

APPENDIX

APPENDIX

United States v. Elvis Reyes,

United States District Court Opinion, 8:20-cr-00111-VMC-AAS Appendix A

United States v. Elvis Reyes,

2022 WL 4476660 (11th Cir.) Appendix B

Appendix A

Elvis Harold Reyes
8:20-cr-111-T-33AAS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

Case Number: 8:20-cr-111-T-33AAS

v.

USM Number: 73485-018

ELVIS HAROLD REYES

Sara Lenore Mieczkowski, AFPD

AMENDED JUDGMENT IN A CRIMINAL CASE

Defendant pleaded guilty to Counts Six and Twenty-Two of the Indictment. Defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 U.S.C. §§ 1341, 1349, and 2	Mail Fraud	February 25, 2018	Six
18 U.S.C. §§ 1028(A)(a)(1) and 2	Aggravated Identity Theft	May 25, 2018	Twenty- Two

Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts One through Five, Seven through Twenty-One, and Twenty-Three through Twenty-Five are dismissed on motion of the United States.

IT IS ORDERED that 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, Defendant shall notify the Court and United States Attorney of any material change in Defendant's economic circumstances.

Date of Imposition of Judgment: April 12, 2021



VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

June 29, 2021

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IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED FORTY-NINE (249) MONTHS**. This term consists of a 225-month term as to Count Six and a consecutive 24-month term as to Count Twenty-Two.

The Court recommends to the Bureau of Prisons that the defendant:

1. Be confined at FCI Coleman; and
2. Be evaluated by a physician for his kidneys and other medical issues.

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

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 U.S. Marshal

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SUPERVISED RELEASE

Upon release from imprisonment, Defendant will be on supervised release for a term of **THIRTY-SIX (36) MONTHS**. This term consists of a 36-month term as to Count Six and a 12-month term as to Count Twenty-Two, all such terms to run concurrently.

MANDATORY CONDITIONS

1. Defendant shall not commit another federal, state or local crime.
2. Defendant shall not unlawfully possess a controlled substance.
3. Defendant shall refrain from any unlawful use of a controlled substance. Defendant shall 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.)
4. Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.
5. Defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

Defendant shall also comply with the additional conditions on the attached page.

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, Defendant shall 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. Defendant shall 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. After initially reporting to the Probation Office, Defendant will receive instructions from the court or the Probation Officer about how and when Defendant must report to the Probation Officer, and Defendant must report to the Probation Officer as instructed.
2. After initially reporting to the Probation Office, you will receive instructions from the court or the Probation Officer about how and when Defendant shall report to the Probation Officer, and Defendant shall report to the Probation Officer as instructed.
3. Defendant shall 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. Defendant shall answer truthfully the questions asked by your Probation Officer
5. Defendant shall 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), Defendant shall 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, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
6. Defendant shall allow the Probation Officer to visit you at any time at your home or elsewhere, and Defendant shall permit the Probation Officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. Defendant shall 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 Defendant shall 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), Defendant shall 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, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
8. Defendant shall not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, Defendant shall 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, Defendant shall notify the Probation Officer within **72 hours**.
10. Defendant shall 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

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specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. Defendant shall 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 Defendant shall comply with that instruction. The Probation Officer may contact the person and confirm that you have notified the person about the risk.
13. Defendant shall 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: _____

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ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the Probation Officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.
2. Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or making an obligation for any major purchases without approval of the Probation Officer. You shall provide the Probation Officer access to any requested financial information.
3. Defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.

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CRIMINAL MONETARY PENALTIES

Defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment</u>	<u>JVTA Assessment</u>
\$200.00	\$442,368	WAIVED	N/A	N/A

Defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If 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 in full prior to the United States receiving payment.

<u>Name of Payee</u>	<u>Restitution Ordered</u>
U.S. District Court For distribution to victims	\$442,368

SCHEDULE OF PAYMENTS

Having assessed Defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

Special Assessment shall be paid in full and is due immediately.

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be 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, unless otherwise directed by the Court, the Probation Officer, or the United States attorney.

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, and (9) penalties, and (10) costs, including cost of prosecution and court costs.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Order of Forfeiture, that are subject to forfeiture. **[SEE ATTACHED ORDER]**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:20-cr-111-T-33AAS

ELVIS HAROLD REYES

ORDER OF FORFEITURE

Elvis Harold Reyes pleaded guilty to count six of the indictment, a wire fraud scheme, in violation of 18 U.S.C. § 1341. The United States has established that Reyes obtained \$265,627.00 in proceeds as a result of the offense.

The United States moves under 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Rule 32.2(b)(2), Federal Rules of Criminal Procedure, for entry of an order of forfeiture in the amount of \$265,627.00, which upon entry shall be a final order of forfeiture as to Reyes. The motion is **GRANTED**. Reyes is liable for an order of forfeiture in the amount of \$265,627.00.

The proceeds of the offense were transferred to third parties, and the United States cannot locate the proceeds upon the exercise of due diligence. Accordingly, under 21 U.S.C. § 853(p), the United States may seek, as a substitute asset in satisfaction of this judgment, forfeiture of any of Reyes' property up to the \$265,627.00 order of forfeiture. The United States may also

conduct discovery (including depositions, interrogatories, requests for production of documents, and the issuance of subpoenas), pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, to help identify, locate, and forfeit substitute assets. The court retains jurisdiction to enter any order necessary to the forfeiture and disposition of any substitute asset.

