

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

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of June, two thousand twenty,

Before: RAYMOND J. LOHIER, JR.,
JOSEPH F. BIANCO,
MICHAEL H. PARK,

Circuit Judges.

United States of America,

Appellee,

v.

David Gilmartin,

Defendant - Appellant.

ORDER

Docket No. 18-1831

Appellant David Gilmartin having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court




18-1831

United States v. Gilmartin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of May , two thousand twenty.

PRESENT: RAYMOND J. LOHIER, JR.,
JOSEPH F. BIANCO,
MICHAEL H. PARK,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID GILMARTIN,

Defendant-Appellant.

No. 18-1831

FOR DEFENDANT-APPELLANT:

David Gilmartin, *pro se*,
Barstow, CA.

1 FOR APPELLEE:

Stanley J. Okula, Jr., Nanette L.
2 Davis, Special Assistant United
3 States Attorneys, Karl
4 Metzner, Assistant United
5 States Attorney, *for* Geoffrey S.
6 Berman, United States
7 Attorney for the Southern
8 District of New York, New
9 York, NY.

10 Appeal from a judgment of the United States District Court for the
11 Southern District of New York (Valerie E. Caproni, *Judge*).

12 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
13 AND DECREED that the amended judgment and orders of the District Court are
14 AFFIRMED.

15 David Gilmartin appeals from an amended judgment and orders, entered
16 on May 9, 2018 and June 5, 2018, by the United States District Court for the
17 Southern District of New York (Caproni, L) modifying the restitution order that
18 was imposed at Gilmartin's sentencing and denying Gilmartin's motion to
19 reconsider the modification. We assume the parties' familiarity with the
20 underlying facts and prior record of proceedings, to which we refer only as
21 necessary to explain our decision to affirm.

1 As an initial matter, we note that the parties dispute whether our review
2 on appeal is limited to the District Court's denial of the motion for
3 reconsideration, or whether we can review the underlying order that modified
4 the restitution order. Given the limited scope of the notice of appeal, which by
5 its terms designates only the District Court's order denying the motion for
6 reconsideration, we agree with the Government that our review is limited to
7 whether the District Court's denial of reconsideration was an abuse of discretion.
8 See Shrader v. CSX Transp., Inc., 70 F.3d 255, 256 (2d Cir. 1995).

9 We conclude that the District Court did not abuse its discretion in denying
10 Gilmartin's motion for reconsideration. See United States v. Yalincak, 853 F.3d
11 629, 635 (2d Cir. 2017). The motion failed to raise any new arguments that the
12 District Court had not already addressed in its May 1, 2018 opinion and order.
13 The motion also did not point to controlling authority or evidence that the
14 District Court overlooked in its original order. See Shrader, 70 F.3d at 257.

15 Even assuming that we have jurisdiction to review the underlying
16 modification, see Van Buskirk v. United Grp. of Cos., Inc., 935 F.3d 49, 52 (2d Cir.
17 2019), we conclude that the District Court did not err in modifying Gilmartin's

1 restitution order. We review the imposition of a restitution order for abuse of
2 discretion, but our review is de novo when the defendant asserts an error of law.
3 United States v. Thompson, 792 F.3d 273, 276–77 (2d Cir. 2015). A district court
4 may modify the restitution schedule if there is a “material change in the
5 defendant’s economic circumstances.” 18 U.S.C. § 3664(k).

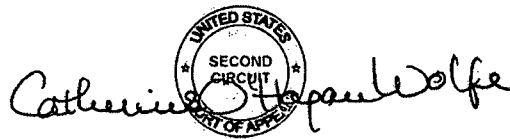
6 There is no doubt that Gilmartin’s economic circumstances materially
7 changed after his release from prison. At the time of sentencing, Gilmartin was
8 not collecting Social Security benefits. Following his release, Gilmartin elected to
9 receive Social Security benefits, which satisfies the statutory test for a “material
10 change in the defendant’s economic circumstances.” 18 U.S.C. § 3664(k); see also
11 United States v. Grant, 235 F.3d 95, 100–01 (2d Cir. 2000) (holding that the release
12 of frozen funds and the consequent availability of the funds following
13 defendant’s release from prison constituted a “material change”). Gilmartin also
14 argues that the sentencing judge intentionally exempted any Social Security
15 retirement benefits from restitution payments. In the absence of more explicit
16 language that the sentencing judge even considered Gilmartin’s Social Security
17 benefits, we cannot conclude that those benefits were purposefully exempted

1 from these payments as Gilmartin claims.

