APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF,	)	10CR2967(5)-IEG
VS.	)	SAN DIEGO, CA OCTOBER 26, 2012
MARCO MANUEL LUIS, DEFENDANT.	)	10:30 A.M.

TRANSCRIPT OF RESTITUTION/EVIDENTIARY HEARING

BEFORE THE HONORABLE IRMA E. GONZALEZ

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: OFFICE OF THE U. S. ATTORNEY
BY: SHERRI W. HOBSON, ESQ.
880 FRONT STREET, RM. 6293
SAN DIEGO, CA 92101

FOR THE DEFENDANT: BURNS & COHAN
BY: TODD W. BURNS, ESQ.
444 WEST C STREET, SUITE 444
SAN DIEGO, CA 92101

COURT REPORTER: FRANK J. RANGUS, OCR
U. S. COURTHOUSE, RM. 4194
940 FRONT STREET
SAN DIEGO, CA 92101
(619) 531-0171

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

MS. HOBSON: YES.

THE COURT: -- 132 SUPREME COURT 2344.

MS. HOBSON: YES.

THE COURT: AND THEN THE CASES THAT YOU'VE REFERRED TO ARE SET FORTH ON PAGE 15.

MS. HOBSON: STARTING WITH BROCK-DAVIS.

THE COURT: YES, AND THIS IS YOUR REPLY BRIEF.

MS. HOBSON: THIS IS MY REPLY BRIEF TO HIS ARGUMENT THAT APPRENDI SOMEHOW EXTENDS TO A RESTITUTION HEARING.

THE COURT: AND I AGREE WITH THE GOVERNMENT THAT APPRENDI DOES NOT APPLY TO RESTITUTION. CERTAINLY, YOU CAN TRY TO READ SOUTHERN UNION THAT WAY, BUT I FIND THAT, BASED ON NINTH CIRCUIT LAW, EVEN THOUGH, ACCORDING TO THE DEFENDANT, THE NINTH CIRCUIT MAY SEEM TO SAY THAT APPRENDI DOES NOT APPLY, I STILL FIND THAT IT'S CLEAR THAT APPRENDI DOES NOT APPLY TO RESTITUTION. IT MAY NOW APPLY TO FINES, BUT THERE'S A DIFFERENCE BECAUSE OF THE STATUTORY MAXIMUM THAT CAN BE CALCULATED WITH FINES, AND YOU CAN'T CALCULATE A STATUTORY, A MAXIMUM WITH (PAUSE) -- LOOK AT WHERE WE ARE NOW. THAT'S THE REASON WE'RE HERE. WE DON'T KNOW WHAT THE MAXIMUM -- WE DON'T KNOW WHAT THE RESTITUTION IS.

SO THAT PART OF THE MOTION I DENY.

OKAY, YOU CAN CALL YOUR FIRST WITNESS.

MS. HOBSON: YOUR HONOR, THE GOVERNMENT CALLS CYNTHIA SWAN.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF,	)	10-CR-2967-1-IEG
VS.	)	SAN DIEGO, CA
	)	JUNE 24, 2013
JOSHUA JOHN HESTER, DEFENDANT.	)	1:30 P.M.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE IRMA E. GONZALEZ

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: OFFICE OF THE U. S. ATTORNEY
BY: SHERRI W. HOBSON, ESQ.
880 FRONT STREET, RM. 6293
SAN DIEGO, CA 92101

FOR THE DEFENDANT: LAW OFFICES OF TIMOTHY A. SCOTT
BY: TIMOTHY A. SCOTT, ESQ.
1350 COLUMBIA STREET, SUITE 600
SAN DIEGO, CA 92101

COURT REPORTER: FRANK J. RANGUS, OCR
U. S. COURTHOUSE, RM. 4194
241 W. BROADWAY
SAN DIEGO, CA 92101
(619) 531-0171

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

THINK WE COMPLIED WITH IT. I THINK WE INDICATED THAT THERE WAS A RESTITUTION ORDER. WE ALERTED THE DEFENSE ATTORNEY, AND THEN I CITED THAT IN MY SENTENCING MEMO AND THERE WAS NO OBJECTION.

I THINK DOLAN IS ON POINT, MEANING, EVEN ASSUMING THAT THE COURT MISSED A 90-DAY DEADLINE, THE COURT CAN STILL ORDER RESTITUTION.

THE COURT: WELL, WE'RE NOT TALKING ABOUT THE 90 DAYS. WE'RE TALKING ABOUT THE TEN DAYS BEFORE SENTENCING. CERTAINLY, TEN DAYS BEFORE SENTENCING, IF I ISSUED THE ORDER IN THE LUIS CASE JANUARY 23RD, AND IT WAS JANUARY 24TH I SENTENCED MR. HESTER, AT LEAST ACCORDING TO THE GOVERNMENT'S CASE, AND MR. HESTER IS SAYING, WELL, BY THE TIME OF THE SENTENCING, THE AMOUNT OF RESTITUTION HAD ALREADY BEEN ASCERTAINED BY THE COURT.

BUT YES, AS TO LUIS, I DID SAY IN THE ORDER THAT THERE WAS JOINT AND SEVERAL LIABILITY. BUT ON THE OTHER HAND, I WANTED TO GIVE MR. HESTER AN OPPORTUNITY TO BE ABLE TO REVIEW THE EVIDENCE IN THE CASE TO SEE IF MAYBE I'D COME TO A WRONG CONCLUSION OR THERE WAS A DIFFERENT AMOUNT THAT SHOULD BE ASCERTAINED, AND THERE'S BEEN NO SUCH SUBMISSION BY MR. HESTER.

AND SO, THEREFORE, THE OBJECTION ON TIMELINESS IS OVERRULED.

AND AS FOR THE OTHER OBJECTION TO THE SUBSTANCE OF

WHAT THE COURT FOUND MR. LUIS AND MR. HESTER TO BE LIABLE FOR, I OVERRULE THAT OBJECTION, TOO, AND I INCORPORATE BY REFERENCE MY ORDER THAT I ISSUED AS TO MR. LUIS TO BE THE SAME ORDER AS TO MR. HESTER. AND I CAN ISSUE A VERY SHORT ORDER JUST SAYING THAT AND PUTTING THE AMOUNTS IN, JUST SO IT'S VERY CLEAR WHAT I AM FINDING MR. HESTER'S LIABLE FOR.

