APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. VAHE DADYAN, *Defendant-Appellant*.	No. 21-50237 D.C. No. 2:20-cr-00579-SVW-8 OPINION

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ARTUR AYVAZYAN, AKA Arthur Ayvazyan, *Defendant-Appellant*.	No. 21-50302 D.C. Nos. 2:20-cr-00579-SVW-3 2:20-cr-00579-SVW

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 8, 2023
Pasadena, California

Filed August 7, 2023

Before: MILAN D. SMITH, JR. and ROOPALI H. DESAI, Circuit Judges, and CAROL BAGLEY AMON,[*] District Judge.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY[**]

Criminal Law

The panel affirmed in part and vacated in part the district court's imposition of restitution obligations on Vahe Dadyan and Artur Ayvazyan following their convictions of various offenses stemming from an eight-person conspiracy to fraudulently obtain and launder millions of dollars in federal Covid-relief funds that were intended to assist businesses impacted by the pandemic.

The panel held that, under the Mandatory Victims Restitution Act (MVRA), the district court properly imposed

[*] The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

restitution in the full amount of the loss caused by the conspiracy instead of just the loss caused by the fraudulent loan applications Vahe and Artur personally played a role in submitting.

As to Artur, the panel held that the district court properly ordered a restitution amount under the MVRA based on the "value" of fraudulently obtained property, which exceeded the amount of "actual loss" the district court found when sentencing him under U.S.S.G. § 2B1.1(b)(1). Artur's proposed rule to make a Guidelines-loss finding a hard cap on a restitution calculation could not be squared with Ninth Circuit precedent, or with the text and purpose of the MVRA.

The panel held that Artur failed to establish that the district court clearly erred in calculating the amount of restitution.

The panel held that precedent foreclosed Artur's argument that his Fifth and Sixth Amendment rights to due process and a jury trial required that a jury, not a district judge, find all facts underpinning restitution beyond a reasonable doubt.

As to Vahe, the panel vacated and remanded for the district court to amend his judgment and commitment order to specify, as the government conceded, that his restitution obligation runs jointly and severally with those of his four trial co-defendants.

In separately filed memorandum dispositions, the panel affirmed Vahe and Artur's jury convictions, affirmed the district court's application of the Sentencing Guidelines to Artur, and vacated and remanded for Artur's resentencing

because the district court plainly erred by failing to invite his allocution.

COUNSEL

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David M. Lieberman (argued) and Christopher Fenton, Attorneys, Appellate and Fraud Sections; Lisa H. Miller, Deputy Assistant Attorney General; Kenneth A. Polite, Jr., Assistant Attorney General; E. Martin Estrada, United States Attorney; Criminal Division, United States Department of Justice, United States Attorney's Office; Washington, D.C.; Daniel G. Boyle and Scott Paetty, Assistant United States Attorneys; Bram M. Alden, Criminal Appeals Section Chief; United States Department of Justice, United States Attorney's Office; Los Angeles, California; Jeremy R. Sanders, Trial Attorney; United States Department of Justice; New York, New York; for Plaintiff-Appellee.

OPINION

M. SMITH, Circuit Judge:

Vahe Dadyan and Artur Ayvazyan were convicted of various offenses stemming from an eight-person conspiracy to fraudulently obtain and launder millions of dollars in federal Covid-relief funds that were intended to assist businesses impacted by the pandemic. On appeal, Vahe and Artur challenge their restitution obligations on both legal and factual grounds. We affirm their restitution obligations, except that we vacate and remand for Vahe's judgment and commitment order to be amended to specify that, as all parties agree, his restitution obligation runs jointly and severally with those of his trial co-codefendants.[1]

FACTUAL BACKGROUND

In March 2020, the federal government provided two lifelines to businesses impacted by the Covid-19 pandemic. The Coronavirus Aid, Relief, and Economic Security (CARES) Act established the Paycheck Protection Program (PPP), which made billions of dollars in government-guaranteed loans available to qualifying businesses for payroll retention and other authorized expenses. Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286–94 (2020). The CARES Act also authorized the Small Business Administration, through the Economic Injury Disaster Loans (EIDL) program, to make low-interest loans to qualifying

[1] In separately filed memorandum dispositions, we affirm Vahe and Artur's jury convictions, affirm the district court's application of the Sentencing Guidelines to Artur, and vacate and remand for Artur's resentencing because the district court plainly erred by failing to invite his allocution.

businesses for certain authorized expenses, including providing sick leave to employees who contracted Covid and maintaining payroll during Covid-related business disruptions. *Id.* § 1110, 306–08.