2 We have considered Gilmartin's remaining arguments and conclude that
3 they are without merit. For the foregoing reasons, the amended judgment and
4 orders of the District Court are AFFIRMED.

5 FOR THE COURT:

6 Catherine O'Hagan Wolfe, Clerk of Court
7

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

MEMO ENDORSED

**United States District Court
for the
Southern District of New York**

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/4/2018

United States of America,
Complainant

Docket #1:12-cr-287

v

Motion for Reconsideration

David Gilmartin,
Defendant.

Defendant's motion for reconsideration is DENIED. Defendant raises no arguments that the Court has not already considered and addressed in its May 1, 2018 order (Dkt. 86). The Clerk is respectfully directed to mail a copy of this endorsement to Defendant. SO ORDERED.

Valerie Capri
6/4/2018

Defendant David Gilmartin moves this court to reconsider its order of 1May2018 pursuant to Local Criminal Rule 49.1, Service and Filing of Motion Papers.

This court has no authority under 18 USC 3664(k) to rewrite the order of restitution unless there has been a material change in my economic condition since sentencing. On 16Jul2013, when I was sentenced, I had no income. Today I have an annual income of \$35k. That is a material change in my economic condition, and it makes it possible for me to make larger monthly payments toward restitution. The court's order of 1May2018 has used this change to rewrite Judge Cedarbaum's schedule for restitution, ordering me to pay "10% of Defendant's earnings, Social Security, and any pension, annuity, gift, inheritance or other source of income to which he is entitled", that is, 10% of income.¹

If instead of drawing Social Security retirement benefits, I had successfully returned to my former occupation and earned, in a good year, \$200k, the original

¹ An expression of the form "10% of A, B, C and other income" means 10% of income, but it implies that A, B and C are examples of income and it makes these examples explicit.

order of restitution would have taxed 10% or \$20k. On the other hand, if I had taken a part-time, minimum-wage job, and received, over a year's time, wages of \$16k, the original order would have taxed away \$1600 at the 10% rate. Whether I received annually \$16k from this low-end job, or \$35k from Social Security, or \$200k from consulting, then in comparison to my lack of income at the time of sentencing, there would have been a material change in my economic conditions.

By such a concept of "material change", there is nothing final about the Final Judgment, since all outcomes will show a material change in my economic circumstances. This interpretation deprives Judge Cedarbaum of her power to set the schedule for restitution. Judge Cedarbaum had the power to sentence me to between six and seven years in prison in accordance with the sentencing guidelines, or to go higher, but in fact she made a downward departure, and sentenced me to four years.

As the 1May2018 order says (at the top of page 2), I was eligible for Social Security, based on my age the day I was interviewed for the PSR, my age being 69. The court added that "the sentencing judge knew that [I] was entitled to draw Social Security" (first paragraph starting on page 6). Her choice to base my restitution on my earnings was another downward departure, and within her discretion to make.

The order argues that it cannot conclude that Judge Cedarbaum "intended to *exclude* Social Security benefits as a source of income from which Defendant must pay restitution if he ultimately decided to draw that benefit." But this is backward. 3664(k) requires the court to establish the condition "material change" or the court has no authority to revise the restitution schedule in Judge Cedarbaum's Final Judgment.

Judge Cedarbaum could have scheduled restitution at 10% of income, but she made a downward departure by ordering me to pay 10% of my earnings. She certainly knew the difference. The court's order of 1May2018 would deprive Judge Cedarbaum of her power to schedule restitution according to her discretion.

Restitution of a particular amount each month may depend on my evolving economic condition. But when the restitution schedule is 10% of earnings (or income), then restitution automatically adjusts for every change in economic condition. If I go from a low-end job making \$16k annually to a consulting business earning \$200k annually, there is a dramatic change in my economic condition, but there is no need to revise the restitution schedule in my Final Judgment.

