
25 sections that uses that locution, losses resulting from

1 the offense of conviction, of which there are three, that
2 there is a way to interpret each of these provisions which
3 squares with our view of the statute.

4 QUESTION: Well, but, of course, it's a criminal
5 statute, and I suppose the rule of lenity and strict
6 construction comes into play.

7 MS. WAX: Well, these three provisions that
8 Petitioner alludes to do not contain an explicit limit on
9 the amount of restitution to the --

10 QUESTION: No, but it appears to be tied to the
11 harm resulting from the offense of conviction.

12 MS. WAX: Well, let me, if I may, go through
13 each of these provisions one by one and give our version
14 of why these provisions were structured and written as
15 they are written and what Congress was attempting to
16 accomplish with -- with -- with these sections.

17 First, starting with 3580(a) and (d) which
18 Petitioner basically relies on in his opening brief.
19 3580(a) we see has a two-part structure. It first says,
20 the court in determining whether to order restitution
21 shall -- and the amount of such restitution -- shall
22 consider the amount of the loss sustained by any victim as
23 a result of the offense. And then it goes on to say, "and
24 such other factors as the courts deem appropriate."

25 Now, the first part of that section speaks in

1 mandatory terms. It tells the sentencing court what it
2 shall consider. And it specifies the amount of loss
3 resulting from the -- the offense, which we maintain is
4 only part of what -- which are only some of the acts the
5 court can consider -- can consider.

6 It's appropriate that in speaking in mandatory
7 terms the provision alludes specifically to the loss
8 resulting from the offense because that is going to form
9 the centerpiece of the vast majority of restitution
10 orders, if only because there will always be an offense of
11 conviction, and most of the time it's the offense of
12 conviction which will cause the harm.

13 There may be many cases in which there is no
14 other significant harm to the victim. There may be cases
15 where the -- the count of conviction encompasses all of
16 the damage done to victims and there's nothing more to
17 consider.

18 Now, it's also appropriate that the damage
19 caused by any related acts of the defendant be subsumed or
20 covered under the catchall phrase "and such other factors
21 as the court deems appropriate" because that's --

22 QUESTION: Well, you -- you -- you say it's
23 appropriate that that be -- what does that mean?

24 MS. WAX: Well, that's the discretionary part.
25 That -- just because of the way restitution works, in our

1 view, that is going to be a discretionary part of the
2 order. It isn't always going to be appropriate to include
3 harm from related acts in the restitution order. There's
4 -- there's a constant part of the restitution order and
5 there's a variable part of the restitution order.

6 QUESTION: May I ask --

7 QUESTION: Yes, but you're -- you're -- you're
8 -- you're reading something into this kind of catchall
9 phrase that gives it a much different content -- content
10 than the -- the -- the clauses that come before it, it
11 seems to me, which isn't the way you would ordinarily read
12 it.

13 MS. WAX: Well, actually not because one of the
14 things that we think comes under that phrase is quite
15 parallel to what the court -- to what the provision
16 mentions in the very first section. Both of them deal
17 with harms from the defendant's acts, both of them deal
18 with loss to the victim from the defendant's acts. It's
19 just that the first part deals with the core of the
20 restitution order, which is the harm from the offense, and
21 the under the second part goes what the court can look to
22 depending on the circumstances.

23 QUESTION: Yes, but -- if -- if -- if you read
24 it as it is, you -- you say a court shall consider the
25 amount of the loss sustained by any victim as a result of

1 the offense. The financial resources of the defendant,
2 the financial needs and earning ability of the defendant
3 and the defendant's dependents and such other factors as
4 the court deems appropriate.

5 Now the last two parts of that are related to
6 the defendant's ability to pay and the defendant's -- that
7 -- that sort of thing.

8 MS. WAX: Well, that's true, but we don't -- we
9 don't see that clause as necessarily just referring to
10 other factors -- factors with respect to the defendant.
11 We think it's entirely --

12 QUESTION: You see it as -- as actually
13 broadening the language of -- of the amount of the loss
14 sustained by any victim as a result of the offense?

