No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

NIMON NAPHAENG, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, NIMON NAPHAENG, who states that he has previously been granted leave to proceed in forma pauperis in the United States Court of Appeals for the First Circuit, and further that the United States Court of Appeals for the First Circuit appointed the undersigned attorney to represent him under the Criminal Justice Act of 1964, U.S.C. § 3006A.

THE PETITIONER
BY HIS ATTORNEY

/s/ John T. Ouderkirk, Jr.
_____
John T. Ouderkirk, Jr.
P. O. Box 2448
Westerly, RI 02891-0924
401.932.4800
jouderkirk@att.net

Dated: January 10, 2019

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

NIMON NAPHAENG, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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Counsel of Record

October Term, 2018

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Donald C. Lockhart, Esq., AUSA

Stephen G. Dambruch, Esq., AUSA

Nimon Naphaeng, Defendant

TABLE OF CONTENTS

INDEX TO THE APPENDIX

QUESTION PRESENTED

WHETHER THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CREATE A STANDARD BURDEN OF PROOF TO ESTABLISH WHETHER A MONETARY LOSS AND ITS AMOUNT IS ACTUALLY RESTITUTION?

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

SUPREME COURT RULES

IN THE SUPREME COURT OF THE UNITED STATES

_____

NIMON NAPHRAENG, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Nimon Naphaeng, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed his conviction and sentence as reported in U.S. v. Nimon Naphaeng, 17-1800, 18-1126 (1st Cir., 10-12-2018) decided on October 12, 2018.

OPINIONS BELOW

The October 12, 2018 decision of the United States Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed was reported after argument, as United States v. Nimon Naphaeng, Nos. 17-1800, 18-1126 (1st Cir., 10-12-2018), and

is reprinted in the Appendix to the Petition at p.14.

JURISDICTION

This case arises from a plea agreement in the United States District Court for the District of Rhode Island.[1] The District Court judge may only award restitution in the amount of the victim's actual loss. Although the restitution amount does not require absolute precision, it cannot be a rough approximation of the appropriate restitution. Here, the District Court awarded restitution grounded solely on pure speculation. He awarded $324,000 to 219 victims that had never contacted the probation department nor made a claim. There were only 16 victims who documented their claims, for a total of $17,160. There were claims that were made solely in the Thai language. Based on the speculation that the defendant charged an average of between $1500 and $2500 per application, the District Court judge awarded every non-responding asylum applicant that amount without knowing if that amount was accurate or not. That was not a reasonable determination of an appropriate restitution award.

The rules of the Supreme Court of the United States provide jurisdiction over this matter with this Court as well as the jurisdiction conferred by 28 U.S.C. § 1254(1). 28 U.S.C. §

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[1] References to the Addendum are denoted "A." followed by the page number in the Addendum. References to the brief are denoted "P." followed by the page number. References to the Appendix are denoted "Apx." followed by the page number.

1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

18 U.S.C. § 3663A

STATEMENT OF THE CASE

The defendant stipulated to the following facts as part of his plea agreement. From approximately August of 2014 until he was arrested, the defendant was executing an immigration fraud scheme by filing false asylum claims on the behalf of others. For a fee, the defendant would file false asylum applications thereby securing the right of the applicant to remain in the United States, obtain an Employment Authorization Document (hereinafter "EAD card") and as a result, further government benefits including a social security number, driver's license, and if otherwise qualified, financial benefits as well.

To execute his scheme, the defendant would advertise on the internet and in flyers posed in Thai restaurants around the United States, that he could, in addition to helping with tax returns, obtain EAD cards for Thai nationals. What he never mentioned, and which was at the heart of his scheme, was that he would file asylum applications in order to obtain the EAD card. He had the applicants supply him with vital personal information including their name and date of birth, photographs and a copy of the biographical page from their passports.

He would then file an asylum application without the knowledge of the applicant in order to obtain the promised documents. Apx.17-18.

REASON FOR GRANTING THE WRIT

I. IT WAS AN ERROR FOR THE COURT OF APPEALS TO AFFIRM THE DISTRICT COURT'S ROUGH APPROXIMATION, WITHOUT A HEARING, OF THE VICTIMS' ACTUAL LOSSES FOR THE PURPOSES OF DETERMINING THE RESTITUTION AWARD.