A final point concerns hiding, omission, deception or perjury on the financial disclosure. *Grant*² concerned Robert Grant's frauds committed through the US Mail while he was incarcerated by the state of New York, and the disposition of some of his ill-gotten gain. The Second Circuit said (pages 100-101) several things relevant to omissions on a financial disclosure:

1. "Because the district court made no finding as to whether Grant concealed or failed to report assets, we do not reach the issue of whether the subsequent discovery of assets [\$400 in Grant's prison account] concealed by a defendant would constitute a material change in circumstances. Surely, however, there would be a remedy that would permit the gathering of assets that were unknown to the authorities [at the time of sentencing] as the result of a defendant's dishonesty."
2. "[T]he district court [committed] error in classifying its later acquisition of knowledge of the inmate account as a material change in Grant's economic circumstances".
3. "[S]ince the funds were frozen, they were not an asset to which the defendant had access."

² *Grant: US v Robert Grant*, 235 F3d 95 (Second, 13Dec2000)

4. “The release of the account and the consequent availability of the funds meet the statutory test for a ‘material change in the defendant's economic circumstances’.”
5. In summary, the Second Circuit implies but does not explain the reason that “material change” means a material change from what the sentencing judge knew when she relied on the defendant’s financial disclosure.

In Note 6, the *Roush*³ court wrote the rule I have just enunciated (in Point 5 under *Grant*), that is,

1. “Discovery of previously unknown or hidden assets would also constitute a change in the defendant's economic circumstances that could justify modification under section 3664(k), as it would be a change in the economic circumstances presented to the court at sentencing.”

In *Grigsby*⁴, Philip Grigsby concealed or failed to disclose \$50k in a union retirement fund. The USDC Kansas (Wichita) discovered the hidden asset and modified the restitution schedule in its Final Judgment so as to disgorge the new-found funds, “as the interests of justice require pursuant to 18 USC 3664(k)”. (style adapted) The Tenth Circuit found no error in the court’s order.

In the 22 year history of the Mandatory Victim Restitution Act of 1996, “material change in economic circumstances” has been recognized as an initial obstacle to any revision under 3664(k) of the trial and sentencing court’s schedule of restitution, and the base circumstances for assessing a possible change are the circumstances known to the sentencing judge. It is the defendant’s responsibility to disclose his financial circumstances. When the financial affidavit is found to have been erroneous due to simple error or conniving, then 3664(k) authorizes a revision of the schedule of restitution.

³ *Roush. US v Edward Roush, Jr.*, 452 FSupp2d 676 (USDC Texas Northern (Dallas), 27Sep2006)

⁴ *Grigsby: US v Philip Andra Grigsby*, Docket #16-3061 (Tenth Circuit, 7Dec2016)

Conclusion

18 USC 3664(k) authorizes a revision of the schedule of restitution only if there is a "material change in economic circumstances". This phrase means a change from the circumstances as they were known to the court at the time of sentencing.

But here, in *US v Gilmartin*, there is no such changed circumstance, economic or financial. All of the relevant information was known to Judge Cedarbaum. There was no omission of any financial data, nor was there any hiding of financial data, nor has the prosecutor claimed that my finances were omitted or hidden. There is therefore no authority for this court to revise the schedule of restitution.

Prayer

That this court replace its order with one that recognizes the trial and sentencing judge's prerogative in this area, by leaving unchanged the Final Judgment as ordered by Judge Cedarbaum.


AFFIDAVIT.

I, David Gilmartin, testify under penalties of perjury that the facts presented in this motion are true and correct to the best of my knowledge and belief.

CERTIFICATE OF SERVICE

I, David Gilmartin, hereby certify that I am serving this Motion for Reconsideration, using First Class Mail, on AUSA Stanley Okula at the Office of the US Attorney, One Saint Andrews Plaza, New York, New York 10007.