Vahe, Artur, and six other individuals conspired to submit fraudulent PPP and EIDL loan applications and, once those loan applications were approved, to launder the fraudulently obtained funds.[2] Vahe, for example, signed a $157,500 PPP loan application stating that his business had eleven employees and average monthly payroll expenses of $63,000—but, in reality, his business had no employees and no payroll expenses. Similarly, Artur (among other things) submitted a $124,000 PPP loan application containing false payroll information. Nor did Vahe and Artur use the PPP funds for authorized business expenses. Instead, after taking a circuitous route, the bulk of Vahe's and Artur's PPP funds ended up facilitating co-conspirators' multi-million-dollar real estate transactions.

A jury convicted Vahe of conspiracy to commit bank and wire fraud (18 U.S.C. §§ 1343–1344, 1349); conspiracy to commit money laundering (*id.* § 1956(h)); and substantive counts of wire fraud, bank fraud, and concealment money laundering (*id.* §§ 1343–1344, 1956(a)(1)(B)(i)). The district court sentenced Vahe to one year and one day in prison and held him jointly and severally liable along with his trial co-defendants for $10,706,188.13 in restitution—with that figure representing the district court's calculation

[2] Because Vahe and Artur are related to and share the same last names as some of their co-conspirators, we refer to them by their first names.

of all losses the conspiracy directly and proximately caused to victims after Vahe joined it.[3]

A jury convicted Artur of conspiracy to commit bank and wire fraud (18 U.S.C. §§ 1343–1344, 1349); conspiracy to commit concealment money laundering (*id.* § 1956(h)); substantive counts of wire and bank fraud (*id.* §§ 1343–1344); and aggravated identity theft (*id.* § 1028A(a)(1)). The district court sentenced Artur to five years in prison and held him jointly and severally liable along with his trial co-defendants for $17,723,141.26 in restitution—with that figure representing the district court's calculation of all losses the conspiracy directly and proximately caused to victims. Vahe and Artur timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. "The legality of a restitution order is reviewed *de novo*, as is the district court's valuation methodology. If the order is within statutory bounds, then the restitution calculation is reviewed for abuse of discretion, with any underlying factual findings reviewed for clear error." *United States v. Gagarin*, 950 F.3d 596, 607 (9th Cir. 2020) (cleaned up).

ANALYSIS

I. Co-Conspirator Liability

Vahe and Artur argue that the district court erred as a matter of law by imposing restitution in the full amount of loss caused by the conspiracy instead of just the loss caused by the fraudulent loan applications they personally played a

[3] As explained below, the parties agree that Vahe's restitution obligation runs jointly and severally with his trial co-defendants, but his current judgment and commitment order does not reflect that. *Infra* section V.

role in submitting.[4] We reject this argument as foreclosed by precedent: Where a defendant is convicted of conspiracy, the Mandatory Victims Restitution Act (MVRA) authorizes a district court to hold the defendant jointly and severally liable, *see* 18 U.S.C. § 3664(h), "for *all* [victims] harmed by the *entire* scheme," *United States v. Riley*, 335 F.3d 919, 931 (9th Cir. 2003) (emphasis added).