The government contended, and the District Court agreed, that there were 368 victims in this case. Of those, 133 reported a loss to the government in some unspecified manner, 16 reported a loss with documentation and 219 never contacted the government or reported any loss whatsoever. Apx.154. The Pre-sentence Report (hereinafter "PSR") had 55 Declarations of Losses attached to it. Of those, five stated that the victim thought the defendant was going to change their visa status, three thought that they were filing for asylum, six thought that the defendant was obtaining a "green card" for them, four thought that the defendant was obtaining a work permit for them and 37 were silent as to the reason they sent money to the defendant. One was not sure how much money was given to the defendant. Of the 55 Declarations of Losses attached to the PSR, only five included documentation. S.A. Declarations.

The defense repeatedly tried to address the accuracy of the

government's claim for restitution, but to no avail. The defense counsel explained to the Court that the defendant questioned whether every victim was actually a "victim" as defined by statute. Apx.88. Defense counsel pointed out that the government's evidence failed to show that everyone did not actually know what the defendant planned to do and therefore were not the victims of fraud. Apx.100; 102. In fact, the government agent in charge testified that a number of people had notice that asylum applications were filed. Apx.75; 80.

This exchange between the judge and defense counsel left no doubt as to the defendant's objection.

> THE COURT: Are you disagreeing that those people actually are not victims in this case?
>
> MS. ALLEN: Yes, Your Honor, yes.

Apx.82.

After an offer of proof, Apx.82-83, the District Court ruled that the government did not have to prove that the victims were actually victims. Apx.104.

The actual number of victims was inconsistent as well. The spreadsheet seized by the government from the defendant had approximately 260 names listed. Apx.64. The agent in charge testified that he only spoke to approximately 20 victims. Apx.65. He later testified that when the government obtained an interpreter, they spoke to 89 or 90 people. Apx.67. The

defendant's own spreadsheet contained far fewer than the 368 claimed by the government. Apx.154.

Some of the victims reported differing losses to themselves. One victim reported a loss of $2000 to the agent in charge, but then told the probation department that the loss was $1000. Apx.95.

The Mandatory Victim Restitution Act (hereinafter "MVRA") requires the payment of restitution where the offense was committed by fraud or deceit and an identifiable victim or victims has suffered a physical injury or pecuniary loss. 18 U.S.C. §§ 3663A(a)91), (c)(1)(A)(ii), (c)(1)(B). For purposes of the MVRA, a victim is anyone who is directly and proximately harmed as a result of the commission of the offense. 18 U.S.C. §3663(2); See also. United States v. Alphas, 785 F.3d 775, 786 (1st Cir., 2015)(vacating and remanding for recalculation of restitution where the district courts initial calculus was based on a "rough approximation" of the victim's losses). A rough approximation is not sufficient mode of calculating a victim's actual loss for purposes of the MVRA. The Court is required to make a reasonable determination of appropriate restitution. Id.

Here, the government has not shown that every alleged victim was harmed by the proximity of the defendant's offenses. The government contended that the similarity of the claims made in numerous other asylum applications and the fact that the

defendant admitted that he charged about $1500 to $2500 on average is enough to establish proximity to the offense. It is not. Those two facts are silent about whether the victim thought, or knew, that they were paying for an application for asylum. In fact, three individuals stated in their Declaration of Losses that they payed the defendant to process their asylum cases. S.A. p.1 of 31; 11 of 42; 38 of 42 (notation on check's memo line). Another stated that he paid the defendant to "properly obtain a work permit." S.A. p.42 of 42. Of the 55 Declarations of Losses attached to the PSR, 37 are silent about what services they thought they would receive from the defendant.

If they thought, or knew, the defendant was filing asylum applications, they were not victims under the MVRA. As such they were not entitled to restitution. The 37 silent Declarations, on their face, did not show by a preponderance of the evidence that those individuals were directly or proximately harmed by the defendant's offenses. Only ten of the 55 Declarations attached to the PSR indicate affirmatively that the victim was misled as to the nature of the documents that the defendant was filing and the four who thought the defendant was obtaining a work permit for them were correct as he did obtain EAD cards for them.

In United States v. Archer, 671 F.3d 149, 172 (2nd Cir., 2011), the Second Circuit reasoned that "victims are those who would not have made the payments to the defendant had they known

about the fraudulent scheme." (internal citations, brackets and quotations omitted). The rule is not about denying benefits to persons with unclean hands; rather, "[i]t is a rule about causation in the fundamental. . . meaning of the word." Archer at 171. That Court reasoned:

> "[i]f a person gives the defendant his money to bet, knowing that the bet might lose, his later loss, for purposes of restitution is, in this fundamental sense, caused not by the defendant accepting his money but by the outcome of the bet."