15 MS. WAX: Well, as pertaining to different acts
16 of the defendant that might cause a loss, depending on the
17 circumstances. And, of course, that won't always be the
18 case. I mean, there will be cases where there isn't any
19 other loss or, if there is, it wouldn't be appropriate for
20 various reasons for the court to take it into account.

21 And this -- this reading -- we're not reading
22 this section in isolation. This comports with the way --

23 QUESTION: But may I ask you -- do you think the
24 judge had discretion to order restitution in an amount
25 less than the amount of the loss if, for example, there -

1 - at the showing of the defendant doesn't have any money
2 and he can't raise the money and so forth?

3 MS. WAX: Yes, we do.

4 QUESTION: So that you aren't saying the amount
5 of the loss is a minimum that applies in all cases. But
6 whereas if it's treated as a maximum, then all these other
7 factors go to whether or not you give them the maximum, or
8 an appropriate --

9 MS. WAX: Where it says "shall consider" so the
10 court --

11 QUESTION: That's right, rather than shall
12 award.

13 MS. WAX: Oh, yes.

14 QUESTION: See, if it -- if it were a minimum,
15 you'd say "shall order" that. But if you say it's -- it's
16 a maximum, you say you considered as the first factor you
17 look at.

18 MS. WAX: Well, right. I'm mean, we -- we only
19 see it as the first factor we look at but we don't see it
20 has exhausting all of the harms that can be looked at.

21 QUESTION: But there's nothing else in the
22 statute that refers to other harms unless you read it into
23 "such other factors," of course.

24 MS. WAX: Well, there are three general
25 provisions of the statute which we think make clear that

1 Congress wanted judges -- did not intend for judges to
2 look simply at the technical bounds of the count of
3 conviction.

4 And we -- we detail those in our brief. The
5 first is 3579(d) which says the order shall be as fair as
6 possible to victims, except that the court shall not
7 prolong and complicate the sentencing process. And if it
8 would complicate and prolong the sentencing process, then
9 the court has discretion to cut back on the award.

10 The second is the general statement of finding
11 and purposes, which appears on page (5)(a) of our appendix
12 which says that one of the goals of the statute is to
13 ensure that the Federal Government does all that is
14 possible for victims -- for victims without infringing on
15 the constitutional rights of defendants.

16 And the third is the this amendment to Rule
17 32(c) of the Federal Rules of Criminal Procedure to
18 provide for the preparation of a pre-sentence report which
19 speaks in the most sweeping terms possible about the facts
20 that are to be gathered--

21 QUESTION: Well, tell me -- you went a little
22 fast for me. Where in 5(a) does it say the government
23 must do everything possible for every victim?

24 MS. WAX: On 5(a) of the appendix of our
25 brief --

1 QUESTION: Yeah.

2 MS. WAX: -- at the bottom Section 2, 18 U.S.A.
3 1512 Note, Section 2(b)(2).

4 QUESTION: 2(b)(2).

5 QUESTION: At the very bottom of 5(a)?

6 MS. WAX: Yes, at the very bottom.

7 QUESTION: Thank you.

8 MS. WAX: You --

9 QUESTION: Ms. Wax, the section you've been
10 talking about, as Mr. Campbell pointed out, is entitled
11 Procedure for Issuing Order of Restitution, and it is
12 really the previous section, 3579, that sets forth what
13 the order of restitution may be. And wherever the statute
14 refers to the order, it says in ordering restitution under
15 this section. That is, under 3579. 3580 says that as
16 well -- the court in determining whether to order the
17 restitution under Section 3579.

18 I really interpret the structure to be that 3579
19 says what the maximum can be, and it sets forth quite
20 explicitly what restitution may be ordered. And 3580 I --
21 I regard as being a provision that says to what extent you
22 may go below the maximum permitted by that. It, of
23 course, begins by reciting, "shall consider the amount of
24 the loss sustained," but that's -- that's all -- as
25 recited in 3579. And then it says, however, you can

1 consider all these other things, the financial resources.
2 If you can't afford the whole loss, you don't charge the
3 whole loss.

4 Why isn't that a more logical way to read the
5 thing than -- than to try to read new substantive
6 provisions into 3580, a provision that is entitled
7 procedure?