In *Riley*, the defendant pled guilty to, among other offenses, conspiracy to produce fictitious financial instruments (there, checks and money orders). *Id.* at 923–25. Challenging his restitution obligation, the defendant argued that "he should not be held accountable for the losses caused by his coconspirators' check cashing"—that is, his co-conspirators' conduct within the scope of and in furtherance of the conspiracy he joined. *Id.* at 931. We rejected this argument and held: "[I]n a case involving a conspiracy or scheme, restitution may be ordered for all persons harmed by the entire scheme. . . . A conspirator is vicariously liable for reasonably foreseeable substantive crimes committed by a coconspirator in furtherance of the conspiracy." *Id.* at 931–32. So too here: The district court did not err by holding Vahe and Artur jointly and severally liable for restitution in the full amount of loss that the entire conspiracy caused.[5]

[4] Vahe's restitution obligation (about $10.7 million) is less than Artur's (about $17.7 million) because the district court excluded from Vahe's obligation all losses caused before Vahe joined the conspiracy.

[5] This is not to suggest that a district court *must* follow the approach taken here. Instead, a district court has a choice where it "finds that more than 1 defendant has contributed to the loss of a victim." 18 U.S.C. § 3664(h). A court may, as the district court did here, hold each

II. Different Restitution and Guidelines-Loss Calculations

Artur argues that the district court erred as a matter of law by ordering a restitution amount (about $17.7 million) that exceeded the amount of loss the district court found when sentencing him (more than $1.5 million but less $3.5 million). As above, our precedent forecloses this argument: There is no categorical rule that restitution must be equal to or less than the amount of loss found when applying Sentencing Guidelines § 2B1.1(b)(1) or similar loss-based Guidelines sections.

As Artur's argument suggests, MVRA restitution calculations in property-deprivation cases and Guidelines section 2B1.1(b)(1) loss calculations do share common ground. When calculating MVRA restitution for a property-based offense and the "return of the [fraudulently obtained] property . . . is impossible, impracticable, or inadequate," the district court "shall require" the defendant to pay "the *value* of the property." 18 U.S.C. § 3663A(b)(1)(B) (emphasis added). When calculating the Guidelines range for a defendant convicted of a standard property-deprivation crime, a district court increases the defendant's Guidelines range to account for the amount of "loss" caused, with loss defined as the greater of the "actual" or "intended" amount of "pecuniary harm." U.S.S.G. § 2B1.1(b)(1) & Application Note 3(A). Given the high-level similarity of these terms ("value" of fraudulently obtained property and "pecuniary harm"), restitution and Guidelines-loss figures often mirror one another when the Guidelines calculation is based on actual (rather than intended) loss. *See United States v.*

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defendant jointly and severally "liable for payment of the full amount of restitution," or it "may apportion liability among the defendants." *Id.*

Lawrence, 189 F.3d 838, 842 (9th Cir. 1999) ($574,700 for both); *cf. United States v. Anderson*, 741 F.3d 938, 951 (9th Cir. 2013) (Guidelines § 2B5.3(b)(1) loss of at least $200,000; restitution of $247,144).

Moreover, some of our decisions include statements equating restitution and actual loss. *See, e.g.*, *United States v. Begay*, 33 F.4th 1081, 1096 (9th Cir. 2022) ("any award is limited to the victim's actual losses" (citation omitted)); *United States v. Rizk*, 660 F.3d 1125, 1137 (9th Cir. 2011) ("[a] district court may not order restitution such that victims will receive an amount greater than their actual losses"); *United States v. Stoddard*, 150 F.3d 1140, 1147 (9th Cir. 1998) ("[r]estitution can only be based on actual loss"). As we have done before, "[w]e acknowledge that [these decisions] use of the phrase 'actual loss' in discussion of restitution generates some confusion." *United States v. Nosal*, 844 F.3d 1024, 1046–47 (9th Cir. 2016) (citation omitted). That is because those decisions used "actual loss" in the colloquial sense, not necessarily tethered to a Guidelines calculation. The point being emphasized in those statements is that victims may not receive restitution that exceeds the losses they actually suffered.