Date: May 15, 2018



David Gilmartin
1240 Windy Pass #2
Barstow, California 92311

**Attachment A. My eligibility for Social Security,
as shown in my career**

1. The presentence report (PSR) reported that I had no income and that I had total assets of only \$85. The court noted (Memorandum and Order, at the top of page 2) that I was eligible for Social Security, based on my age the day I was interviewed for the PSR, my age being 69. The court added that "the sentencing judge knew that [I] was entitled to draw Social Security" (first paragraph starting on page 6).
2. I do not dispute that my income was zero, nor that my assets totaled \$85, nor that I was eligible for Social Security retirement benefits. I agree with what this court has stated.
3. Since I was eligible for Social Security, why did I report that I had no income?
 - a. I had been working at a long series of jobs since my wife and I married during my junior year at Texas Christian University. I was the only support of my wife and children during the 1960s and 70s and into the 80s, while our children were still in the house.
 - b. By the early 70s I was working as an economist for private corporations and government agencies, first ABD (all but dissertation), and then PhD. My entire income was documented by IRS Forms W-2.
 - c. After 1990, I worked independently. Usually this work was documented by IRS Forms 1099, but sometimes by W-2s.
 - d. My consulting work continued almost up to the week of my trial, in Jan2013. After conviction, I made no attempt to return to consulting, since I was facing sentencing and incarceration in two or three months. The costs of my legal defense had drained my resources, and I had only enough money for rent, food and transportation before I left my belongings in the hands of family and friends and my daughter drove me to Federal Prison Camp at Lompoc, California, on 1Oct2013.
 - e. I had liquidated all my assets, and had none left. I had spent the money in my bank account, and had a small bit of cash in my pocket at the time of sentencing. I survived on a few small gifts from supporters until I entered prison.
 - f. It turned out to be eight months from conviction (23Jan2013) to incarceration (1Oct2013), but I never had more than three months' notice on incarceration. Since Social Security does not send benefits to prisoners, this short horizon left no time to apply for retirement benefits. Nor could I have returned to consulting, since I couldn't commit to a

project for more than two months, given the uncertainties of sentencing and incarceration.

- g. Thus during the months leading up to sentencing and then in the short time between sentencing and incarceration, my assets were exhausted, my cash was no more than pocket money, and my income was non-existent.
- h. My plan for supporting myself after release from prison was to return to my consulting work, or since I would then be age 74, as an alternative, I could begin to draw my retirement benefits under Social Security.
- i. That is why I had no income at all at the time of sentencing.

**Attachment B. The special nature of Social Security
in a financial disclosure**

1. The parallel question is why I had no assets, given that I was eligible for Social Security.
 - a. I filled out the personal balance sheet, revealing my assets and liabilities, as a part of the required financial disclosure,
 - b. "an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate" according to 18 USC 3664(d)(2).
 - c. The long form, identified as Probation Form 48 (Rev. 900), required from me "a complete listing of all assets you own or control as of this date and any assets you have transferred or sold since your arrest ... [whether] yours alone ... or jointly held ... [or] held by [others] that you enjoy the benefit of":
 - d. This included all
 - i. Bank accounts,
 - ii. Securities,
 - iii. Money owed to me by others,
 - iv. Life insurance policies, at their cash-surrender value,
 - v. Safe-deposit boxes or storage space,
 - vi. Motor vehicles,
 - vii. Real estate,
 - viii. Mortgage loans owed to me,
 - ix. Other assets, including cash on hand, jewelry, art, paintings, coin and stamp collections, other collectibles, antiques, copyrights, patents and so forth.
 - x. Anticipated assets, including any assets you expect to receive or control from lawsuits for compensation or damages, profit-sharing, pension plans, inheritance, wills, or as an executor or administrator of any succession or estate.
 - xi. Trust assets, including all trusts in which your are a grantor, the trustee or a fiduciary, and finally,

- xii. Business holdings, including businesses in which you have an interest or with which you were affiliated within the last three years.
2. The list did not include Social Security because Social Security is not an asset. It is an entitlement, wholly dependent on the whim of Congress to fund it, to cover its deficits, to increase or decrease the benefits, or restructure them in favor of one group or another. My entitlement entitles me to whatever Congress gives me for this year. There is no asset value that I could liquidate to fund other things, or mortgage, or give away. By contrast, union and corporate pensions are assets based on the firm's turnover for different types of work and the actuarial investments needed to fully fund the promises (especially since the Employee Retirement Income Security Act of 1974), but Social Security is not an asset, and it is not funded and it is not actuarially sound. Therefore, the balance sheet (Form 48) collects no information about it, and as the court observed, "The PSR was entirely silent on the Defendant's eligibility for Social Security benefits. *See id.*" (the top of page 2)
 3. However, to repeat what I brought out above, under point #1 of Attachment A,
 - a. the sentencing judge knew at the time of sentencing that I was eligible for Social Security,
 - b. the court knows today that I was eligible at the time of sentencing, and
 - c. the court knows today that the sentencing judge knew at the time of sentencing that I was eligible for Social Security.
 4. This court wrote (the bottom of page 2), "Once released from prison, sometime in mid-2017, Defendant decided to begin to draw his Social Security retirement benefits. *See* Dkt. 75 at 1; Dkt. 84 at 4."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 5/1/2018