(Archer, 671 F.3d at 171.).

In Archer, the Court noted that if the clients had thought they were buying the defendant's honest legal services they may very well have been victims of the defendant's offenses, but if they thought, or knew, that they were buying temporary work permits, or trying to see if the government would grant their immigration petitions, they suffered no loss proximately caused by the defendant's visa fraud. Id. at 172. That court went further to question whether an individual who paid money for a service that they did not receive was indeed a victim of consumer fraud rather than immigration fraud. If so, then the government would be seeking restitution for losses caused by an unprosecuted offense rather than the offense of conviction, something it may not do. United States v. Archer, 671 F.3d 149, 170 (2nd Cir., 2011).

In the present case, if these individuals knowingly gave the

defendant money to get an EAD card, or thought the government might grant the fraudulent asylum application, there was no loss proximately caused by the defendant's fraud.

In the present case, the government devised a restitution scheme that consisted of those victims who had 1)submitted declaration of losses statements to the probation office (55 are attached to the PSR), 2) spoken to the government's agent but not communicated with probation (presumably the 133 victims reported), 3)banking records obtained by the grand jury subpoena and 4) not been able to be contacted by the government or probation (presumably the remaining 219). It was unclear which category the sixteen victims with identified documentation fall under since only five of the Declarations of Losses attached to the PSR included documentation. Apx.154. For many of these unclaimed losses, the District Court assessed an amount of $1500. This was a generalized amount not supported by any evidence specific to the victim, but based on the defendant's admission during his change of plea that he charged that amount on average. He did not charge that amount to everyone, only on average. While the MVRA does not require exact precision, it does require the Court to root its calculation in actual loss, not speculation and rough justice. Restitution under the MVRA must not unjustly enrich crime victims or provide them a windfall. United States v. Ferdman, 779 F.3d. 1129, 1133 (10th Cir., 2015)(district court

may not dispense with the necessity of proof as mandated by the MVRA and simply "rubber stamp" a victims claim of loss based upon a measure of value unsupported by the evidence). Such is the case here where, if the defendant did indeed prepare the unclaimed 219 asylum applications (an assumption based on purely unconfirmed, circumstantial evidence), there is no evidence that he charged any money from any of the applicants. The Court may only award restitution in the amount of the victim's actual loss. United States v. Innarelli, 524 F.3d 286, 294 (1st Cir, 2008).

To be clear, the defendant has not, and does not, challenge the restitution order as it pertains solely to those victims named in the Counts of the Indictment to which he pled guilty.

The Court of Appeals for the First Circuit (hereinafter "COA") gave passing note to the requirement that the Act mandates that restitution commensurate with the victims' actual losses. United States v. Naphaeng, 17-1800, 18-1126, p.11 (1st Cir., 10-12-2018. Mere guesswork will not suffice. Id. The burden of proof, the COA acknowledged, is a preponderance of the evidence. Id. What is more, a court may only order restitution for losses that have an adequate causal link to the defendant's criminal conduct. Id. So far, so good.

Then, however, the COA stated that the law is "transparently clear" that the court's order must "reasonably respond to some reliable evidence." (emphasis added). The reliable evidence the

COA responded to was a spreadsheet, prepared by the government. Id. The spreadsheet was nothing more than a description of the government's opinion; not preponderant evidence.

While the government was allowed to put on its evidence for the imposition of restitution, the defendant was twice prevented from cross examining the government's agent; a fact which the First Circuit Court of Appeals conceded. Apx.82; 98; 100; United States v. Naphaeng, 17-1800, 18-1126, p.17 (1st Cir., 10-12-2018). The defendant was denied a full and fair opportunity to elicit testimony and evidence whether any of the individuals identified as victims were on notice that the defendant was filing asylum applications on their behalf. If they were, then they were not "victims" as defined by the MVRA, and not entitled to restitution. The government did not call a single victim to the stand. The District Court had no direct evidence as to the expectations or understandings of any of the victims. The COA stated that their conclusion was "buttressed by the testimony of the DHS agent, who vouchsafed that '[t]he people we talked to thought they were getting work cards only." United States v. Naphaeng, 17-1800, 18-1126, p.15 (1st Cir., 10-12-2018) They received their work cards. Therefore, they did not meet the causal injury requirement of the MVRA.

The District Court had no direct evidence that the defendant was involved in the 219 non-reported victims' applications; only

circumstantial evidence that the claims and language used therein was similar to other applications in which the defendant was involved. The District Court increased the restitution amount from $400,000 to $581,880 (almost $200,000) without even affording the defendant a hearing and the opportunity to present any evidence.