But those statements and the noted similarities between restitution and Guidelines loss do not add up to the categorical rule, advanced by Artur, that once a court determines "actual loss" for Sentencing Guidelines purposes, its restitution determination cannot exceed that amount. Instead, when our court has actually been presented with Artur's categorical argument, we have rejected it. In *Nosal*, we explained: "We must initially decide whether, as [the defendant] urges, the restitution award is invalid because it exceeds the actual loss that the district court determined for the purposes of the Sentencing Guidelines

U.S.S.G. § 2B1.1(b) . . . . The answer to that question is found in our observation that 'calculating loss under the guidelines is not necessarily identical to loss calculation for purposes of restitution.'" *Id.* at 1046 (citation omitted). Indeed, we have cautioned district courts to not reflexively "rely on [their] calculation of the loss under the Sentencing Guidelines to determine the amount of restitution as the two measures serve different purposes and utilize different calculation methods." *Anderson*, 741 F.3d at 952; *see also United States v. Gossi*, 608 F.3d 574, 582 (9th Cir. 2010) ("we reject [the defendant's] argument that we should look to the advisory Sentencing Guidelines for calculating the victim's losses"). Artur's proposed categorial rule, which would make a Guidelines-loss finding a hard cap on a restitution calculation, cannot be squared with our court's precedent.

Nor can Artur's proposed categorical rule be squared with the text and purpose of the MVRA. The MVRA does not just set forth the high-level guidance that restitution should equal the "value" of fraudulently obtained property; it provides specific instructions on how to calculate "value" in specific situations—sometimes doing so in ways that expressly contradict the Guidelines' approach to calculating loss. Consider the following two examples: The MVRA requires compensation for "expenses incurred during participation in the investigation," while Guidelines commentary provides that "[l]oss shall not include . . . costs incurred by victims primarily to aid the government in[] the prosecution and criminal investigation of an offense." *Nosal*, 844 F.3d at 1046–47 (quoting 18 U.S.C. § 3663A(b)(4); U.S.S.G. § 2B1.1 Application Note 3(D)(ii)). Similarly, the MVRA "can include prejudgment interest," *United States v. Catherine*, 55 F.3d 1462, 1465

(9th Cir. 1995), while Guidelines commentary provides that "[l]oss shall not include . . . interest of any kind," U.S.S.G. § 2B1.1 Application Note 3(D)(i). In each example, the MVRA not only tolerates but requires a restitution calculation that exceeds Guidelines loss.

That is not to suggest that a large discrepancy will always be without significance. An unexplained discrepancy may, in certain cases, facilitate a defendant's clear-error challenge to his or her restitution obligation—though we caution against overreliance on a discrepancy, as it does not indicate *which* figure, restitution or Guidelines loss, might be erroneous.[6] Or, an unexplained discrepancy not rooted in statutory differences might provide a hint that the district court included a non-cognizable form of loss in its restitution calculation. But to reiterate our holding: A discrepancy, standing alone, does not establish legal error.

III. Clear-Error Challenge

We now turn to and reject Artur's clear-error challenge. In the district court, "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence," with the government bearing "[t]he burden of demonstrating the amount of loss sustained by a victim as a result of the offense." 18 U.S.C. § 3664(e). In resolving such a dispute, the district court must rely on "evidence that possesses sufficient indicia of

[6] Here, for instance, the government suggested at oral argument that the district court's Guidelines loss calculation constituted procedural error, before clarifying that it was not raising that argument on appeal. "Because the government did not take an appeal" on this issue and Artur "has nothing to gain from a higher advisory guidelines range," we express no view on whether the district court committed procedural error. *United States v. Dokich*, 614 F.3d 314, 320 (7th Cir. 2010).

reliability to support its probable accuracy." *Anderson*, 741 F.3d at 951–52 (citation omitted); *see also United States v. Waknine*, 543 F.3d 546, 557–58 (9th Cir. 2008) (victim affidavits in question "were too summary and too conclusory to be sufficiently reliable in the face of [the defendant's] objections"). "[E]xact precision is not required and district courts do have a degree of flexibility in accounting for a victim's complete losses." *Anderson*, 741 F.3d at 954. Accordingly, the district court is entitled to draw reasonable inferences when coming to its restitution calculation. *See United States v. Walter-Eze*, 869 F.3d 891, 914–15 (9th Cir. 2017).