MR. SCOTT: VERY GOOD, YOUR HONOR.

THE COURT: AND YOU CAN EXPLAIN THAT, HOPEFULLY, TO YOUR CLIENT.

MR. SCOTT: THANK YOU.

THE COURT: YOUR MOTION IS DENIED.

AND I ALSO FIND RESTITUTION IS MANDATORY, AND THAT YOU, MR. HESTER HAD NOTICE OF IT. OKAY, SO I'LL PUT THAT IN A SHORT ORDER WHEN I GET SOME TIME TO DO THAT.

MR. SCOTT: VERY GOOD.

THE COURT: OKAY.

MR. SCOTT: THANK YOU, YOUR HONOR.

(PROCEEDINGS ADJOURNED.)

(END OF TRANSCRIPT)

765 F.3d 1061
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Marco Manuel LUIS, Defendant–Appellant.

No. 13–50020.
|
Argued and Submitted March 6, 2014.
|
Filed Aug. 28, 2014.

Synopsis

Background: After defendant pled guilty to two counts of conspiracy to engage in monetary transactions in property, the United States District Court for the Southern District of California, Irma E. Gonzalez, Senior District Judge, 2013 WL 149726, ordered restitution under Mandatory Victims Restitution Act (MVRA). Defendant appealed.

Holdings: The Court of Appeals, N.R. Smith, Circuit Judge, held that:

[1] conspiracy to engage in monetary transactions in property was an "offense against property" under MVRA;

[2] determination that loan purchaser was a victim under MVRA was not abuse of discretion;

[3] improper calculation of loan purchaser's loss required remand; and

[4] loan originator's sale of defaulted loan did not constitute an intervening cause for its loss.

Affirmed in part, and vacated and remanded in part.

West Headnotes (12)

[1] Criminal Law
Review De Novo

The legality of an order of restitution is reviewed de novo, and factual findings supporting the order are reviewed for clear error.

8 Cases that cite this headnote

[2] Criminal Law
Restitution

Provided that it is within the bounds of the statutory framework, a restitution order under the Mandatory Victims Restitution Act (MVRA) is reviewed for abuse of discretion. 18 U.S.C.A. § 3663A(a)(1), (c)(1).

6 Cases that cite this headnote

[3] Sentencing and Punishment
Restitution

Defendant's conviction of conspiracy to engage in monetary transactions in property derived from criminal activity constituted an "offense against property" under Mandatory Victims Restitution Act (MVRA); loan originator and loan purchaser suffered pecuniary loss when loans occasioned by defendant's offenses went unpaid. 18 U.S.C.A. §§ 1956(h), 1957, 3663A(a)(1), (c)(1).

3 Cases that cite this headnote

[4] Sentencing and Punishment
Burden of proof

Government bears the burden of proving that a person or entity is a victim for purposes of restitution under Mandatory Victims Restitution Act (MVRA). 18 U.S.C.A. § 3663A(a)(2).

5 Cases that cite this headnote

[5] Criminal Law
Restitution

Court of Appeals reviews a determination that a person or entity is a victim under the

Mandatory Victims Restitution Act (MVRA) for abuse of discretion. 18 U.S.C.A. § 3663A(a)(2).

5 Cases that cite this headnote

[6] **Sentencing and Punishment**
Victims

A district court does not abuse its discretion in finding a loan purchaser is a victim under the Mandatory Victims Restitution Act (MVRA), if the defendant fraudulently obtained the loan and the fraud was not discovered until after the purchase. 18 U.S.C.A. § 3663A(a)(2).

1 Cases that cite this headnote

[7] **Sentencing and Punishment**
Victims

District court's determination that loan purchaser was a "victim" of defendant's conspiracy to engage in monetary transactions in property, within meaning of Mandatory Victims Restitution Act (MVRA), was not abuse of discretion, where fraudulent nature of the loans was concealed at the time they were purchased from loan originator. 18 U.S.C.A. §§ 1956(h), 1957, 3663A(a)(1), (c)(1).

Cases that cite this headnote

[8] **Criminal Law**
Sentence
Sentencing and Punishment
Measure of valuation

District court's improper calculation of loan purchaser's loss, in calculating restitution award under Mandatory Victims Restitution Act (MVRA), based on the unpaid principal loan balance, rather than the value of the loans when they were purchased, required remand for new determination of loss. 18 U.S.C.A. § 3663A(a)(2).

5 Cases that cite this headnote

[9] **Sentencing and Punishment**
Measure of valuation
Sentencing and Punishment
Credits and Offsets

Different formulas apply to determine a victim's actual losses on loans, for purposes of calculating restitution under Mandatory Victims Restitution Act (MVRA), depending on whether the victim is a loan originator or a loan purchaser: the restitution formula for a loan originator begins with the amount of the unpaid principal balance due on the fraudulent loan, while the restitution formula for a loan purchaser begins with how much the victim paid for the fraudulent loan, or the value of the loan when the victim acquired it, with the applicable amount then being offset by the amount of money the victim received in selling the collateral. 18 U.S.C.A. § 3663A(a)(2).

4 Cases that cite this headnote

[10] **Criminal Law**
Restitution
Sentencing and Punishment
Measure of valuation

Applying of loan originator formula for determining restitution under Mandatory Victims Restitution Act (MVRA) when the victim is a loan purchaser who paid less than the unpaid principal amount to purchase the loan would cause the victim to receive an amount exceeding its actual losses and would constitute plain error. 18 U.S.C.A. § 3663A(a)(2).

2 Cases that cite this headnote

[11] **Sentencing and Punishment**
Credits and Offsets

A sentencing court must reduce the restitution amount awarded to a victim of a fraudulent loan under Mandatory Victims Restitution Act (MVRA) by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it. 18 U.S.C.A. § 3663A(a)(2).

2 Cases that cite this headnote

[12] Sentencing and Punishment

Monetary, pecuniary, or economic loss

Loan originator's choice to sell defaulted loan, rather than foreclose on property, did not constitute an intervening cause of originator's loss, as would bar restitution under Mandatory Victims Restitution Act (MVRA) in sentencing defendant for conspiracy to engage in monetary transactions in property, where the sale of defaulted loan, which was a very common method of mitigating loss, was foreseeable, and defendant's criminal conduct had directly caused the default. 18 U.S.C.A. § 3663A(a)(2).