DONE and ORDERED in Tampa, Florida, this 29th day of December, 2020.



VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Appendix B

2022 WL 4476660

Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Elvis Harold REYES, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.

Elvis Harold Reyes, Defendant-Appellant.

No. 21-11286

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Non-Argument Calendar

|

No. 21-12510

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Filed: 09/27/2022

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:20-cr-00111-VMC-AAS-1

Attorneys and Law Firms

U.S. Attorney Service - Middle District of Florida, Holly Lynn Gershow, U.S. Attorney's Office, Tampa, FL, Sara C. Sweeney, U.S. Attorney's Office, Orlando, FL, for Plaintiff-Appellee.

Meghan Ann Collins, James T. Skuthan, Federal Public Defender's Office, Orlando, FL, Rosemary Cakmis, Law Office of Rosemary Cakmis, Orlando, FL, Sara Lenore Mieczkowski, Federal Public Defender's Office, Tampa, FL, for Defendant-Appellant.

Before Jordan, Newsom, and Grant, Circuit Judges.

Opinion

PER CURIAM:

*1 Elvis Reyes appeals his conviction and sentence for mail fraud and aggravated identity theft. He argues that the district court's restitution order was not supported by sufficient evidence. We conclude that Reyes's sentence—including the order of restitution—does not exceed the statutory maximum and does not violate the Eighth Amendment, and Reyes's appeal is otherwise barred by the appeal waiver in his plea agreement. We therefore affirm.

I.

Reyes was charged in a 25-count indictment with mail fraud, making false statements on immigration forms, and aggravated identity theft. He entered into a written plea agreement in which he agreed to plead guilty to one count of mail fraud and one count of aggravated identity theft and “to make full restitution” to the victims of his offense pursuant to  18 U.S.C. §§ 3663 and  3663A, and the government agreed to move to dismiss the other charges. Reyes acknowledged that the amount of restitution would be determined by the court and would be at least \$265,627. The plea agreement also provided that Reyes waived his right to appeal his sentence on any ground, unless the district court imposed a sentence above the statutory maximum or the applicable Sentencing Guidelines range, the sentence violated the Eighth Amendment, or the government appealed his sentence.

After a change-of-plea hearing in which the magistrate judge discussed all the relevant provisions of the plea agreement with Reyes, the district court accepted the plea agreement and Reyes's guilty plea. The court sentenced Reyes to 249 months in prison followed by three years of supervised release. It later amended the judgment to add an order of restitution in the amount of \$442,368.

Reyes appealed both the initial judgment and the amended judgment, and we granted his motion to consolidate these appeals. His sole argument on appeal is that the government failed to present sufficient evidence of loss to support the full amount of restitution calculated by the district court. Reyes does not challenge the validity of the appeal waiver in his plea agreement; he contends that his argument is not barred by his appeal waiver because the restitution order (1) exceeded the statutory maximum, and (2) violated the Eighth Amendment's prohibition on excessive fines. We reject the arguments that fall within the exceptions to Reyes's appeal waiver, and we decline to consider his remaining argument.¹

II.

A.

To avoid his appeal waiver, Reyes attempts to recast his argument that the court relied on insufficient evidence in calculating restitution as an argument that the amount of restitution exceeded the statutory maximum. We can make short work of that argument because the restitution statute does not have a maximum. *See*  18 U.S.C. §§ 3663,  3663A;  *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006). To the extent that Reyes challenges the district court's findings regarding the number of victims or the amount of loss per victim, those arguments are barred by his appeal waiver. *See*  *United States v. Grinard-Henry*, 399 F.3d 1294, 1295–96 (11th Cir. 2005) (appeal waiver barred challenge to sentence based on court's drug-quantity findings); *see also* *United States v. Johnson*, 541 F.3d 1064, 1067–68 (11th Cir. 2008) (sentence appeal waiver barred challenge to untimely restitution order).

B.

*2 Reyes also asserts, without elaboration, that the district court's restitution order violated the Excessive Fines Clause of the Eighth Amendment. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality”; a fine is excessive “if it is grossly disproportional to the gravity of a defendant's offense.”

 *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The restitution imposed here was directly proportional to Reyes's offense because he was ordered to pay only the amount of actual loss to the victims. Assuming for argument's sake that restitution could be considered a “fine”—that is, “a payment to a sovereign as punishment for some offense”—Reyes's restitution was not “excessive” and did not violate the Eighth Amendment.  *Id.* at 327.

* * *

The district court's order of restitution did not exceed the statutory maximum penalty and did not violate the Eighth Amendment. Reyes's challenge to the district court's calculation of actual loss to the victims is barred by the appeal waiver in his plea agreement, and we decline to consider it. *See* *United States v. Boyd*, 975 F.3d 1185, 1191 (11th Cir. 2020) (reaching the merits of a defendant's challenge to his sentence despite his appeal waiver would deprive the government of the benefit of its bargain). We therefore affirm Reyes's convictions and sentence.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 4476660

Footnotes

¹ “[W]e review the legality of a sentence *de novo *United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005). We also review the scope of an appeal waiver *de novo*. *King v. United States*, 41 F.4th 1363, 1366 (11th Cir. 2022).*