CONCLUSION

The COA is not applying the eligibility requirements of the MVRA consistently with other Circuits or the court's other decisions. A standardized requirement for determinative proof in restitution orders is necessary to ensure consistent application of the MVRA. For this and all the other reasons stated above, this Honorable Court should review the decision of the United States Court of Appeals for the First Circuit and grant the writ of certiorari

THE DEFENDANT
BY HIS ATTORNEY

/s/ John T. Ouderkirk, Jr.

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CERTIFICATE OF SERVICE

I, John T. Ouderkirk, Jr., do hereby certify that I have

caused the foregoing to be served by mailing a complete copy to Donald C. Lockhart, Esq. and Stephen G. Dambruch, Esq., both of the U.S. Attorneys Office, 50 Kennedy Plaza, 8th Floor, Providence, RI 02903, and one copy each to the Clerk of the United States Court of Appeal for the First Circuit, 1 Courthouse Way, Suite 2500, Boston, MA 02210-3004,, and the Solicitor General of the United States, Room 5614, DOJ, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001, on this 11th day of January, 2019.

/s/ John T. Ouderkirk, Jr

_____

John T. Ouderkirk, Jr.

AFFIDAVIT OF TIMELY FILING (SUP. CT. R. 29.2)

Under oath I depose and say that my name is John T. Ouderkirk, Jr., and that I am the attorney for the petitioner. On January 10, 2018, I filed the Petition with the Clerk of the United States Supreme Court at 1st Street, N.E., Washington, DC 20543-0001 through the court's on-line filing website. The judgement was entered on October 12, 2018 and the last day for filing is January 10, 2019.

/s/ John T. Ouderkirk, Jr.

_____

John T. Ouderkirk, Jr.

APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 17-1800
18-1126

UNITED STATES OF AMERICA,

Appellee,

v.

NIMON NAPHAENG,

Defendant, Appellant.

JUDGMENT

Entered: October 12, 2018

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's amended restitution order is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:
Richard W. Rose
Mary E. Rogers
John P. McAdams
Donald Campbell Lockhart
Dulce Donovan
John T. Ouderkirk, Jr.

United States Court of Appeals
For the First Circuit

Nos. 17-1800
18-1126

UNITED STATES OF AMERICA,

Appellee,

v.

NIMON NAPHAENG,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. William E. Smith, U.S. District Judge]

Before

Howard, Chief Judge,
Selya and Thompson, Circuit Judges.

John T. Ouderkirk, Jr., for appellant.
Donald C. Lockhart, Assistant United States Attorney, with whom Stephen G. Dambruch, United States Attorney, was on brief, for appellee.

October 12, 2018

SELYA, Circuit Judge. In these sentencing appeals, defendant-appellant Nimon Naphaeng, a convicted fraudster, challenges a restitution order entered pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, in the amount of $581,880. After pausing to smooth out two jurisdictional wrinkles, we reach the merits and conclude that the appellant's challenge is futile. Accordingly, we affirm.

I. BACKGROUND

We briefly rehearse the relevant facts and travel of the case. The appellant concocted a fraudulent scheme to obtain work permits for Thai nationals living in the United States. Specifically, he advertised through flyers and the internet that he could obtain employment-authorization documents (EADs) in exchange for fees ranging from $1,500 to $2,500 per person. He was, in fact, able to obtain EADs for the applicants — but he did so by filing asylum petitions on the applicants' behalf. These petitions, filed without the applicants' knowledge, were apocryphal. As the appellant admitted to the district court, concealing the asylum applications from his clientele was "at the heart" of the scheme.

The appellant perpetrated his fraud over a period of sixteen months — but the chickens eventually came home to roost. In January of 2015, an immigration officer noticed that around sixty-four Thai asylum applications were filed from two Rhode

Island addresses. This spike in filings was extraordinary; typically, an average of twenty Thai asylum applications were filed each year. Nor were common addresses the only feature shared by these suspicious applications: they also contained exactly the same typographical errors, identical explanations for seeking asylum, matching supplemental forms, and the same coterie of supporting documents.

In due season, a federal grand jury sitting in the District of Rhode Island returned a twenty-six count indictment against the appellant. In addition, the government "froze" hundreds of thousands of dollars that had been accumulated by the appellant.