Cases that cite this headnote

Attorneys and Law Firms

***1063** Todd W. Burns, Burns and Cohan, San Diego, CA, for Defendant–Appellant.

Lawrence E. Spong (argued), Assistant United States Attorney; Bruce R. Castetter, Assistant United States Attorney Chief, Appellate Section Criminal Division; Laura E. Duffy, United States Attorney, United States Attorney's Office, San Diego, CA, for Plaintiff–Appellee.

Appeal from the United States District Court for the Southern District of California, Irma E. Gonzalez, Senior District Judge, Presiding. D.C. No. 3:10–cr–02967–IEG–5.

Before: RICHARD A. PAEZ, N. RANDY SMITH, and ANDREW D. HURWITZ, Circuit Judges.

OPINION

N.R. SMITH, Circuit Judge:

The Mandatory Victim Restitution Act ("MVRA") requires a district court to order restitution when (1) a defendant commits an "offense against property," and (2) there is a "victim." *See* 18 U.S.C. § 3663A(a)(1), (c)(1). We affirm the district court's determination that both requirements were met in this case.

Marco Luis pleaded guilty to two counts of conspiracy to engage in monetary transactions in property 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. Because Luis's crimes infringed on JP Morgan Chase's ("Chase") and CitiGroup's ("Citi")[1] property interests, they were offenses against property. *See United States v. Stephens,* 374 F.3d 867, 871 (9th Cir.2004). Also, the district court did not abuse its discretion in determining that Chase was a victim, because the fraudulent nature of the loans was concealed at the time Chase purchased them. *See United States v. Yeung,* 672 F.3d 594, 603 (9th Cir.2012), *overruled in part on other grounds by* ***1064** *Robers v. United States,* —— U.S. ——, 134 S.Ct. 1854, 188 L.Ed.2d 885 (2014).

We affirm the calculation of restitution owed to Citi, because the district court deducted from the base restitution amount the actual amount received in mitigation of the victim's loss. *See Robers,* 134 S.Ct. at 1856. However, we vacate and remand for the district court to recalculate the amount owed to Chase, because the district court applied a formula for a loan originator, although Chase had purchased the loans. *See Yeung,* 672 F.3d at 602.

FACTS & PROCEDURAL HISTORY

Luis and Joshua Hester, long-time friends, began investing in real property together. As a real estate agent, Luis had the know-how. As a career marijuana dealer, Hester had the cash.

In 2006, Luis and Hester purchased a parcel of real property in Rancho Santa Fe, California for $2,050,000. Luis filled out the purchasing paperwork, using Hester's girlfriend (Kelsey Wiedenhoefer) as the straw buyer. Luis falsely stated that Wiedenhoefer was self-employed and earned $420,000 per year. Luis also falsely represented Wiedenhoefer's employment history and the source of the down payment and future monthly payments. Lastly, Luis obtained a preapproval letter from Dennis O'Connor, which falsely stated O'Connor had prepared Wiedenhoefer's tax returns and could verify that she was successfully self-employed. Relying on this paperwork,

Washington Mutual approved two mortgages, in the amounts of $1,640,000 and $204,7500. Thereafter, Hester made the down payment and monthly mortgage payments using Wiedenhoefer's bank account. The payments were interest only; Hester never paid any principal.

In 2007, Luis and Hester purchased ten acres of real property in Palomar, California for $560,000. Again, Luis filled out the purchasing paperwork. This time, he used Jay Hansen as the straw buyer. Luis knew that Hansen delivered marijuana to Hester's customers, but falsely stated that Hansen made $12,500 a month detailing cars. Citi issued two mortgages in the amounts of $448,000 and $112,000, making the Palomar property 100% financed. Hester provided Hansen with funds for the closing costs and monthly mortgage payments.

In December 2008, the Palomar loans went into default. In September 2009, the Rancho Santa Fe loans went into default. The fraudulent nature of these loans was discovered during a larger investigation of Hester's illegal marijuana distribution; Hansen, Hester, Wiedenhoefer, and Luis were then charged criminally in connection with the purchase of the two properties.

On March 19, 2012, Luis pleaded guilty to two counts of conspiring to engage in prohibited monetary transactions in violation of 18 U.S.C. §§ 1956(h) and 1957. On August 27, 2012, the district court sentenced him to 48 months in custody. The court also ordered restitution in the amount of $545,029.90. Luis provided this amount of loss to the district court in his sentencing memorandum.

On September 5, 2012, Luis requested the restitution order be vacated and reconsidered "based on an appropriate record, whether, to whom, and how much restitution should be ordered." The district court granted this request and held hearings regarding restitution. Witnesses from Chase and Citi testified at the hearings.

Patrick M. Carr, vice president and controller for Chase, testified that Washington Mutual Bank originally authorized the loans on the Rancho Santa Fe property for $1,640,000 (first mortgage) and $204,750 ***1065** (second mortgage). On September 25, 2008, Chase purchased Washington Mutual Bank's assets and liabilities. This purchase included a group of loans totaling about $120 billion of unpaid debt. Chase paid about $90 billion for that group of loans, which included the Rancho Santa Fe property loans. The outstanding unpaid principal balance on the Rancho Santa Fe property loans remained $1,844,750. In September 2011, Chase foreclosed on the Rancho Santa Fe property. (On the foreclosure sale date, the unpaid principal balance of the loans remained the same.) At the sale, Chase bid $1,228,815 and purchased the property.

Cynthia Swan, a business operations analyst with Citi, testified that Citi originally authorized the Palomar Mountain property loans for $448,000 (first mortgage) and $112,000 (second mortgage). Around December 2008, these loans went into default. Citi elected not to foreclose on the property. Rather, in April 2010, Citi sold the first mortgage for $230,068. At the time of the sale, the Palomar property first mortgage's unpaid principal balance was $447,977. Citi wrote off the unpaid balance of the second mortgage, $111,858.

The district court ordered $615,935 in restitution to Chase. The court subtracted the Rancho Santa Fe property foreclosure sale price ($1,228,815) from the unpaid principal balance on the first mortgage ($1,640,000), resulting in a loss of $411,185 on the first mortgage. The court added this loss to the unpaid principal balance on the second mortgage ($204,750).