On appeal, a factual challenge to a restitution calculation is subject to clear-error review. *Gagarin*, 950 F.3d at 607. Broad, unsupported contentions of inaccuracy will generally not overcome that deferential standard of review. A defendant-appellant must undermine the reliability of specific evidence on which the district court relied or undermine specific factual underpinnings of the calculation. *See Waknine*, 543 F.3d at 557–58 (clear error to rely on "summary and . . . conclusory" victim affidavits when defendant challenged affidavits' assertions); *United States v. Matsumaru*, 244 F.3d 1092, 1108–09 (9th Cir. 2001) (clear error to not discount from calculation the value that the victim *did* receive in the fraudulent transaction).

Here, the district court elected not to calculate restitution at the time of sentencing and instead ordered supplemental briefing. The government largely rested on its prior papers and a declaration that attached as an exhibit a table of over one hundred fraudulently obtained loans the government contended were connected to the conspiracy. Artur argued in his supplemental brief that "many of th[e] loans" in the government's table "involv[ed] real companies" and that it

is "unclear whether the loans were fraudulent at all or whether the third party simply had a [legitimate] connection" to one of the co-conspirators. In a written order, the district court accepted the $17.7 million sum supported by the government's table. Addressing Artur's argument, the court explained that all the loans in the table "are connected to the conspiracy" in "a variety of ways." The table includes loans that were obtained via applications submitted in co-conspirators' own names, using co-conspirators' known aliases, and from IP addresses traced to co-conspirators' homes. Proceeds from included loans were traced to bank accounts and entities controlled by co-conspirators. And the loans included in the table supported the bank and wire fraud counts on which the jury convicted.

On appeal, Artur again suggests in passing that it is "unclear" whether some loans included in the restitution amount were "fraudulent at all" and described the government's table as resting on "cryptic summaries that did not explain [the loans'] illegality." Artur does not identify any particular loans that he thinks were legitimate; nor does he identify which particular "summaries" are so "cryptic" that the loans they describe cannot be connected to the conspiracy. Moreover, Artur does not challenge any of the district court's detailed factual findings that connected the loans in the table to the conspiracy. Accordingly, Artur fell far short of establishing that the district court clearly erred in calculating restitution.

IV. Due Process and Jury-Trial Right

Artur argues that his Fifth and Sixth Amendment rights to due process and a jury trial require that a jury (not a district judge) find all facts underpinning restitution beyond a reasonable doubt (not by a preponderance of the evidence).

Artur concedes that our precedent forecloses this argument, and he raises it before this panel only to preserve it. *See United States v. George*, 949 F.3d 1181, 1188 (9th Cir. 2020); *United States v. Green*, 722 F.3d 1146, 1148–51 (9th Cir. 2013).

V. Joint and Several Liability

Vahe requests a limited remand instructing the district court to amend his judgment and commitment order to reflect that his restitution obligation runs jointly and severally with that of his trial co-defendants. The MVRA provides the district court with two options where it "finds that more than 1 defendant has contributed to the loss of a victim": The "court may make each defendant liable for payment of the full amount of restitution *or* may apportion liability among the defendants." 18 U.S.C. § 3664(h) (emphasis added). Here, the district court determined in an order addressing the restitution obligations of four of Vahe's co-defendants that joint and several liability is appropriate. The judgment and commitment order for each of those four defendants further specifies that their restitution obligations run jointly and severally. Yet Vahe's judgment and commitment order does not so specify. The government concedes on appeal that Vahe's restitution obligation runs jointly and severally and that a limited remand would be appropriate. Accordingly, we remand Vahe's case on this narrow ground and instruct the district court to amend Vahe's judgment and commitment order to specify, as everyone agrees, that his restitution obligation runs jointly and severally with those of his four trial co-defendants.

CONCLUSION

For the above reasons, we **AFFIRM** Vahe's and Artur's restitution obligations, except that we **VACATE AND**

REMAND for the district court to amend Vahe's judgment and commitment order to specify that his obligation runs jointly and severally. We address in separately filed memorandum dispositions Vahe and Artur's arguments regarding their jury convictions and Artur's arguments regarding his sentencing.