----- X
UNITED STATES OF AMERICA,

-against-

DAVID GILMARTIN,

Defendant.
----- X

:
: 12-CR-287 (VEC)

:
: MEMORANDUM
: OPINION AND ORDER
:
:

VALERIE CAPRONI, United States District Judge:

In July 2013, Defendant David Gilmartin was convicted for engaging in a multi-year tax evasion scheme. *See* Judgment, Dkt. 60. The sentencing court imposed an order of restitution, along with terms of imprisonment and supervised release. *Id.* Defendant now moves for this Court to “clarify” language in his court-ordered schedule of restitution payments. *See* Def.’s Ltrs., Dkts. 75, 76, 83, 84, 85. At the same time, the Government cross-moves to modify the payment schedule pursuant to 18 U.S.C. § 3664(k), due to a material change in Defendant’s economic circumstances. *See* Gov. Ltr., Dkt. 81. For the following reasons, Defendant’s motion is GRANTED IN PART, and the Government’s motion is GRANTED.

BACKGROUND

The Court assumes familiarity with the facts of this case. *See United States v. Gilmartin*, 684 F. App’x 8 (2d Cir. 2017). Defendant was a “tax protestor” who claimed that the federal government could not legally obligate him to pay income tax. *See id.* at 10; Gov. Ltr. at 2.¹ After a seven-day trial in early 2013, a jury found Defendant guilty of multiple tax crimes and mail fraud. *See Gilmartin*, 684 F. App’x at 10; Judgment, Dkt. 60.

¹ According to Defendant, he is an “IRS protestor,” not a “tax protestor.” Dkt. 84 at 6. That distinction is immaterial to the issue before the Court.

Prior to Defendant's sentencing, the U.S. Office of Probation prepared a presentence report ("PSR"). Although Defendant was eligible to draw Social Security retirement (he was 69 years old at the time), he was apparently not doing so, as the PSR reported that he had no income and that his assets totaled \$85. *See* Gov. Ltr. at 2. The PSR was entirely silent on the Defendant's eligibility for Social Security benefits. *See id.*

The Court sentenced Defendant to a term of imprisonment of four years, a term of supervised release of three years, and a \$500 special assessment. *See* Judgment at 1–4.² The Court also entered an order of restitution in the amount of \$1,672,399.62. *Id.* at 5. The Court's schedule of payments ordered Defendant to pay restitution "in monthly installments of 10% of the defendants [sic] earnings, *after* the defendant is earning money."³ *Id.* at 6 (emphasis in original).

While Defendant was incarcerated, he had no income other than his family's occasional financial support. *See* Dkt. 75 at 1; Dkt. 84 at 4–5, 8. The prison warden ordered Defendant to pay restitution out of these support payments, but Defendant refused on the ground that the payments did not constitute "earnings" within the meaning of the Court's order. *See* Dkt. 75 at 1–2; Dkt 76 at 4; Dkt. 84 at 8–9. The warden levied administrative sanctions against Defendant for failing to comply (for example, Defendant was not released to a halfway house and his access to email, telephone, and the commissary was revoked); Defendant appealed those sanctions within the Bureau of Prisons. *See* Dkt. 75 at 1; Dkt 76 at 4–5; Dkt. 84 at 8–9.

Once released from prison, sometime in mid-2017, Defendant decided to begin to draw his Social Security retirement benefits. *See* Dkt. 75 at 1; Dkt. 84 at 4. Accordingly, Defendant's

² The presiding judge at Defendant's trial and sentencing was the late Judge Miriam Goldman Cedarbaum.

³ The Court's schedule of payments also ordered Defendant to pay the costs of prosecution (\$2,532.52) as part of these monthly installments. Judgment at 6.

probation officer ordered him to begin paying restitution out of his Social Security income.