The district court ordered $329,767 in restitution to Citi. The court subtracted the sale price of the first mortgage ($230,068) from the unpaid principal balance on the first mortgage ($447,977), a loss of $217,909. The court added this loss to the unpaid principal balance on the second mortgage ($111,858). Luis timely appealed the restitution order.

STANDARD OF REVIEW

[1] **[2]** "The legality of an order of restitution is reviewed *de novo,* and factual findings supporting the order are reviewed for clear error." *United States v. Brock–Davis,* 504 F.3d 991, 996 (9th Cir.2007) (citing *United States v. Hackett,* 311 F.3d 989, 991 (9th Cir.2002); *United States v. Stoddard,* 150 F.3d 1140, 1147 (9th Cir.1998)). "Provided that it is within the bounds of the statutory framework, a restitution order is reviewed for abuse of discretion." *Id.*

DISCUSSION

I. Restitution was mandatory

The MVRA requires restitution when (1) sentencing a defendant convicted of "an offense against property under [Title 18], including any offense committed by fraud or deceit"; and (2) there is "an identifiable victim or victims [who] suffered ... pecuniary loss." 18 U.S.C. § 3663A(a)(1), (c)(1). Luis claims the district court erred in finding both elements satisfied. We disagree.

A. "Offense against property"

[3] Luis pleaded guilty to conspiring to engage in monetary transactions in property derived from criminal activity under 18 U.S.C. §§ 1956(h) and 1957. The MVRA does not define "offense against property." *See* 18 U.S.C. § 3663A. However, we have held that "against property" means infringing on a victim's property interest. *See Stephens,* 374 F.3d at 871. In *Stephens,* we determined that failure to pay child support in violation of 18 U.S.C. § 228 constitutes an offense against property. *Id.* at 868, 871. Omission of required support payments infringed on the ***1066** other parent's right to receive the payments, a property interest. *Id.* at 871. The failure to pay child support "involv[ed] pecuniary loss" and therefore constituted an offense against property. *See id.* Here, quite simply, Chase and Citi suffered pecuniary loss when the Rancho Santa Fe property and Palomar property loans went unpaid. Luis's offenses occasioned these losses.

Luis's argument that "against property" requires physical damage to property is unavailing. *See United States v. Hunter,* 618 F.3d 1062, 1064 (9th Cir.2010) (holding that a conviction for mail fraud invoked the MVRA); *c.f. United States v. Rizk,* 660 F.3d 1125, 1134–37 (9th Cir.2011) (applying the MVRA to offenses arising out of a mortgage fraud scheme, which included conspiracy, bank fraud, and loan fraud). Moreover, in *United States v. Lazarenko,* 624 F.3d 1247 (9th Cir.2010), we agreed with the parties that money laundering and conspiracy to launder money constituted offenses against property. *Id.* at 1249–50. A conviction under 18 U.S.C. § 1957 is for money laundering. *United States v. Bush,* 626 F.3d 527, 529 (9th Cir.2010); *United States v. Rogers,* 321 F.3d 1226, 1229 (9th Cir.2003).

We are not alone in this conclusion. Other Courts of Appeals agree that convictions under § 1957 are subject to the MVRA. *See, e.g., United States v. Diaz,* 245 F.3d 294, 296, 312 (3d Cir.2001); *United States v. Polichemi,* 219 F.3d 698, 707, 714 (7th Cir.2000).

Luis also argues that, even if actually engaging in transactions with proceeds from unlawful activity constitutes an offense against property, conspiracy to engage in such transactions does not. However, that distinction does not matter. Conspiracy to launder money triggers the "same penalties" as actual money laundering, 18 U.S.C. § 1956(h), and MVRA restitution is a "penalty," *see id.* § 3663A(a)(1).

B. "Victim"

The district court found Chase and Citi were victims for MVRA purposes. Luis only challenges this finding as to Chase.[2] He argues that the government failed to meet its burden to show actual loss suffered by Chase. Luis is incorrect.

[4] **[5]** "The government bears the burden of proving that a person or entity is a victim for purposes of restitution." *United States v. Waknine,* 543 F.3d 546, 556 (9th Cir.2008). Under the MVRA, a victim is "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. § 3663A(a)(2). A loan purchaser can be a victim. *See Yeung,* 672 F.3d at 602. We review a determination that a person or entity is a victim for abuse of discretion. *See id.* at 603.

[6] The district court does not abuse its discretion in finding a loan purchaser is a victim, if the defendant fraudulently obtained the loan and the fraud was not discovered until after the purchase. *Id.* This makes good sense, because the loan purchaser would not know that the loan's value was less than it would otherwise appear to be, due to the unlikelihood of debtor payment. *See id.*

[7] Here, Chase purchased the Rancho Santa Fe property loans on September 25, 2008. The fraudulent nature of the loans and the fact that they were being paid with ***1067** illicit gains did not come to light until July 2010, when the government filed charges against Luis and his co-defendants. Consequently, the district court did not abuse

its discretion in concluding Chase was a victim for MVRA purposes. [3]

II. Restitution calculation

A. Rancho Santa Fe property loans

1. Calculation based on unpaid principal balance

[8] Luis contends that the district court erred by calculating restitution based on the unpaid principal loan balance rather than the value of the loans when Chase purchased them. On this point, we agree with Luis.

[9] **[10]** Different formulas apply to determine a victim's actual losses on loans, depending on whether the victim is a loan originator or a loan purchaser. *Id.* at 601–02 (Calculation rules "require some adjustment ... where the victim is the loan purchaser as opposed to the loan originator."). The restitution formula for a loan originator begins with the amount of the unpaid principal balance due on the fraudulent loan, *see id.* at 601, while the restitution formula for a loan purchaser begins with "how much the victim paid for the fraudulent loan (or the value of the loan when the victim acquired it)," *id.* at 602. The applicable amount is then offset "by the amount of money the victim received in selling the collateral." *Robers,* 134 S.Ct. at 1856. Applying the loan originator formula when the victim is a loan purchaser who paid less than the unpaid principal amount to purchase the loan "would cause the victim to receive an amount exceeding its actual losses ... [and] would constitute plain error." *Yeung,* 672 F.3d at 602.