After some preliminary skirmishing (not relevant here), the appellant pleaded guilty to seven counts of mail fraud, see 18 U.S.C. § 1341, and two counts of visa fraud, see id. § 1546(a).[1] As part of the plea agreement, the parties agreed that the per-application fee charged by the appellant ranged from $1,500 to $2,500. Although the change-of-plea colloquy specifically identified only ten victims, the parties did not purport to make a definitive head count. Instead, identification of those victims who might be owed restitution was deferred to the sentencing phase.

[1] As provided in the plea agreement, the remaining counts were dismissed at the time of sentencing.

On May 3, 2017, the district court held the first of two sentencing hearings. By then, the court had the benefit of certain additional filings: a presentence investigation report (PSI Report) and sentencing memoranda prepared by both the appellant and the government. The government's memorandum included a spreadsheet listing the total number of victims, specifying whether each such victim had been contacted by either a government investigator or the probation office, and indicating the amount of restitution arguably due.

At the first sentencing hearing, a Department of Homeland Security (DHS) agent verified the information contained in the spreadsheet. The appellant's counsel cross-examined the agent, attempting to undermine the reliability of the government's spreadsheet, questioning the number of victims, and suggesting that some victims may have had knowledge that asylum applications were being filed on their behalf.

Two months later, the district court convened a second sentencing hearing. The appellant's counsel resumed her questioning of the DHS agent. This time, however, the questioning zeroed in on the appropriate amount of loss for restitution purposes (a finding separate and apart from the amount of loss needed to construct the guideline sentencing range, see USSG §2B1.1 cmt. n.3(A)). The district court eventually interrupted this line of questioning and proceeded to sentence the appellant. To allow

the government more time to collect victim-related information, though, the court entered a provisional restitution order of $400,000, "subject to amendment." Judgment entered on July 27, 2017, and the appellant promptly filed a notice of appeal.

Having completed its information-gathering, the government filed two supplemental memoranda and sought a total of $581,880 in restitution on behalf of 368 victims. Its supplemental memoranda identified four categories of victims: 87 victims who had contact with both the probation office and the DHS; 46 victims who had contact only with the DHS; 16 victims who were identified through material submitted to the grand jury; 219 victims who were identified only by their asylum applications. According to the government, the first group of victims was due $168,620 in restitution, the second group of victims was due $72,100 in restitution, the third group of victims was due $17,160 in restitution, and the fourth group of victims was due $324,000 in restitution. The appellant countered that the government's recommended restitution over-counted the number of victims and rested on insufficient evidence. As a fallback, the appellant contended that the district court had denied him a full and fair opportunity to test the government's proffer. The court rejected the appellant's arguments, adopted the government's calculations,

and ordered restitution accordingly.[2] The appellant filed a second notice of appeal — but he did so before the district court entered its final judgment on the docket.

II. ANALYSIS

We divide our analysis into two parts, first addressing a pair of jurisdictional concerns and then addressing the substance of the appellant's challenge.

A. Jurisdictional Concerns.

Even though the appellant advances only a single assignment of error — a claim that the district court blundered in fashioning the restitution order — we are held at the starting line by jurisdictional concerns. While the government has eschewed any challenge either to the district court's jurisdiction or to this court's appellate jurisdiction, "we have an independent obligation to explore" potential jurisdictional infirmities. United States v. George, 841 F.3d 55, 70 (1st Cir. 2016). We start there, dealing with two jurisdictional questions that lurk in the penumbra of this case.

1. District Court Jurisdiction. The initial question concerns whether the pendency of the first notice of appeal

[2] The district court's amended restitution order appears to contemplate 352 victims rather than the 368 victims memorialized in the government's spreadsheet. Neither party has attached any significance to this small discrepancy, and we make no further mention of it.

divested the district court of jurisdiction to enter the final restitution order. It is settled that once an appeal is taken, a district court generally loses jurisdiction to proceed with any matter related to the appeal's substance during the pendency of the appeal. See id. at 71. In such a situation, the conventional practice is for the district court to ask the court of appeals to stay the original appeal and effect a temporary remand, thus enabling the district court to make a further ruling. See Fed. R. App. P. 12.1(b); see also United States v. Maldonado-Rios, 790 F.3d 62, 64-65 (1st Cir. 2015); Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 (1st Cir. 1979). Notwithstanding this general rule, though, we have concluded that a district court retains jurisdiction to modify a previously existing forfeiture order even after an appeal has been taken. See United States v. Ferrario-Pozzi, 368 F.3d 5, 10-11 (1st Cir. 2004) (confirming district court's jurisdiction to issue final forfeiture award when that award was "an amendment of an existing order" that provisionally set a forfeiture amount); cf. George, 841 F.3d at 72 (finding district court jurisdiction lacking when forfeiture order was entered for the first time following appeal). The Ferrario-Pozzi panel based its conclusion on Federal Rule of Criminal Procedure 32.2(e), which recognizes that circumstances sometimes exist in which a district court may have to amend its initial forfeiture order (including, for example, the government's subsequent

identification of additional property subject to forfeiture). See 368 F.3d at 11. The MVRA contains an analogous provision with respect to restitution orders. See 18 U.S.C. § 3664(d)(5). If victim losses are not sufficiently ascertainable by the date of sentencing, the court "shall set a date for the final determination" of restitution. Id.