8 MS. WAX: Well, first of all, Your Honor,
9 Petitioner in a sense cast the first stone in this because
10 he did rely on 3580(a) and (d) as evincing a substantive
11 limit on the amount of restitution. We think that those
12 two procedural provisions can fully be squared with the
13 absence of a substantive limit, and we think that there is
14 no substantive limit in 3579.

15 The core of the authorization to grant retribute
16 -- to award restitution to victims is in 3579(a)(1), where
17 the court says when sentencing a defendant convicted of a
18 offense, the court may order restitution to any victim of
19 the offense. And even though Petitioner started out
20 saying that that limited the amount of restitution, he now
21 agrees that that says it is absolutely silent on the
22 amount of restitution that can awarded to the victim.

23 QUESTION: I know, but today he relied 3579(b)
24 and that does talk about values rather specifically.

25 MS. WAX: We believe that to rely on 3579(b) as

1 -- as -- as presenting an ironclad limit on the amount of
2 restitution to the count of conviction is to completely
3 misinterpret both the language of 3579(b) and the --

4 QUESTION: Well, there's certainly --

5 MS. WAX: -- reason why it was put --

6 QUESTION: -- is nothing in 3579(b) that
7 suggests anything larger than the value of the property
8 that was taken, is there?

9 MS. WAX: Well, there's --

10 QUESTION: There's quite -- quite a detailed
11 description of return the property, return its value,
12 return its value less what they got from a third party.
13 There's a whole scheme based on value without the
14 slightest hint of something in excess of value. Or at --
15 do I misread it?

16 MS. WAX: Well, we understand it as -- as
17 allowing the court to use the calculus prescribed in (b)
18 for parallel instances of property loss or damage or
19 bodily harm that are caused by other than the conduct of
20 conviction.

21 We do not read this -- this phrase "in the case
22 of an offense resulting in damage to or loss," et cetera,
23 as language of limitation. If anything, its language of
24 illustration.

25 The focus of this provision is on giving the

1 court guidelines for calculating a restitution in the case
2 of bodily injury or loss of property, and the reason that
3 Congress put it in, was to work in tandem with 3579(d) to
4 make sure that the courts would have a way of simplifying
5 and expediting.

6 QUESTION: Yes, but the puzzling thing about
7 this argument is the easiest case is where you know a
8 specific loss of \$1,000, and you don't need a lot of
9 guidelines to say give back the money. But if you're
10 going to say in addition to giving back the money, you've
11 got to loss at all these other intangibles out there, I'd
12 think you'd need guidelines for the case where you want
13 more than what was stolen.

14 MS. WAX: Except --

15 QUESTION: That's where you have the real
16 problems in deciding how much. And they never even
17 mention that possibility. These are kind of lousy
18 guidelines if that's what you're saying they're intended
19 to do.

20 MS. WAX: Well, we -- the legislative history
21 reveals that -- or at least experience with the previous
22 law I -- I would rather say, revealed that the hangup was
23 how -- deciding how to calculate the various components of
24 damage and what should be left in and what should be taken
25 out.

1 That problem arises with regard to the offense
2 of conviction amount as much as to the amount that might
3 awarded for other acts. And so this provision solves the
4 problem for both components of the award.

5 QUESTION: Ms. Wax, what -- what also suggests
6 to me that 79(b) is -- is exclusive and sets forth the
7 only kind of restitution you can get is the fact that it's
8 so comprehensive. It goes right down even kind of injury
9 there could be to a victim. It begins with property and
10 then it says bodily injury in (2), and then (3) is death.
11 And incidentally in the case of death, under (3), all this
12 provides for his pay an amount equal to the cost of
13 necessary funeral and related expenses.

14 Now, since you consider that just illustrative,
15 I suppose you would say that Federal judges can invent
16 wrongful death amounts for -- for death to -- to -- to an
17 individual. Can -- can -- can they do that?

18 MS. WAX: Your Honor, I'm -- I'm not implying
19 that it is necessarily simply illustrative with regard to
20 the category of the types or components of damages that
21 can go into the award.