Here, Chase purchased the loans; it did not originate them. Yet the district court applied the loan originator formula: It calculated restitution by subtracting the foreclosure sale price of the property from the unpaid principal balance on the loan. Thus, *Yeung* compels us to vacate the restitution order with respect to the Rancho Santa Fe property loan calculation and remand for the district court to recalculate Chase's loss, based on "how much [Chase] paid for the fraudulent loan[s] (or the value of the loan[s] when [Chase] acquired [them])." *See id.*

2. Calculation based on Chase's floor bid

[11] Luis also argues that the district court erred by offsetting the restitution amount owed to Chase by $1,228,815 (Chase's floor bid/the foreclosure sale price) rather than subtracting $1,598,847 (the fair market value assessment Luis submitted). However, *Robers v. United States,* ——U.S. ——, 134 S.Ct. 1854, 188 L.Ed.2d 885 (2014)—decided after oral argument took place in the instant appeal—dooms this argument, holding that "a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, *not the value of the collateral when the victim received it.*" *Id.* at 1856 (emphasis added).

B. Palomar property loans

Luis makes a similar argument concerning Citi's loss. He contends the district court should have subtracted from the unpaid principal balance the fair market value ***1068** of the Palomar property at the time Citi could have foreclosed on it, instead of the sale price of the first mortgage loan. Again, *Robers* substantiates the district court's calculation method. *See id.* The district court must subtract the actual amount received in mitigation of the loss. *See id.* Here, the district court did just that.

[12] Nor does Citi's choice to sell the loan rather than foreclose on the property constitute an intervening cause. "The basic question that a proximate cause requirement presents is 'whether the harm alleged has a sufficiently close connection to the conduct' at issue." *Id.* at 1859 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* —— U.S. ——, 134 S.Ct. 1377, 1390, 188 L.Ed.2d 392 (2014)). Foreseeable causes usually do not break the causal chain. *See id.* Here, selling defaulted loans, a very common method of mitigating loss, was foreseeable. Further, Luis's criminal conduct directly caused the defaults. *See generally United States v. Gamma Tech Indus., Inc.,* 265 F.3d 917, 928 (9th Cir.2001) (discussing "losses at least one step removed from the offense conduct"). Thus, the district court did not abuse its discretion in calculating restitution on the Palomar property loans. [4]

CONCLUSION

We **VACATE in part** and **REMAND** the restitution order for recalculation of restitution as to the Rancho Santa Fe loans. As to the remaining issues, we **AFFIRM.**

The parties shall bear their own costs.

All Citations

765 F.3d 1061, 14 Cal. Daily Op. Serv. 10,170, 2014 Daily Journal D.A.R. 12,033

Footnotes

1 CitiGroup includes CitiMortgage and CitiBank.

2 Because Luis does not argue that Washington Mutual and Citi were not "directly harmed" by criminal conduct in the course of the money laundering conspiracy, § 3663A(a)(2), we consider only whether a loan purchaser may be a victim of a fraudulent scheme.

3 Luis also argues that Chase "made out like a bandit" when it purchased Washington Mutual's assets and liabilities, which included the Rancho Santa Fe property mortgages. According to Luis, the profit Chase made on the *overall* purchase of the assets and liabilities of another bank means Chase did not suffer loss as to the Rancho Santa Fe mortgages. He offers no support for his novel argument, and we therefore deem it waived. *See Howard v. Everex Sys., Inc.,* 228 F.3d 1057, 1069 n. 18 (9th Cir.2000) (Failure to cite governing law waives the issue.).

4 While Luis also claims *Apprendi* error, he concedes that *United States v. Green,* 722 F.3d 1146 (9th Cir.2013) forecloses his claim.

584 Fed.Appx. 805
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Joshua John HESTER, Defendant–Appellant.

No. 13–50330.
|
Argued and Submitted July 10, 2014.
|
Submission Withdrawn and Deferred July 11, 2014.
|
Resubmitted Sept. 12, 2014.
|
Filed Sept. 16, 2014.

Attorneys and Law Firms

Bruce R. Castetter, Assistant U.S., Lawrence E. Spong, Assistant U.S., Office of the U.S. Attorney, San Diego, CA, for Plaintiff–Appellee.

Timothy Allen Scott, Law Offices of Timothy A. Scott, Benjamin Lee Coleman, Coleman & Balogh LLP, San Diego, CA, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of California, Irma E. Gonzalez, Senior District Judge, Presiding. D.C. No. 3:10–cr–02967–IEG–1.

Before: SILVERMAN, TALLMAN, and RAWLINSON, Circuit Judges.

MEMORANDUM [*]

Joshua John Hester (Hester) appeals from the district court's restitution order entered in favor of JP Morgan Chase Bank (Chase) and CitiGroup/CitiMortgage (Citi). The underlying drug trafficking scheme ***806** involved two properties relevant to this appeal—the Rancho Santa Fe property and the Palomar property. *See United States v. Luis,* No. 13–50020, 765 F.3d 1061, 1063–64, 2014 WL 4236390, at *1 (9th Cir. Aug. 28, 2014).

The district court correctly determined that the Mandatory Victim Restitution Act (MVRA) required Hester and his co-defendant Marco Luis (Luis) to pay restitution for offenses against property. *See id.* Chase and Citi each qualified as a "victim" entitled to restitution under the MVRA. *Id.* However, in calculating restitution as to the Rancho Santa Fe property, and without the benefit of our recent *Luis* decision, "the district court erred by calculating restitution based on the unpaid principal loan balance rather than the value of the loans when Chase purchased them...." *Id.* at 1067, 2014 WL 4236390, at *4. On remand, the district court should use the formula for a loan purchaser rather than for a loan originator. *See id.* at 1066–68, 2014 WL 4236390, at *4–*5. Therefore, "*Yeung* [1] compels us to vacate the restitution order with respect to the Rancho Santa Fe property loan calculation and remand so the district court may recalculate Chase's loss, based on how much Chase paid for the fraudulent loans (or the value of the loans when Chase acquired them)." *Id.* at 1067, 2014 WL 4236390, at *5 (citation, alterations, and internal quotation marks omitted). No similar abuse of discretion occurred in calculating restitution for the Palomar property loans. *See id.* [2]

We also reject Hester's argument that the district court's restitution order should be reversed because it was untimely. Although 18 U.S.C. § 3664(d)(5) requires that a final determination of victims' losses be made within ninety days of sentencing, that provision is for the benefit of victims, not defendants. *See United States v. Marks,* 530 F.3d 799, 811–12 (9th Cir.2008). Absent a showing of prejudice resulting from the delay, any error was harmless. *See United States v. Moreland,* 622 F.3d 1147, 1173 (9th Cir.2010).

