

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-6441

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALIMAMY BARRIE,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, Senior District Judge. (1:11-cr-00476-TSE-1)

Submitted: July 21, 2020

Decided: July 24, 2020

Before AGEE, DIAZ, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Alimamy Barrie, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Alimamy Barrie appeals the district court's order denying his 18 U.S.C. § 3582(c)(2) (2018) motion for a sentence reduction and his motion to vacate the restitution order relating to his conviction for conspiracy to commit wire and mail fraud. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Barrie*, No. 1:11-cr-00476-TSE-1 (E.D. Va. filed Mar. 16, 2020; entered Mar. 17, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

v.

ALIMAMY BARRIE

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Criminal No. 11-CR-476

ORDER

This matter comes before the Court on Defendant Alimamy Barrie's motion to vacate restitution and motion for resentencing. The government has filed oppositions to both of defendant's motions and the matter is thus ripe for disposition. Oral argument is dispensed with as the facts and legal contentions are adequately set forth in the existing record and oral argument would not aid the decisional process.

I.

On March 31, 2011, a criminal complaint was filed against defendant alleging that defendant stole another person's identity and used that stolen identity to steal funds from the victim's bank account. See Criminal Complaint (Dkt. 1). On October 3, 2011, pursuant to a plea agreement, defendant waived indictment and pled guilty to a one-count criminal information charging him with conspiracy to commit wire and mail fraud, in violation of 18 U.S.C. § 1349. See Criminal Information (Dkt. 22); Plea Agreement (Dkt. 24). In his statement of facts, defendant admitted to conspiring with the victim's nurse to steal the victim's identity. See Statement of Facts ¶ 3 (Dkt. 25). The victim was a retired man incapacitated by Huntington's disease and defendant used the victim's information to obtain approximately \$593,171.45 from the victim's retirement accounts. See *id.* ¶ 2.

As part of the plea agreement, defendant agreed to a 14-level offense level enhancement pursuant to § 2B1.1(b)(1) for losses and intended losses of at least \$400,000, but less than \$1,000,000, and to a 2-level offense level enhancement pursuant to § 2B1.1(b)(10)(A) and (C) for relocating the scheme to another jurisdiction to evade detection and sophisticated means. See Plea Agreement at ¶ 5. Defendant also agreed, pursuant to the plea agreement, that restitution was mandatory in the full amount of the victim's losses pursuant to the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A (the "MVRA"), which he agreed was properly calculated to be \$476,038.83. See Plea Agreement ¶ 10. On January 27, 2012, the Honorable Gerald Bruce Lee sentenced defendant to 48 months of incarceration, within the Guidelines range of 41-51 months, as well as a three-year term of supervised release and restitution of \$476,038.83.¹ See Judgment in a Criminal Case (Dkt. 40).

II.

To begin with, defendant seeks to have his sentence reduced based on a change in intervening law, specifically Amendments 791, 792, and 794 to the United States Sentencing Guidelines (the "Guidelines"). Each Amendment was issued on November 1, 2015. Amendment 791 adjusted the monetary table for § 2B1.1(b)(1) to account for inflation and, as applicable here, changed the minimum monetary loss necessary for a 14-level enhancement from \$400,000 to \$550,000. Amendment 792 amended § 2B1.1(b)(10)(C) to add that an offense involved sophisticated means "and the defendant intentionally engaged in or caused the conduct constituting

¹ After defendant was sentenced on the instant offense, defendant went to trial in the District of Maryland and was found defendant guilty of two counts of wire fraud and one count of aggravated identity theft. See *United States v. Barrie*, No. 14-cr-6, 2017 WL 6048223 (D. Md. Dec. 5, 2017). In that case, defendant was sentenced to 112 months

"sophisticated means." U.S.S.G., App. C, amend. 792, at 111. Amendment 794 clarified the circumstances under which a defendant may be entitled to a mitigating role reduction.