APPENDIX B

NOT FOR PUBLICATION

FILED

AUG 7 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 8, 2023
Pasadena, California

Before: M. SMITH and DESAI, Circuit Judges, and AMON,** District Judge.

A jury convicted Vahe Dadyan of various offenses stemming from an eight-person conspiracy to fraudulently obtain and launder millions of dollars in federal Covid-relief funds that were intended to assist businesses impacted by the pandemic.

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

** The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

Vahe argues that his convictions are not supported by sufficient evidence.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review "de novo the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution and asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 980–81 (9th Cir. 2020) (cleaned up). We affirm Vahe's jury convictions.[2]

1. A rational jury could have convicted Vahe for conspiracy to commit wire and bank fraud (Count 1). *See* 18 U.S.C. §§ 1343–1344, 1349. "[P]roof of the defendant's connection to the conspiracy must be shown beyond a reasonable doubt, but the connection can be slight." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004). "[T]he government need not prove the defendant knew all the conspirators and details or participated in all the conspiracy's dealings." *United States v. Jaimez*, 45 F.4th 1118, 1123 (9th Cir. 2022). Here, evidence shows that Vahe worked in tandem with co-conspirator Tamara Dadyan to submit a $157,500 loan application with false payroll information for his business, Voyage Limo. Voyage Limo had, in fact, no payroll activity, and the false information reported on

[1] Because Vahe shares the same last name as one of his co-conspirators, we refer to all defendants by their first names.

[2] In a separately filed opinion, we affirm Vahe's restitution obligation, except that we remand for Vahe's judgment and commitment order to be amended to reflect that his restitution obligation runs jointly and severally with those of his trial co-defendants.

Vahe's application exactly matched that on other applications submitted by co-conspirators.

2. A rational jury could have convicted Vahe for conspiracy to commit money laundering (Count 26). *See* 18 U.S.C. § 1956(h). Evidence shows that the $157,500 from the Voyage Limo loan was deposited in a bank account that Vahe controlled. Tamara texted Richard Ayvazyan, another co-conspirator, to "send the account number again so I have [Artur Ayvazyan, another co-conspirator] go deposit the 157k Vahe." All but $2,500 of that sum was then transferred with the false description, "payroll," to a Runyan Tax Service account controlled by Richard. That money was then transferred to an escrow company for the purchase of a house. Text messages between Richard and Tamara then contemplate paying at least $50,000 to Vahe. And bank records show two $25,000 payments to one of Vahe's business accounts.

3. A rational jury could have convicted Vahe, pursuant to *Pinkerton*, for bank and wire fraud based on acts taken by his co-conspirators (Counts 8–12, 19–20). *See* 18 U.S.C. §§ 1343–1344; *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946) (a defendant is liable for offenses committed by co-conspirators that are "in furtherance of the conspiracy," "within the scope" of the conspiracy, and "reasonably forsee[able]"). On appeal, Vahe does not contend that *Pinkerton*'s requirements are not met—he makes only the threshold argument that because "he

is not guilty of conspiracy, then he cannot be guilty of any of these [*Pinkerton*-based] counts." Because we affirm his conspiracy convictions (*supra* sections 1 and 2), we also affirm his *Pinkerton*-based convictions.

AFFIRMED in part; VACATED AND REMANDED in part (as explained in the separately filed opinion).

APPENDIX C

NOT FOR PUBLICATION

FILED

AUG 7 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTUR AYVAZYAN, AKA Arthur Ayvazyan, Defendant-Appellant.	No. 21-50302 D.C. Nos. 2:20-cr-00579-SVW-3 2:20-cr-00579-SVW MEMORANDUM*

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A jury convicted Artur Ayvazyan of various offenses stemming from an eight-person conspiracy to fraudulently obtain and launder millions of dollars in federal Covid-relief funds that were intended to assist businesses impacted by the pandemic.