AFFIRMED IN PART, VACATED and REMANDED IN PART.

All Citations

584 Fed.Appx. 805

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Circuit Rule 36–3.

1 *United States v. Yeung,* 672 F.3d 594 (9th Cir.2012), *overruled in part on other grounds by Robers v. United States,* —— U.S. ——, 134 S.Ct. 1854, 188 L.Ed.2d 885 (2014).

2 While Hester also alleges error under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), he concedes that *United States v. Green,* 722 F.3d 1146 (9th Cir.2013), forecloses this argument.

TODD W. BURNS
California Bar No. 194937
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101-5008
Telephone: (619) 236-0244
Facsimile: (619) 768-0333
E-mail: todd@burnsandcohan.com

Counsel for Marco Luis

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE BARRY TED MOSKOWITZ)

UNITED STATES OF AMERICA, Plaintiff, v. MARCO MANUEL LUIS (5), Defendant.	Case No. 10-cr-2967-BTM DEFENDANT LUIS'S NOTICE OF MOTION AND MOTION TO JOIN BRIEFING FILED BY DEFENDANT HESTER ON JANUARY 11, 2016 Date: January 25, 2016 Time: 2:30 p.m.

I. Introduction

Defendant Marco Luis hereby notices his motion, and moves, to join in the briefing filed on January 11, 2016 by his co-defendant Joshua Hester. Hester's briefing relates to the Court's November 23, 2015 order with respect to Judge Gonzalez's failure to "specify in [Hester's] restitution order the manner in which, and the schedule according to which, the restitution [ordered from Hester] is to be paid." 18 U.S.C. §3664(f)(2). Hester and Luis are essentially identically situated in this respect – indeed, Hester's restitution order does nothing more than incorporate Luis's restitution order. For that reason, the briefing submitted by Hester is equally applicable to Luis, and Luis moves to join that briefing and asks that the Court hold that there is no legally enforceable restitution order with respect to Luis. Before addressing that, and other, legal points, a brief review of the facts is warranted.

for the next five months. In light of Luis's financial situation, he requests that, if the Court is inclined to set a payment schedule, he be required to pay $50 per month toward restitution for Citigroup.

On a final note, in his previous appeal Luis argued that the holding of *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), with respect to criminal fines, supports the conclusion that the principles of *Apprendi* apply to restitution, and thus restitution could not be imposed in Luis's case because the restitution allegations were not charged in the indictment nor proved to a jury beyond a reasonable doubt. Prior to Luis's appellate argument, the Ninth Circuit rejected that claim in a published opinion, *see United States v. Green*, 722 F.3d 1146 (9th Cir. 2013), and Luis's request for *en banc* review was denied. Luis raised the issue again in a petition for writ of *certiorari*, which was also denied Recognizing that this Court is bound by *Green*, Luis nonetheless raises the *Southern Union/Apprendi* issue again here to preserve the issue for potential later appellate review.

Respectfully submitted,

Dated: January 13, 2016

s/ Todd W. Burns
Counsel for Mr. Luis

TIMOTHY A. SCOTT
California Bar No. 215074
LAW OFFICES OF TIMOTHY A. SCOTT, APC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone: (619) 794-0451
Facsimile: (619) 652-9964
Email: tscott@timscottlaw.com

Attorneys for Joshua Hester

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA, Plaintiff, v. JOSHUA HESTER, Defendant.	Case No. 10cr2967-BTM **Joinder in Briefing by Defendant Luis (Docket # 1022)**

Mr. Hester respectfully joins the briefing filed today by co-defendant Luis at Docket # 1022. Specifically, Mr. Hester joins in Mr. Luis's arguments preserving *Apprendi* / *Southern Union* arguments in the restitution context, as set forth in his brief.

Dated: January 13, 2016

Respectfully submitted,

s/ Timothy A. Scott

TIMOTHY A. SCOTT

LAW OFFICES OF TIMOTHY A. SCOTT, APC
Attorneys for Joshua Hester

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSHUA JOHN HESTER (1) MARCO MANUEL LUIS (5) Defendants.	Case No.: 10cr2967 BTM **ORDER ON ORDER TO SHOW CAUSE**

I. BACKGROUND

On August 27, 2012, Judge Gonzalez sentenced Defendant Marco Manuel Luis to 48 months in custody and also ordered restitution in the amount of $545,024.90, an amount set forth in Luis's sentencing memorandum. Luis's Judgment [Doc. 677] indicates that the defendant shall pay restitution in the amount of $545,024.90 to the United States immediately. The Judgment provides: "If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment."

On September 5, 2012, Luis requested that the restitution order be vacated and reconsidered. Judge Gonzalez granted this request and held an evidentiary hearing.

In an Order Granting Restitution [Doc. 773] as against Luis, Judge Gonzalez found that CitiGroup's loss on both of the Palomar Mountain loans combined was $329,767. With respect to the Rancho Santa Fe loans, Judge Gonzalez found that the loss to JP Morgan Chase ("Chase") on both loans was $615,935. Judge Gonzalez ordered Luis to pay jointly and severally with co-defendants restitution in the amount of $329,767 to CitiGroup and $615,935 to Chase.

In a separate Order Granting Restitution [Doc. 891] dated July 16, 2013, Judge Gonzalez incorporated by reference the prior Order Granting Restitution and ordered defendant Joshua John Hester to pay jointly and severally, with the codefendants, restitution in the amount of $329,767 to CitiGroup and $615,935 to Chase. Hester's Judgment [Doc. 804] filed on January 28, 2013, does not provide for the payment of restitution.

Luis and Hester appealed the restitution orders. The Ninth Circuit affirmed the calculation of restitution owed to CitiGroup on the Palomar Mountain loans but vacated and remanded for recalculation of the restitution owed to Chase.

Upon remand, the case was assigned the undersigned judge. The parties briefed the issue of what restitution, if any, was owed to Chase, and the Court held an evidentiary hearing on July 29, September 16-17, and December 16, 2015.