The timetable here is reminiscent of that in Ferrario-Pozzi. The first notice of appeal was filed on July 27, 2017. The appeal was taken from a judgment that included a restitution order that had been clearly denominated as provisional. The district court entered the final restitution order while that appeal was pending. Given the teachings of Ferrario-Pozzi as well as the MVRA's statutory guidance, we conclude that the pendency of the first appeal did not strip the district court of jurisdiction to enter the final restitution order.

This conclusion is reinforced by our own order staying the appellant's first appeal. That stay, issued six days before the district court entered the amended judgment, recognized the district court's intention to file an amended judgment. Although no formal remand was made, the practical effect was the same: when the district court amended the restitution order, the first appeal had been stayed and concerns about shared jurisdiction had been

abated. In these unusual circumstances, we think that the district court's jurisdiction was intact.[3]

2. Appellate Jurisdiction. The remaining jurisdictional question relates to our appellate jurisdiction. It arises because the appellant's second notice of appeal was filed after the district court's final restitution order was announced but before the amended judgment was actually entered on the docket. At first blush, then, the second notice of appeal would seem to be premature. The Supreme Court recently considered a similar issue in Manrique v. United States, 137 S. Ct. 1266, 1270 (2017). There, the Court found a notice of appeal insufficient to confer appellate jurisdiction in a restitution case when it was "filed between the initial judgment and the amended judgment." Id. The Court made pellucid that the defendant should instead have filed a timely "notice of appeal from the amended judgment imposing restitution." Id. at 1274.

But we have said before that "appearances can be deceiving." Moreno v. Holder, 749 F.3d 40, 43 (1st Cir. 2014) (citing Aesop, The Wolf in Sheep's Clothing (circa 550 B.C.)). And in the last analysis, this case is distinguishable from

[3] To be sure, the district court would have been well-advised to have engaged the gears of the conventional Rule 12.1(b) protocol, and to have requested a temporary remand. Such a course of action would have eliminated any lingering doubts about the district court's authority to act.

Manrique. Here — unlike in Manrique — the appellant did file a second notice of appeal. Of course, his timing was imperfect: the second notice of appeal was filed after the district court modified the restitution award but before the court actually entered the amended judgment. Thus, the appellant (in the government's turn of phrase) "jumped the gun." He should have waited to file the second notice of appeal until after the amended judgment was entered on the docket. See Fed. R. App. P. 4(b)(1).

In the circumstances of this case, however, the infelicitous timing of the second notice of appeal is harmless. That notice of appeal, albeit premature, is rescued by Federal Rule of Appellate Procedure 4(b)(2), which provides that "[a] notice of appeal filed after the court announces a[n] . . . order — but before the entry of the judgment . . . is treated as filed on the date of and after the entry." Consequently, we treat the second notice of appeal as if it were filed on March 15, 2018 (the date of entry of judgment).[4] Given this convenient legal fiction, we have jurisdiction over the second appeal.

[4] For the sake of completeness, we note that the premature filing of a notice of appeal may be forfeited if not seasonably raised by the opposing party. See Manrique, 137 S. Ct. at 1271-72 (finding that "requirement that a defendant file a timely notice of appeal from an amended judgment imposing restitution" represents a mandatory claim-processing rule that may be forfeited). Because the government has elected not to contest the point, forfeiture would be available here.

B. The Merits.

Having allayed any jurisdictional doubts, we reach the merits. Our standard of review is uncontroversial: "We review restitution orders for abuse of discretion, examining the court's subsidiary factual findings for clear error . . . ." United States v. Chiaradio, 684 F.3d 265, 283 (1st Cir. 2012).