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** The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

Artur argues that his convictions are not supported by sufficient evidence and that the district court erred in its application of the Sentencing Guidelines and by failing to invite his allocution.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part as to his jury convictions and the district court's application of the Sentencing Guidelines; we vacate in part as to the district court's failure to invite allocution and remand for his de novo resentencing.[2]

SUFFICENCY OF THE EVIDENCE

"The court reviews de novo the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution and asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 980–81 (9th Cir. 2020) (cleaned up).

1. A rational jury could have convicted Artur for conspiracy to commit wire and bank fraud (Count 1). *See* 18 U.S.C. §§ 1343–1344, 1349. "[P]roof of the defendant's connection to the conspiracy must be shown beyond a reasonable doubt, but the connection can be slight." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004). "[T]he government need not prove the defendant knew all the

[1] Because Artur shares the same last name as one of his co-conspirators, we refer to all defendants by their first names.

[2] In a separately filed opinion, we affirm Artur's restitution obligation.

conspirators and details or participated in all the conspiracy's dealings." *United States v. Jaimez*, 45 F.4th 1118, 1123 (9th Cir. 2022). Artur submitted a loan with false payroll information exactly matching the payroll information on other loan applications connected to the conspiracy; texts between the conspiracy's two principal organizers contemplated Artur's involvement in the conspiracy, including that Artur "want[ed] to do another [fraudulent loan application] with [U.S.] bank"; and Artur's home and cellphone were filled with materials (including stolen identification documents) connected to fraudulent loan applications.

2. A rational jury could have convicted Artur of substantive counts of wire fraud and bank fraud (Counts 2, 4–14, 16–20). *See* 18 U.S.C. §§ 1343–1344. The fraudulent loan applications and wire transfers underpinning these counts were "in furtherance of the conspiracy," "within the scope" of the conspiracy, and "reasonably forsee[able]." *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

3. A rational jury could have convicted Artur of aggravated identity theft (Count 24). *See* 18 U.S.C. § 1028A(a)(1). A fraudulent loan application in the name of an individual (A.D.) was submitted from an IP address registered to Artur. A.D. had previously traveled to the United States on a student visa, and Artur's cellphone contained pictures of A.D.'s driver's licenses and social security card. Artur contends that the materials on his cellphone and in his home belonged solely to his wife, but a jury is not obligated to credit that explanation. *See Tuan Ngoc Luong*,

965 F.3d at 980–81 ("viewing the evidence in the light most favorable to the prosecution").

4. A reasonable jury could have convicted Artur of conspiracy to commit money laundering (Count 26). *See* 18 U.S.C. § 1956(h). Artur's wife and one of the principal organizers of the conspiracy (Tamara Dadyan) texted the other principal organizer (Richard Ayvazyan) that she would "have [Artur] go deposit the 157k Vahe [*i.e.*, another co-conspirator]." A few days later, $155,000 of Vahe's $157,500 loan was transferred to a Runyan Tax Service account controlled by Richard for "payroll." Additionally, Tamara texted Richard, "I'm expecting a wire for Art for $73500." A few days later, $73,500 was transferred to Runyan Tax Service for "payroll." And two days later, Runyan Tax Service issued a $73,500 check to Artur's business.

SENTENCING

"In the sentencing context, we review the district court's factual findings for clear error, its construction of the United States Sentencing Guidelines de novo, and its application of the Guidelines to the facts for abuse of discretion. *United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021) (cleaned up). If an issue was not raised below, we review it for plain error. Fed. R. Crim. P. 52(b); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (explaining plain error requirements).

5. The district court did not plainly err by finding the facts underpinning

Artur's loss and sophisticated-means enhancements by a preponderance of the evidence instead of by clear-and-convincing evidence.[3] While these enhancements increased Artur's Sentencing Guidelines offense level by more than four levels, they did not more than double his recommended Guidelines range—instead, they increased it from 37-46 months to 70-87 months. *See United States v. Parlor*, 2 F.4th 807, 817 (9th Cir. 2021) (not plain error to apply the preponderance standard where the four-level-enhancement but not the more-than-double factor is met). Additionally, the loss enhancement was based on "the extent of a conspiracy" for which Artur was convicted—a factor that "weighs heavily against" requiring the heightened clear-and-convincing standard. *United States v. Riley*, 335 F.3d 919, 926 (9th Cir. 2003).