On October 5, 2015, the United States filed a motion for the Court to enter an order authorizing the Bureau of Prisons to turnover funds in excess of $12,000 held in the inmate trust account of Hester to be applied to restitution in his case. Hester opposed the government's request [Doc. 1020], arguing that the Court lacks jurisdiction to amend the CitiGroup restitution judgment and that because Judge Gonzalez made no findings regarding Hester's financial resources, there is

account was approximately $940. Based on this information, the Court sets a payment schedule of $500 per month.

C. Inclusion of Payment Schedule as a Condition of Supervised Release

As to both Hester and Luis, the Court includes a restitution payment schedule as a condition of supervised release.

Relying on United States v. Hatten, 167 F.3d 884 (5th Cir. 1999), Defendants argue that the Court lacks jurisdiction to modify the conditions of supervised release on the grounds of illegality. However, Hatten is distinguishable because in Hatten, the judgment had been final for three years.

Here, the judgment is not final because Defendants appealed the restitution orders, which were vacated in part and remanded for further proceedings. Having ruled on the remanded issues, the Court will amend the judgments to conform to the Court's rulings regarding restitution. As part of the amended judgments, the Court will set forth a payment schedule, which will be a condition of supervised release.

As discussed above, the Court finds that for Hester, a payment schedule of $500 per month is appropriate. Based on what the Court knows about Luis's financial circumstances, the Court sets a payment schedule of $100 per month for Luis.

III. CONCLUSION

For the reasons discussed above, the Court authorizes the Bureau of Prisons to turnover to the Clerk of Court all of the funds, with the exception of $500, held in the Inmate Trust Account of Joshua John Hester. The Clerk shall apply these funds as payment toward the restitution owed by Defendant in this case.

The Court will also amend the judgment of Joshua John Hester to (1) reflect that Hester owes, jointly and severally with co-defendants, restitution in the amount

of $329,767 to CitiGroup; (2) set a restitution payment schedule of $500 per month; and (3) include the payment schedule as a condition of supervised release.

The Court will amend the judgment of Marco Manuel Luis to (1) reflect that Luis owes, jointly and severally with co-defendants, restitution in the amount of $329,767 to CitiGroup; (2) set a restitution payment schedule of $100 per month; and (3) include the payment schedule as a condition of supervised release.

IT IS SO ORDERED.

Dated: March 14, 2016

Barry Ted Moskowitz, Chief Judge
United States District Court

Nos. 16-50107 & 16-50123

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSHUA HESTER AND MARCO LUIS,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
The Honorable Barry T. Moskowitz, Presiding
No. CR-10-02967-BTM

Appellants' Joint Opening Brief

TIMOTHY A. SCOTT
NICOLAS O. JIMENEZ
Law Offices of Timothy A. Scott, APC
1350 Columbia Street, Suite 600
San Diego, California 92101
619-794-0451

Counsel for Joshua Hester

TODD W. BURNS
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101
619-236-0244

Counsel for Marco Luis

to immediate apply them to Hester's restitution obligation. The district court erred in finding to the contrary. For this reason too, reversal should result.

III. Because the restitution allegations in this case were not charged in the indictment or proven to the jury beyond a reasonable doubt, restitution could not be imposed.

Hester and Luis argued before the district court that *Apprendi* and *Southern Union Co.* precluded restitution from being imposed in this case. Appellants recognize that this argument is currently foreclosed by this Court's precedent, including *United States v. Green*[74] and *United States v. Alvarez*.[75] Nevertheless, Hester and Luis raise the argument here to preserve it, if necessary, for Supreme Court review.

Conclusion

The district court acted beyond the scope of the remand and without authority under any applicable statute when it amended Hester and Luis's judgments in this case. The district court also erred by ordering the funds in Hester's inmate trust account to be turned over to Citibank. For the foregoing reasons, the Court should reverse and remand for a new entry of judgment.

[74] 722 F.3d 1146 (9th Cir. 2013).

[75] 835 F.3d 1180 (9th Cir. 2016).

708 Fed.Appx. 441 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Joshua John HESTER, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Marco Manuel **Luis**, Defendant-Appellant.

No. 16-50107, No. 16-50123
|
Submitted December 8, 2017 * Pasadena, California
|
Filed January 04, 2018

Appeal from the United States District Court for the Southern District of California, Barry Ted Moskowitz, Chief Judge, Presiding, D.C. No. 3:10-cr-02967-BTM-1, D.C. No. 3:10-cr-02967-BTM-5

Attorneys and Law Firms

Sherri Walker Hobson, Assistant U.S. Attorney, Helen H. Hong, Assistant U.S. Attorney, Ajay Krishnamurthy, Michael Emerson Lasater, Esquire, U.S. Attorney, Carol M. Lee, Assistant U.S. Attorney, Office of the US Attorney, San Diego, CA, Thomas T. Watkinson, II, Esquire, U.S. Attorney, US Department of Justice, Southern District of California, San Diego, CA, for Plaintiff-Appellee

Timothy Allen Scott, Attorney, Scott Trial Lawyers, San Diego, CA, for Defendant-Appellant

Before: KELLY, ** CALLAHAN, and BEA, Circuit Judges.

***442** MEMORANDUM ***

In 2012, both Joshua Hester and Marco Luis pleaded guilty to conspiracy to launder money, and Hester pleaded guilty to various drug trafficking offenses. The district court ordered Luis and Hester to pay **restitution** to JP Morgan Chase ("Chase") in the amount of $615,935, and to CitiGroup, Inc., in the amount of $329,767, but did not specify a **restitution** payment schedule. Luis and Hester appealed the **restitution** orders. This Court affirmed the calculation of **restitution** owed to CitiGroup, and vacated and remanded for the district court to recalculate the amount owed to Chase. *United States v. Luis*, 765 F.3d 1061, 1064 (9th Cir. 2014); *United States v. Hester*, 584 Fed.Appx. 805, 806 (2014).

On remand, the district court [1] ruled that no **restitution** was owed to Chase. In regards to the **restitution** owed to CitiGroup, the district court ordered that the Bureau of Prisons turn over all funds in Hester's Inmate Trust Account, minus $500 for Hester's necessary personal expenses, and set a **restitution** payment schedule as a condition of supervised release for both defendants. Luis and Hester appeal a second time, challenging the district court's ability to set a **restitution** payment schedule and to order the Bureau of Prisons to turn over funds in Hester's Inmate Trust Account. We have jurisdiction under 8 U.S.C. § 1291, and we affirm.