22 I -- I am saying that it is illustrative with
23 regard to a completely different category, which is the
24 acts that can give rise to the harm, the types of actions
25 that could be the source of the harm or the cause of the

1 harm.

2 QUESTION: I see. I see what you mean.

3 MS. WAX: And those are two completely different
4 categories.

5 QUESTION: Fair enough.

6 MS. WAX: Okay. The first category is what --
7 is this provision is concerned with. That is an entire
8 focus of this provision. The first category is just -- is
9 incorporated in here in one line of locution, which we
10 think does not exhaust the possibilities for the award of
11 damages. We think it leaves open the possibility of
12 awarding damages resulting from other acts of the
13 defendant that are not encompassed by the literal terms of
14 the count of conviction.

15 QUESTION: What is your -- what is the limit?
16 Is there some outside limit on what compensation you think
17 can -- can be ordered? How would you describe it?

18 MS. WAX: Well, there are two answers to that.
19 We do think there are limits, yes. We don't think that
20 the sentencing court has unlimited discretion --

21 QUESTION: It seems to me you'd certainly leave
22 a -- a judge -- a judge has a duty under (a)(2) that if he
23 doesn't order restitution or orders only partial
24 restitution, he has to give his reasons.

25 MS. WAX: Right.

1 QUESTION: How does -- how does he ever know
2 when he's ordering only partial restitution under your
3 theory --

4 MS. WAX: Well --

5 QUESTION: -- which seems to be so -- be so
6 open-ended that -- you tell me what their limits are?

7 MS. WAX: Right. Well, there are three possible
8 sources of limitation. One is that Congress in its wisdom
9 incorporated the limitation that it has to be harm to the
10 victim of the offense. So, there are certain victims that
11 are going to get compensation and unfortunately --

12 QUESTION: Oh, I understand that.

13 MS. WAX: -- there are certain that are going to
14 be left out.

15 QUESTION: Well, I understand that. But you
16 just say --

17 MS. WAX: Secondly --

18 QUESTION: -- it doesn't say how much.

19 MS. WAX: Right. The second limitation -- and
20 here is in the concept of restitution itself. It has to
21 be an order of restitution. And that means that there --
22 there should be some linkage, some relationship, between
23 the conduct of the defendant that's taken into account,
24 the related conduct. There has to be some unity between
25 that conduct and the actual offense of conviction.

1 So an act by the defendant that harms the victim
2 which is remote -- extremely remote in time or has no
3 clear connection to the episode or the ongoing course of
4 conduct of which the count of conviction is a part would
5 probably be inappropriate. It would be inappropriate for
6 the judge to include that in the order of restitution, and
7 it could well be an abuse of discretion.

8 And to understand that, one needs to look at the
9 purposes of restitution and the nature of restitution.
10 The purposes of restitution, as with other criminal
11 sanctions, are deterrence, retribution and rehabilitation.
12 And it is abundantly obvious that, for example,
13 restitution for a mere fraction of the harm that the
14 defendant actually did to the victim would not adequately
15 serve those purposes.

16 But the flip side of that is that restitution
17 for very remote or unrelated harms would not really add to
18 the power and the value of the sanction of restitution for
19 this crime.

20 QUESTION: Of course, one of the collateral
21 effects of your argument -- there are other banks here.
22 And the MBank I believe, which was the one that got the
23 restitution order, in effect may have gotten all this
24 man's assets. It got a huge order of restitution. And
25 the other banks could that were just in counts that were

1 not prosecuted or not subject to plea agreement received
2 nothing. And that's a collateral effect of what you
3 argument and -- that doesn't seem to me to square with
4 evenhanded restitution.

5 I recognize no one argues you can give
6 restitution to other victims. But that's a collateral
7 effect of what your arguing here.

8 MS. WAX: There's no doubt that in the practical
9 application of this statute, as Congress wrote it, there
10 are victims who are going to lose out. I mean, if -- if
11 the pattern of a certain crime is multiple instances of
12 violations directed at many, many different victims, which
13 sometimes happens, for example, with mail fraud counts,
14 then the fact is that there's not going to be terribly
15 effective restitution to the mass of victims if the
16 conviction is limited to one count.