See Dkt. 75 at 1–2; Dkt. 76 at 1. Defendant refused on the ground that Social Security benefits are not “earnings.” *See* Dkt. 75 at 1–2; Dkt. 76 at 1.

Defendant then submitted several letters to this Court asking the Court to “clarify[]” that family gifts and Social Security payments do not fall within the term “earnings.” *See* Dkts. 75, 76. He argued that he needed the Court’s “clarification” both to support his ongoing Bureau of Prisons appeal and to forestall his probation officer from pursuing a violation of supervised release based on his alleged failure to pay restitution. *See* Dkt. 75 at 2; Dkt. 76 at 1–2. Defendant cited a number of statutes and regulations to argue that neither gifts nor Social Security benefits are “earnings” under the federal tax laws. *See* Dkt. 76 at 3–4.

In response, the Government agreed with Defendant that his Social Security benefits do not constitute “earnings” within the meaning of the Court’s schedule of restitution payments. *See* Gov. Ltr. at 2–3. Nevertheless, the Government argued that Defendant’s decision to begin drawing Social Security retirement benefits after he was released from prison constitutes a “material change in the defendant’s economic circumstances,” entitling this Court to adjust Defendant’s schedule of restitution payments pursuant to 18 U.S.C. § 3664(k).⁴ *Id.* at 3. The Government moved this Court to require Defendant to pay restitution through a portion of his Social Security benefits and any other financial resources available to him, regardless of whether

⁴ 18 U.S.C. § 3664(k) provides in full:

A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution. The court may also accept notification of a material change in the defendant’s economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

they fall within the term “earnings.” *Id.* at 5. Defendant submitted several letters in reply. *See* Dkts. 83, 84, 85.

DISCUSSION

I. Defendant’s Motion to “Clarify” the Order of Restitution Is Granted in Part

Because the Government concedes that Social Security benefits are not “earnings,” the portion of Defendant’s motion that relates to that question is granted.

The balance of Defendant’s motion, which relates to his receipt of gifts while incarcerated, is denied. Defendant argues that he is presently appealing sanctions that the warden imposed for his failure to pay restitution while incarcerated. *See* Dkt. 76 at 4. In Defendant’s view, a ruling from this Court, clarifying that his family’s gifts were not subject to restitution, is critical to his appeal. *See* Dkt. 76 at 2; Dkt. 85 at 2–3. But, as Defendant acknowledges, he has not exhausted his administrative remedies as to this appeal, which currently lies in the Bureau of Prisons. *See* Dkt. 84 at 9. Thus, this issue is not properly before this Court, and the portion of Defendant’s motion that relates to this question is denied.

II. The Government’s Motion to Adjust Defendant’s Restitution Schedule Is Granted

A. Defendant’s Economic Circumstances Have Materially Changed

Upon “any material change in [a] defendant’s economic circumstances that might affect the defendant’s ability to pay restitution,” a court may “adjust the payment schedule, or require immediate payment in full, as the interests of justice require.” 18 U.S.C. § 3664(k); *see also United States v. Kyles*, 601 F.3d 78, 83 (2d Cir. 2010); *United States v. Grant*, 235 F.3d 95, 100 (2d Cir. 2000). Finding a “material change” requires “an objective comparison of a defendant’s financial condition before and after a sentence is imposed.” *Grant*, 235 F.3d at 100.

Defendant’s economic circumstances have clearly changed in light of his election to begin receiving Social Security benefits. At the time of sentencing, Defendant had assets

totaling \$85 and no income. *See* Gov. Ltr. at 2. Today, Defendant receives over \$35,000 in annual Social Security benefits. *See* Dkt. 84 at 3 n.1. By any measure, this change is objective and material. Under these circumstances, § 3664(k) permits the court to adjust, or even accelerate, Defendant's schedule of restitution payments, so that his victims can be promptly and justly compensated.