To place the appellant's arguments in perspective, we begin by differentiating between the calculation of loss demanded by the sentencing guidelines and the calculation of loss demanded by the MVRA. In a fraud case resulting in financial loss, the defendant's guideline sentencing range is determined in part by calculating the greater of either the intended loss or the actual loss. See USSG §2B1.1, cmt. n.3(A). Intended loss is quantified by measuring "the loss the defendant reasonably expected to occur." United States v. Innarelli, 524 F.3d 286, 290 (1st Cir. 2008). So viewed, intended loss serves a punitive purpose, punishing the defendant for the harm that he sought to inflict. See id.

In contrast, restitution is designed to compensate the victim, not to punish the offender. To this end, the MVRA mandates that a defendant convicted of certain federal crimes, including those "committed by fraud or deceit," must make restitution to victims commensurate with the victims' actual losses. 18 U.S.C. § 3663A(c)(1)(A)(ii); see Innarelli, 524 F.3d at 293 (noting that restitution is meant to "make the victim whole again"). For this

purpose, actual loss is "limited to pecuniary harm that would not have occurred but for the defendant's criminal activity." United States v. Alphas, 785 F.3d 775, 786 (1st Cir. 2015). It follows that, a court must base a restitution order on "the full amount of each victim's losses . . . without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). Consistent with this logic, an order for restitution ought not to confer a windfall upon a victim. See United States v. Cornier-Ortiz, 361 F.3d 29, 42 (1st Cir. 2004).

When determining restitution, a sentencing court is not expected to undertake a full-blown trial. See S.Rep. No. 104-179, at 18 (1995), as reprinted in 1996 U.S.C.C.A.N. 924, 931 (cautioning that the restitutionary phase of a criminal case is not to "become fora for the determination of facts and issues better suited to civil proceedings"). As a result, "'absolute precision is not required' in calculating restitution under the MVRA." United States v. Mahone, 453 F.3d 68, 74 (1st Cir. 2006) (quoting United States v. Burdi, 414 F.3d 216, 221 (1st Cir. 2005)). Rather, a restitution award requires only "a modicum of reliable evidence." United States v. Vaknin, 112 F.3d 579, 587 (1st Cir. 1997); see United States v. Curran, 525 F.3d 74, 84 (1st Cir. 2008).

This is not to say that Congress "conceive[d] of restitution as being an entirely standardless proposition."

Vaknin, 112 F.3d at 587. Mere guesswork will not suffice. The government bears the burden of proving a victim's actual loss by preponderant evidence. See 18 U.S.C. § 3664(e). What is more, "a court may only order restitution for losses that have an adequate causal link to the defendant's criminal conduct." Alphas, 785 F.3d at 786.

In the case at hand, neither party disputes the appropriateness of a restitution order. Their disagreement is only as to the amount of the award. The appellant argues that restitution should be limited to those victims named in the indictment who submitted proofs of loss. With respect to any and all other putative victims, the appellant submits that the government's evidence was insufficient to undergird the restitution order.

The appellant places too heavy a burden on the government. The law is transparently clear that "[a]s long as the court's order reasonably responds to some reliable evidence, no more is exigible." United States v. Sánchez-Maldonado, 737 F.3d 826, 828 (1st Cir. 2013). In this instance, the government proffered a detailed spreadsheet, describing its extensive efforts to trace and contact all of the persons defrauded over the sixteen-month duration of the scheme. This spreadsheet identified four groups of victims and summarized all of the relevant information in the government's possession, including how much money each

victim had paid to the appellant and the method of payment. The government recommended specific restitution amounts for each victim based on the data in the spreadsheet and the amounts that the appellant routinely charged to his customers.[5] The government's information, coupled with the appellant's own admissions, supplied more than a modicum of reliable evidence. See Curran, 525 F.3d at 84.

In a variation on his insufficiency-of-evidence theme, the appellant challenges the number of victims. He predicates this challenge largely on the notion that some of the persons that dealt with the appellant may have known that asylum applications were filed on their behalf. Relying primarily on a 2011 Second Circuit decision, the appellant suggests that those persons cannot be classified as victims for MVRA purposes. See United States v. Archer, 671 F.3d 149, 173 (2d Cir. 2011) (explaining that persons who were complicit in and knew all along of defendant's fraudulent scheme are ineligible for victim status and thus restitution).

Archer is a horse of a different hue. Here — unlike in Archer — the appellant admitted that concealing the asylum applications was at the heart of his fraudulent scheme. Although the appellant now maintains that this admission applied only to

[5] Where information was lacking as to the amount of fees paid by a particular individual, the government used the figure of $1,500 — the low end of the range of fees charged by the appellant. The district court appears to have followed the same praxis.

those victims specifically identified in the indictment, the district court did not clearly err in inferring that the same narrative applied to all of the appellant's customers. This inference is buttressed by the testimony of the DHS agent, who vouchsafed that "[t]he people we talked to thought they were getting work cards only. They did not know about the asylum."