17 Congress structured the Act this way. We think
18 it had good and sensible reasons for doing it because it
19 does create boundaries, it does cabin the sentencing
20 court's discretion in a way that is -- makes a lot of
21 sense for restitution, which is about the relationship
22 between the victim and the defendant and the confrontation
23 between the victim and defendant and measures whereby the
24 defendant makes the victim whole.

25 So we understand the concern that you're

1 speaking of and it is a concern but this is the way
2 Congress wrote the statute, in our opinion.

3 I was speaking of the general provisions of the
4 statute which in our view buttress our reading of the
5 statute as permitting the sentencing judge under
6 appropriate circumstances to go beyond the offense of
7 conviction to look at the harm done by the defendant to
8 the victim.

9 And, as I said, there were three provisions of
10 the statute which we believe can be read to mandate full
11 and fair restitution and to show that restitution confined
12 to the count of conviction could not possibly fulfill
13 Congress' purposes in enacting --

14 QUESTION: Could I just make one -- one
15 observation? You repeatedly said these provisions can be
16 read in such and such a way. Don't you think there's a
17 sort of a duty of fair notice to the defendant that they
18 -- they must be read this way when you're ordering
19 restitution of nine time the amount that was specified in
20 the event?

21 The mere fact that a statute can be read to
22 support this kind of result, is that -- is that -- do you
23 think that's enough in a case like this?

24 MS. WAX: Well, I -- I guess we'd -- I'd have to
25 say that perhaps can be read is -- is not the best way of

1 putting it.

2 QUESTION: I don't think it is.

3 MS. WAX: We think it must be read because of
4 what Congress was trying to accomplish with this statute
5 and because the reading that Petitioner urges would so
6 eviscerate the efficacy of these restitution provisions
7 that we just can't believe that this is the way Congress
8 meant for them to be interpreted.

9 And we're not just saying that out of thin air.
10 We think that that impulse finds substantiation in
11 particular provisions of the statute, which admittedly
12 some -- some of which speak in general terms, but which we
13 think show Congress' intent.

14 QUESTION: If you lose this case, it seems to me
15 that government can always protect itself against too
16 narrow a restitution order. In your plea bargaining
17 arrangement you can bargain about restitution.

18 MS. WAX: Your Honor, we don't think so.

19 QUESTION: Why not?

20 MS. WAX: First of all, it's true that we could
21 attempt to elicit a promise from the defendant that they
22 pay comprehensive restitution flowing from all the counts
23 that we think they are guilty of in the process of
24 hammering out a plea agreement on a very narrow count. We
25 could -- the prosecutor could try and get that promise out

1 of the -- the defendant.

2 QUESTION: But you couldn't get it in an order,
3 you don't think, if you loss this case?

4 MS. WAX: No, we don't think so. And this case
5 illustrates why that promise is so odious. This
6 individual has 13 years to pay restitution. If he
7 willfully reneges on his promise to pay restitution at
8 year 10, we do not think that the prosecutor has a
9 realistic prospect of reviving the charges that he's
10 relinquished as part of the deal and making them stick.

11 The fact is that victims will suffer, and
12 defendants will go scot free. They will not --

13 QUESTION: Well, Ms. Wax, this looks a case
14 where the government entered into a very poor plea
15 agreement from the standpoint of public policy. And I
16 would think a prosecutor would want to be a little careful
17 before entering into such a limited agreement with someone
18 who has caused so much harm or been privy to much broader
19 activity than that encompassed in the plea agreement.

20 Now, I guess you would agree that the prosecutor
21 doesn't have to accept a limited plea bargain like this or
22 go along with it.

23 MS. WAX: That's correct. The prosecutor
24 doesn't. But -- and we -- we don't actually think that,
25 as these matters go, the prosecutor did anything out of

1 the ordinary or anything that, you know, he shouldn't have
2 done here. I mean, this individual was sentenced to eight
3 years in jail on the basis of the plea to this single
4 count.