A straightforward application of the Second Circuit's decision in *Grant* controls this Court's ruling. *See* 235 F.3d at 100. In *Grant*, at the time of the defendant's sentencing, an account containing money belonging to the defendant was "frozen" and, therefore, was unavailable to the defendant. *Id.* at 98, 100. Sometime after sentencing, the account became "unfrozen," and the defendant gained access to the money. *Id.* at 98, 100–01. The Second Circuit held that "[t]he release of the account and the consequent availability of the funds [met] the statutory test for a 'material change'" under § 3664(k). *Id.* at 101. The Court affirmed the district court's modification of the defendant's restitution schedule. *Id.* Here, while Defendant had the *right* to collect Social Security benefits at the time of sentencing, *see* Gov. Ltr., Ex. A, those funds became available to Defendant only once he *elected* to receive them *after* sentencing. In both this case and *Grant*, the change in the availability of funds after sentencing constitutes a "material change" under § 3664(k).

The parties dispute whether Defendant adequately disclosed to the Court his right to future Social Security benefits at the time of his sentencing. *See* Gov. Ltr. at 3–4; Def. Ltr., Dkt. 84, at 7–8. This dispute is immaterial. In *Grant*, the district court "made no factual finding" whether the defendant had or had not failed to disclose the frozen account. 235 F.3d at 100. The Second Circuit held that regardless of the defendant's disclosure *vel non*, the unfreezing of the account constituted an objective "material change in [his] economic circumstances" that

warranted modification. *Id.* at 100–01. Similarly, this Court need not find that Defendant failed to disclose assets in order to modify his restitution schedule under § 3664(k), given the undisputed fact that he now receives over \$35,000 per year in income. The objective change in Defendant’s income is sufficient.⁵

Defendant argues that there are no changed circumstances because the sentencing judge knew that he was entitled to draw Social Security retirement benefits. *See* Dkt. 84 at 2. While Defendant is no doubt correct that the sentencing judge knew that he was entitled to draw Social Security, the issue is whether she foresaw that he would actually do so. After all, this Defendant views Social Security benefits as “welfare,” *id.*, and despite having been eligible to draw 100 percent of his Social Security retirement benefits since age 66, *see* Gov. Ltr., Ex. A, he had failed to do so at the time he was sentenced, even though he had zero income, *see id.* at 2. Given those facts, this Court cannot conclude that the sentencing judge intended to *exclude* Social Security benefits as a source of income from which Defendant must pay restitution if he ultimately decided to draw that benefit. Nevertheless, because the parties agree that Social Security benefits do not constitute “earnings” within a narrow reading of the sentencing judge’s schedule of payments, this Court will modify that schedule to (1) include those benefits on a go-forward basis and (2) to accelerate his obligation to pay restitution in an amount equal to the Social Security benefits that the Defendant has “escrowed” since this issue first arose. *See* Dkt. 85 at 2.

As a final matter, nothing in the Social Security Act limits this Court from adjusting Defendant’s restitution schedule to account for his benefits. While the Act prohibits the

⁵ As in *Grant*, the question of whether a court can modify a restitution schedule based on a defendant’s concealment of his assets (even if those assets did not materially change post-sentencing in an objective sense) is not presented here. *See Grant*, 235 F.3d at 100 (“[W]e do not reach the issue of whether the subsequent discovery of assets concealed by a defendant would constitute a material change in circumstances.”).

attachment or garnishment of Social Security income, *see* 42 U.S.C. § 407, actions to enforce the payment of criminal restitution are exempt from that provision, *see* 18 U.S.C. § 3613(a), (f); *In re Partida*, 862 F.3d 909, 912 (9th Cir. 2017) (“[T]he plain language of the MVRA makes clear that the government can collect restitution, despite any federal laws to the contrary.”); *United States v. Lampien*, 1 F. App’x 528, 531–32 (7th Cir. 2001) (court includes Social Security benefits in its calculation of “the income from which [defendant] could make restitution”).⁶

B. The Court’s Modification to Defendant’s Restitution Schedule

In light of the foregoing, the Court modifies the restitution order contained in Defendant’s Judgment as follows:

The cost of prosecution (\$2,532.52) and restitution (\$1,672,399.62) is to be collected in monthly installments equal to the amount of 10% of Defendant’s earnings, Social Security benefits, and any pension, annuity, gift, inheritance, or other source of income to which he is entitled. If Defendant has not yet paid the \$500.00 Special Assessment, he must do so immediately. In addition, Defendant must immediately pay an amount equal to 10% of the monthly Social Security benefits that he has received since he began to draw his Social Security retirement (which the Court understands that he currently has “escrowed”).