Defendant must rely on 18 U.S.C. § 3582(c)(2) to obtain a reduction based on these Amendments. The problem for defendant is that the Guidelines designate which amendments are retroactively applicable for § 3582(c)(2) motions, and none of the amendments defendant relies on are designated in the Guidelines as retroactive. Section 1B1.10, which governs sentence reductions under § 3582(c)(2), provides that where "the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment" under § 3582(c)(2). U.S.S.G. § 1B1.10(a)(1) (2016) (emphasis added).² The commentary to § 1B1.10 similarly states that "[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range." U.S.S.G. § 1B1.10 cmt. n.2 (2016). None of the amendments defendant cites—Amendments 791, 792, and 794—is listed under subsection (d), and as a result defendant is not entitled to claim the benefit of these amendments in his § 3582(c)(2) motion. See *id.* § 1B1.10(d). The result reached here—that defendant may not rely on the non-retroactive Amendments to the Guidelines—finds firm support in decisions of the Fourth Circuit, this Court, and the District of Maryland. See *United States v. McNeill*, 671 F. App'x 67, 68 (4th Cir. 2016) ("Amendment 794 cannot be given retroactive effect in a § 3582(c)(2) proceeding"); *United States v. Akhter*, 303 F. Supp. 3d 468, 469-71 (E.D. Va. 2017) (denying retroactive application of Amendments 791, 792, and 794); *Barrie*, 2017 WL

² Section 1B1.10(b)(1) also provides that in determining whether a reduction under § 3582(c)(2) is warranted, the "court shall determine the amended guidelines range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b)(1) (2016) (emphasis added). Nothing in § 1B1.10 distinguishes between substantive and clarifying amendments for the purpose of retroactivity; for both substantive and clarifying amendments, their effect is determined by whether the amendment is listed in the guidelines manual.

6048223 at *1 (denying this defendant's claim that Amendments 791, 792, and 794 should apply to him).³ Accordingly, defendant is not entitled to have his sentence reduced pursuant to those Amendments and his motion must be denied.⁴

III.

Defendant next argues that the restitution order entered in this case should be vacated, because the victim has passed away. Defendant cites no statute or other authority for the proposition that the restitution order entered on January 27, 2012 may be vacated or otherwise modified. A review of the MVRA and associated case law demonstrates that the restitution order should not be vacated and thus defendant's motion in this regard must be denied.

To begin with, the MVRA requires that a district court "shall order . . . that the defendant make restitution to the victim[s] of the offense" upon conviction and, as the Fourth Circuit has held, removed discretion from district courts to order restitution in an amount less than the full amount of the victim's losses. See 18 U.S.C. § 3663A(a)(1); *United States v. Roper*, 462 F.3d 336, 340 (4th Cir. 2006) (noting that, outside limited circumstances, "no statutory authority provides district courts the power to remit restitution orders imposed under the MVRA"). Defendant has pointed to no statute or authority establishing that the victim's death ends defendant's obligation to pay restitution. Indeed, the restitution order is part of the judgment entered in this case and may

³ See also *United States v. Page*, 727 F. App'x 70 (4th Cir. 2018) (holding no retroactive application of Amendment 794); *United States v. Ramos*, 719 F. App'x 283 (4th Cir. 2018) (same); *United States v. Barnes*, 699 F. App'x 256 (4th Cir. 2017) (same); *United States v. Mohammed*, No. 12-CR-495, 2016 WL 1047376 at *7 (S.D. Va. March 10, 2016) (denying retroactive application of Amendments 791 and 792); *United States v. Kimble*, 13-CR-0035, 2018 WL 5841970 at *2 (D. Md. Nov. 8, 2018) (denying retroactive Application of 791).