5 QUESTION: Well, what does that mean in terms of
6 actual service in incarceration? A year or two?

7 MS. WAX: Well, this was before the Sentencing
8 Reform Act. I actually don't know the answer to that
9 question. But he did receive a substantial jail term.
10 But that's just the point. The -- the prosecutor got a
11 plea bargain which involved a substantial jail term, which
12 more or less comports with our view of the kind of penalty
13 that an individual should get for pilfering \$90,000. But
14 in doing so, he had to sacrifice a tremendous amount of
15 restitution.

16 He basically had to go down to 1/100th of the
17 value of what this person took from the bank, which we
18 think is virtually as good as no restitution at all. And
19 this will happen over and over again, we think, if this
20 Court embraces Petitioner's view of the statute.

21 It will -- it will impale prosecutors on the
22 horns of a dilemma, it's true. The question will be
23 should, you know, should I accept this plea bargain which
24 necessarily involves convicting the person on fewer counts
25 than he was indicted on, or even that we think could

1 prove, and thereby sacrifice the interest of victims.

2 And we don't think -- we think Congress was
3 aware of prosecutorial practice and we don't think that
4 Congress wanted that kind of sacrifice of victims'
5 interests where again and again in the statute, in the
6 legislative history, it emphasized that full and fair
7 restitution to victims was its goal.

8 QUESTION: There is another provision of the
9 statute, of course, that makes it easy for the victims to
10 file and win a suit. It -- it does provide that in any
11 civil action brought by a victim, the -- the acts
12 constituting the offense will be conclusively established,
13 doesn't it?

14 MS. WAX: Yes, but once -- but there, that
15 estoppel provision, 3580(e), does limit estoppel to the
16 acts involved in the narrow offense of conviction. So it
17 doesn't help the individual --

18 QUESTION: It doesn't help your case either.

19 MS. WAX: We think it does help our case and so
20 did the court below, Your Honor, because in saying the
21 offense involving the acts giving rise to restitution,
22 that provision implies that there might be acts giving
23 rise to restitution that are not part of the offense. And
24 that's how the court below interpreted it as in fact
25 implying a more expansive view of the statute. So, we

1 would disagree with that.

2 If the court has no further questions --

3 QUESTION: Thank you, Ms. Wax.

4 Mr. Campbell, do you have rebuttal?

5 REBUTTAL ARGUMENT OF LUCIEN B. CAMPBELL

6 ON BEHALF OF THE PETITIONER

7 MR. CAMPBELL: Thank you, Mr. Chief Justice.

8 First I'd like to suggest the petitioner's
9 interpretation would in no way eviscerate the Victim and
10 Witness Protection Act. Apart from the government's
11 considerable power to insist on full restitution where
12 appropriate as part of a plea agreement, the statute
13 involved in this case, credit card fraud, specifically
14 permits aggregation. Not only of amounts, but of credit
15 cards.

16 And, in fact, count 6 of the indictment that
17 appears in the Joint Appendix, page 5 and 6, one of the
18 dismissed counts, aggregated not only amounts but two
19 different credit cards. If the government in this case
20 had considered it so important to obtain a conviction that
21 would support an order of full restitution under the VWPA,
22 it could have insisted on a plea of guilty to a count
23 aggregating all of these losses.

24 The other half of the government's argument
25 other than the catchall phrase in 3580(a), seems to be

1 general legislative purposes -- that is, to restore
2 victims.

3 Congress did have that goal within the limits of
4 the criminal justice system. But at the same time,
5 Congress had a very specific purpose to limit restitution
6 to the offense of conviction.

7 And this Court has repeated as recently as last
8 month in the Crandon and Boeing case that general
9 expressions of legislative purpose can rarely carry the
10 burden of expanding a criminal statute beyond what is
11 clearly warranted in the text.

12 I believe that Congress balanced competing
13 interests when it passed the VWPA, it perpetuated the
14 bright line of restitution limited to losses established
15 by the offense of conviction. And that is a line that
16 serves all of the interests well.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Campbell.

19 The case is submitted.

20 (Whereupon, at 12:09 p.m., the case in the
21 above-entitled matter was submitted.)

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24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-5691 - FRASIEL L. HUGHEY, Petitioner V. UNITED STATES

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BY *Lona M. May*

(REPORTER)

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