If more were needed – and we doubt that it is – victim declarations attached to the PSI Report are consistent with this inference. The majority of the declarations that stated a reason for the payment can fairly be summarized by saying that the money the victims lost was paid to obtain work permits, not to apply for asylum.[6] To cinch the matter, the record is barren of any indication that the appellant filed so much as a single bona fide asylum application or told even a single victim that he was trumping up the paperwork undergirding the EADs.

Battling on, the appellant argues that the restitution order should not have extended to victims who had no contact with

[6] Three declarations attached to the PSI Report do indicate that the signatories paid for asylum applications. It is unclear, however, whether those victims knew at the time they paid the appellant that the money would be used to file asylum applications or, conversely, whether they learned about the asylum applications only during the government's investigation. We note, moreover, that even if they knew contemporaneously about the filings, there is no reason to believe that they knew the asylum applications were fraudulent. In such circumstances, we think that the district court had the latitude to "resolv[e] uncertainties with a view towards achieving fairness to the victim." Alphas, 785 F.3d at 787 (quoting Burdi, 414 F.3d at 221).

the government. This argument is unpersuasive. For one thing, restitution need not be limited to victims who have contacted the government. What counts is whether the government submits sufficiently reliable information to show that particular persons were in fact victims. See Curran, 525 F.3d at 84; United States v. Catoggio, 326 F.3d 323, 327-28 (2d Cir. 2003); United States v. Berardini, 112 F.3d 606, 609-10 (2d Cir. 1997). For another thing (as the government noted at the second sentencing hearing), the circumstances particular to the appellant's victims — foreign nationals seeking U.S. work permits — made it uniquely difficult for the government to communicate with them. When government agents made telephone calls, "people were so fearful that out of the blue they got . . . a telephone call" that they asked whether the agents were coming for them.

That ends this aspect of the matter. The first step in fashioning a supportable restitution order is to identify particular victims who have suffered pecuniary losses as a result of the defendant's criminal activity. See Cornier-Ortiz, 361 F.3d at 42. Here, the government stayed within appropriate bounds in taking this first step: it identified victims based on bogus asylum applications that shared unusual features common to those that the appellant admittedly filed. The district court acted well within the realm of its discretion in finding that the roster

of identified persons comprised a roster of victims eligible for restitution.

The appellant has one last string to his bow. He importunes us to find that he was "denied a full and fair opportunity" to elicit testimony from the DHS agent through cross-examination. We reject his importunings.

The district court allowed the appellant's counsel to cross-examine the DHS agent at some length. The cross-examination was comprehensive and included grilling the agent about the asylum application procedure, the agent's conversations with victims, the victims' knowledge (or lack of knowledge) that asylum applications had been filed to their behoof, and the extent (if at all) to which any payments had been refunded to them.

To be sure, the district court cut cross-examination short near the end of the second sentencing hearing. Nevertheless, the right to cross-examination is not a right to endless cross-examination. See United States v. Laboy-Delgado, 84 F.3d 22, 28 (1st Cir. 1996); see also Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (explaining that the Constitution "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis in original)). The critical inquiry is whether a party has been accorded a fair and adequate opportunity to confront the witnesses against him. See

Laboy-Delgado, 84 F.3d at 28. On this chiaroscuro record, this inquiry produces an affirmative answer. Consequently, we discern no abuse of discretion in the district court's implicit determination that — by the time the cross-examination was halted — the appellant already had enjoyed a fair and adequate opportunity to cross-examine the witness.

III. CONCLUSION

Let us be perfectly clear. We readily acknowledge that a restitution order must entail more than a mere guess or a bald approximation of actual loss. See Vaknin, 112 F.3d at 587 (cautioning that "an award cannot be woven solely from the gossamer strands of speculation and surmise"). But the calculation of a restitution order does not demand metaphysical certainty. Here, the district court's analysis is record-based and constitutes a fair appraisal of actual losses. That appraisal, in turn, rests on more than a modicum of reliable evidence. Taking into account the barriers to a more exact calculation (such as the length of the appellant's scheme, the number of victims, the lack of organized records, and the difficulty in communicating with non-English speakers), we think that the court did enough to satisfy the strictures of the MVRA.

We need go no further. For the reasons elucidated above, the district court's amended restitution order is

Affirmed.