The Court notes that this modification affects only the schedule of Defendant’s restitution payments, not the total amount of restitution due. *See Kyles*, 601 F.3d at 83 (explaining that a schedule of payments is an exercise of equitable discretion, and thus subject to modification, whereas the amount of restitution is an imposed sentence, and thus entitled to finality); *United States v. Zaman*, No. 03-CR-824 (FB), 2015 WL 778177, at *1 (E.D.N.Y. Feb. 24, 2015) (same (citing *Kyles*, 601 F.3d at 83)).

⁶ To be clear, the Court is not ordering attachment or garnishment. The Court is merely taking into account Defendant’s income from Social Security as a means of calculating an appropriate amount for Defendant to pay monthly payments toward his restitution obligation.


CONCLUSION

For all the foregoing reasons, Defendant's motion to "clarify" the meaning of the word "earnings" in his original Judgment is GRANTED IN PART. The Government's cross-motion to modify Defendant's schedule of payments is GRANTED. The Clerk is respectfully directed to close the open motion at Dkt. 75.

The Clerk is also respectfully directed to mail and email a copy of this order to Defendant and to note mailing on the docket.

SO ORDERED.

Dated: May 1, 2018
New York, New York



VALERIE CAPRONI
United States District Judge

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

David Gilmartin

Date of Original Judgment: 7/16/2013
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 1: S1 12-CR-00287-01(VEC)

USM Number: 62712-112

Lowell H. Beacraft, Jr., Esq.

Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☒ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count(s) 1, 2, 3, 4, and 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
26 U.S.C. 7212(a)	Corrupt Endeavor to Impede the Due Administration of the Internal Revenue Service	12/31/2010	1

26 U.S.C. 7201	Evasion of Payment of Income Taxes	6/25/2012	2
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The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/25/2013

Date of Imposition of Judgment

Valerie Caproni

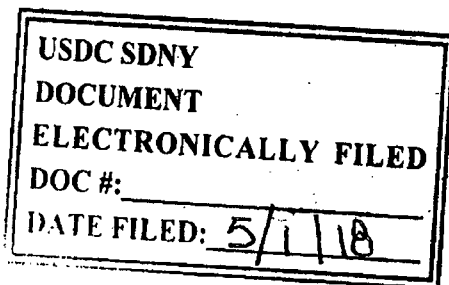
Signature of Judge

Valerie Caproni, U.S.D.J.

Name and Title of Judge

5/1/2018

Date



DEFENDANT: David Gilmartin

CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

ADDITIONAL COUNTS OF CONVICTION

[illegible]

DEFENDANT: David Gilmartin
CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 4 years.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the Bureau of Prisons designate the defendant to FPC Lompoc.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before ^{12pm} ~~2~~ p.m. on 10/1/2013

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: David Gilmartin

CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: David Gilmartin

CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: David Gilmartin

CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant is to report to the nearest Probation Office within 72 hours of release from custody.

If the defendant is sentenced to any period of supervision, it is recommended that the defendant be supervised by the district of residence.

DEFENDANT: David Gilmartin

CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 500.00	\$	\$	\$ 1,672,399.62

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Internal Revenue Service	\$1,573,104.85	\$1,573,104.85	100%
IRS-RACS, Attn: Mail Stop			
6261, Restitution 333 W. Pershing Ave., Kansas City, MO 64108			
New York State Department of Taxation and Finance,	\$99,294.77	\$99,294.77	100%
P.O. Box 5300, Albany, NY 12205			

TOTALS	\$	<u>1,672,399.62</u>	\$	<u>1,672,399.62</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: David Gilmartin
CASE NUMBER: 1: S1 12-CR-00287-01(VEC)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A ☒ Lump sum payment of \$ 500.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
(*) The cost of prosecution (\$2,532.52) and restitution (\$1,672,399.62) is to be collected in monthly installments equal to the amount of 10% of Defendant's earnings, Social Security benefits, and any pension, annuity, gift, inheritance, or other source of income to which he is entitled. If Defendant has not yet paid the \$500.00 Special Assessment, he must do so immediately. In addition, Defendant must immediately pay an amount equal to 10% of the monthly Social Security benefits that he has received since he began to draw his Social Security retirement (which the Court understands that he currently has "escrowed").

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☒ The defendant shall pay the cost of prosecution. \$2,532.52
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.