⁴ In any event, it appears, based on the agreed upon statement of facts and the plea agreement, that applying Amendments 791, 792, and 794 to defendant would not result in a lower sentence for defendant. First, the statement of facts establishes that the anticipated losses were \$ 593,171.45. See Statement of Facts at ¶ 21 (Dkt. 25). Second, it appears that even under Amendment 792, defendant would still qualify for a sophisticated means enhancement based on his methods of stealing and using the victim's information. See Statement of Facts. Finally, defendant has not been entitled to a mitigating role adjustment.

not be modified unless expressly permitted by statute. See *United States v. Bratton-Bey*, 564 F. App'x 28, 29 (4th Cir. 2014) ("A sentence imposing restitution is a final judgment that may not be modified absent one of several enumerated statutory exceptions."). The MVRA does not itself create such an exception. See *Roper*, 462 F.3d at 339 ("[W]e believe the terms of the MVRA clearly dictate that a district court cannot remit a mandatorily imposed restitution order."). That the victim has passed does not change this conclusion. See 18 U.S.C. § 3663A(a)(1) (providing for restitution to victim or, "if the victim is deceased, to the victim's estate (emphasis added)). * Although no court appears to have addressed this precise scenario, courts have held that restitution obligations may pass to a victim's successor.* *

To find that defendant could avoid his restitution obligation following the victim's death, would greatly undermine the "rehabilitative and retributive purposes" of restitution. *United States v. Karam*, 201 F.3d 320, 328 (4th Cir. 2000). Such a holding would only encourage defendants to prey on vulnerable populations, namely the ill or the elderly, in the hopes that they could avoid any restitution obligation by simply waiting for their victims to die. Moreover, it would be anomalous to hold that the defendant could avoid a restitution obligation upon the victim's death when the Fourth Circuit has held that such an obligation does not end even upon the defendant's death. See *United States v. Penderung*, 438 F. App'x 198, 199 (4th Cir. 2011) (holding that even when a "prison sentence abate[s] as a result of his death pending appeal, the restitution order survives" (emphasis added)).

* See, e.g., *United States v. Vernon*, 481 F. App'x 828, 832 (4th Cir. 2012) (finding that "successor lenders are victims within the meaning of the MVRA"); *United States v. Wallace*, 451 F. App'x 523, 526 (6th Cir. 2011) (allowing restitution where the "direct victim . . . passes on its loss to a successor in interest"); *United States v. Haddock*, 50 F.3d 835, 841 (10th Cir. 1995) (holding that bank who purchased assets of defunct bank was proper victim under 18 U.S.C. 3664(e)(2) (a victim may "assign the victim's interest in restitution payments

In sum, there is no statutory or case authority providing that a restitution order may be vacated or remitted upon the victim's death. Moreover, it would be inappropriate to reduce defendant's restitution obligation where defendant preyed on a vulnerable victim, has made only minimal payments (\$725) on a large restitution obligation (\$476,038.83), and had only to wait for the victim to die. Accordingly, defendant's motion must be denied.

That defendant's restitution obligations are not vacated in light of the victim's death, begs the question to whom should defendant's payments be directed. Under the terms of the restitution order, all payments are to be made to the Clerk of the Court and then distributed to the victim. See Restitution Order (Dkt. 43). Although the government refers generally to the victim's "heirs," the government does not identify any specific heir to whom restitution payments should be distributed. Response at 4 (Dkt. 69). Defendant's motion suggests that the victim died intestate and that an attorney has been appointed to act as a conservator of the estate. See Motion at 2. Since the victim is now deceased, the government is directed to advise the Court promptly to whom or to what entity the restitution payments should be disbursed.

Accordingly,

It is hereby **ORDERED** that defendant's motion to reduce sentence (Dkt. 64) is **DENIED**.

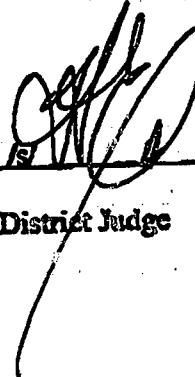
It is further **ORDERED** that defendant's motion to vacate restitution (Dkt. 61) is **DENIED**.

It is further **ORDERED** that the government is **DIRECTED** to advise the Court promptly as to whom or to what entity restitution payments should be disbursed in light of the victim's death.

To appeal this decision, defendant must file a written Notice of Appeal with the Clerk of this court within fourteen (14) days of receipt of this Order. Failure to file a timely Notice of Appeal waives the right to appeal.

The Clerk of Court is directed to send a copy of this Order to all counsel of record and to defendant at his last known address.

Alexandria, VA
March 16, 2020


T. S. Ellis, III
United States District Judge