The district court exercised its power to enforce the CitiGroup **restitution** order that this Court had affirmed previously. *See Peacock v. Thomas*, 516 U.S. 349, 356, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996). Under the Mandatory Victim **Restitution** Act ("MVRA"), the district court must "specify in the **restitution** order the manner in which, and the schedule according to which, the **restitution** is to be paid, in consideration of" the defendant's financial resources. 18 U.S.C. § 3664(f)(2); *Ward v. Chavez*, 678 F.3d 1042, 1052 (9th Cir. 2012).

The first district judge assigned to Luis's and Hester's case did not consider ***443** their financial resources or set a **restitution** payment schedule, which made **restitution** due immediately at the time of their sentencing. *See* 18 U.S.C. § 3572(d)(1) ("A person sentenced to pay a fine or other monetary penalty, including **restitution**, shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments."); *United States v. Carter*, 742 F.3d 440, 444-45 (9th Cir. 2014) (per curiam) (the "practical effect" of failing to provide any particular payment schedule in a **restitution** order is that **restitution** is due "immediately upon [the defendant's] sentencing"). The

defendants never satisfied that obligation, so on remand, in order to "enforce the order of **restitution**," *Carter*, 742 F.3d at 445, the newly-assigned district judge considered the defendants' financial circumstances and provided a payment schedule with which they could comply. The court did what the MVRA requires by "setting a **restitution** payment schedule" after "consider[ing] the defendant's financial resources." *Ward*, 678 F.3d at 1052.

Moreover, the district court did not err by requiring the Bureau of Prisons to turn over the funds held in Hester's Inmate Trust Account. Under 18 U.S.C. § 3664(n), if a defendant ordered to pay **restitution** "receives substantial resources from any source ... during a period of incarceration, such person shall be required to apply the value of such resources to any **restitution** ... still owed." Because Hester's Inmate Trust Account showed that he received "substantial resources" during his period of incarceration ($12,500 in 2015 alone), he was required by law to apply those funds to the $329,767 in **restitution** he still owed.

AFFIRMED.

All Citations

708 Fed.Appx. 441 (Mem)

Footnotes

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

** The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

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

1 On remand, this action was assigned to a different district judge, because the first district judge retired while the appeal was pending.

Nos. 16-50107 & 16-50123

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSHUA HESTER AND MARCO LUIS,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
The Honorable Barry T. Moskowitz, Presiding
No. CR-10-02967-BTM

Appellants' Joint Petition for Panel Rehearing

TIMOTHY A. SCOTT
NICOLAS O. JIMENEZ
Scott Trial Lawyers, APC
1350 Columbia Street, Suite 600
San Diego, California 92101
619-794-0451

Counsel for Joshua Hester

TODD W. BURNS
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101
619-236-0244

Counsel for Marco Luis

Petition for Panel Rehearing

I. The Court should amend its memorandum to address appellants' constitutional challenge to the district court's restitution order.

Appellants, Joshua Hester and Marco Luis, respectfully petition for panel rehearing to request that the Court amend its decision in this case to address the third argument raised in appellants' opening brief. Appellants' opening brief raised three issues, two of which this Court resolved when it filed its memorandum affirming the district court's restitution order in this case (included in the attached addendum). But appellants also argued in their opening brief that restitution could not be imposed in this case because the restitution allegations were not charged in the indictment or proven to the jury beyond a reasonable doubt, as required by *Apprendi v. New Jersey*, 530 U.S. 455 (2000), and *Southern Union Co. v. United States*, 567 U.S. 343 (2012). *See* Appellants' Joint Opening Brief ("AOB") at 1, 23.

Appellants raised the issue before the district court—*see* Appellant's Excerpts of Record ("ER") at 130 and Clerk's Record ("CR") at 1024—but ultimately conceded there and before this Court that "this argument is currently foreclosed by [Ninth Circuit] precedent, including *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013) and *United States v. Alvarez*, 835 F.3d 1180 (9th Cir. 2016)."

AOB at 23. Accordingly, appellants did not brief the issue any further, raising it in the opening brief "to preserve it, if necessary, for Supreme Court review." *Id*.

On January 4, 2018, this Court affirmed the district court's restitution order, finding that "the district court exercised its power to enforce the Citigroup restitution order that this Court had affirmed previously" and that "the district court did not err by requiring the Bureau of Prisons to turn over the funds held in Hester's Inmate Trust Account." Addendum at 3-4. But the Court overlooked appellants' constitutional challenge to the restitution order. Appellants recognize that the Court is bound by its published opinions in *Green* and *Alvarez*, but request that the memorandum be amended to include the Court's formal ruling on the *Apprendi* / *Southern Union* issue. The rules of the Supreme Court require appellants to submit with their petition for writ of certiorari any "opinions, orders, findings of fact, and conclusions of law…entered in conjunction with the judgment sought to be reviewed." Rule 14(h) of the Rules of the Supreme Court of the United States, as amended November 13, 2017. The requested amendment would allow the *Apprendi / Southern Union* issue to be properly preserved and ripe for potential Supreme Court review.

Conclusion

For the foregoing reasons, appellants respectfully request that the Court amend the memorandum in this case to include a formal ruling on the *Apprendi / Southern Union* issue raised in appellants' opening brief.

January 16, 2018

Respectfully submitted,

/s/ Timothy A. Scott
/s/ Nicolas O. Jimenez
TIMOTHY A. SCOTT
NICOLAS O. JIMENEZ

Counsel for Joshua Hester

/s/ *Todd W. Burns*
TODD W. BURNS

Counsel for Marco Luis

FILED

FEB 27 2018

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. JOSHUA JOHN HESTER, Defendant-Appellant.	No. 16-50107 D.C. No. 3:10-cr-02967-BTM-1 Southern District of California, San Diego ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCO MANUEL LUIS, Defendant-Appellant.	No. 16-50123 D.C. No. 3:10-cr-02967-BTM-5 Southern District of California, San Diego

Before: KELLY,* CALLAHAN, and BEA, Circuit Judges.

Appellants' petition for panel rehearing is denied.

* The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.