6. Even assuming *arguendo* that the district court erred by failing to make Sentencing Guidelines § 1B1.3(a)(1)(B) "particularized findings" regarding the scope of the conspiracy Artur joined, *United States v. Lloyd*, 807 F.3d 1128, 1142 (9th Cir. 2015), any error would not affect Artur's substantial rights. While the district court did not expressly make "particularized findings" when applying the relevant-conduct Guidelines section, it made the required findings when conducting

[3] One of Artur's co-defendants requested application of the clear-and-convincing standard at his own sentencing hearing. This, however, did not preserve the issue for Artur, as the defendant- and fact-specific nature of the inquiry "logically required a separate objection" by Artur at his own sentencing hearing. *United States v. Scrivener*, 189 F.3d 944, 953–54 (9th Cir. 1999).

its section 3553(a) analysis. The district court found that Artur "knew the scope of the conspiracy" and that his claim of limited knowledge was "patently incredible." *Cf. Riley*, 335 F.3d at 928 (deeming failure to expressly determine "the scope of [the defendant's] participation" harmless because the court "adopt[ed] the factual findings of the PSR," which went to that consideration).

7. The district court did not commit legal error by imposing an identical loss amount on four co-coconspirators with differing roles in the conspiracy. A Guidelines Application Note expressly contemplates that co-conspirators with differing roles in a conspiracy may receive the same loss adjustment at sentencing. *See* U.S.S.G. § 1B1.3 Application Note 4(C)(ii) (two defendants jointly conspire to sell fraudulent stocks; one fraudulently obtains $20,000; the other obtains $35,000; each is "held accountable" for $55,000 "because the conduct of each was within the scope of the jointly undertaken criminal activity . . . , was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity").

8. The district court did not abuse its discretion when determining that Artur qualified for a sophisticated-means enhancement. *See* U.S.S.G. § 2B1.1(b)(10). As mentioned, Artur's cellphone and home contained materials implicating him in the use of fraudulent IDs (s*upra* sections 1, 3), and the district court found Artur's contention that those materials belonged solely to his wife to be

"patently incredible" and that Artur "perjured himself" by so testifying. Moreover, evidence implicated Artur in two transfers of funds between co-conspirators with the false memo lines of "payroll." *See supra* section 4; *United States v. Horob*, 735 F.3d 866, 872 (9th Cir. 2013) (per curiam) (affirming the application of the sophisticated-means-enhancement because, among other things, the defendant "fabricated numerous documents" and "the complicated and fabricated paper trail made discovery of his fraud difficult").

9. The district court did not abuse its discretion by declining to apply a Sentencing Guidelines § 3B1.2 mitigating-role downward adjustment. Artur's argument that he is "substantially less culpable than the average participant," U.S.S.G. § 3B1.2 Application Note 3(A), requires one to credit his contention that his involvement in the conspiracy was limited to submitting two fraudulent loans. But given the breadth of evidence implicating him in the conspiracy (*supra* sections 1, 3–4), the district court did not clearly err in rejecting that contention.

10. The district court did not plainly err by not expressly addressing the non-exhaustive mitigating-role factors set forth in Application Note 3(C) to Sentencing Guidelines § 3B1.2. "[W]e assume the district judge knew the law and understood his or her obligation to consider all of the sentencing factors," and "the district court need not recite each sentencing factor to show it has considered them." *United States v. Diaz*, 884 F.3d 911, 916 (9th Cir. 2018). In any event, the district

court made findings on every factor as part of its section 3553(a) analysis—finding that Artur "knew the scope of the conspiracy," "mainly assist[ed]" Tamara, and received a sum approximating the Allstate loans that he submitted.

11. The district court did not plainly err by not determining the application of the mitigating-role adjustment with regard only to Artur's role in the money-laundering conspiracy. *See* U.S.S.G. § 2S1.1 Application Note 2(C). Artur contends that he "had no involvement with money laundering," but evidence implicates Artur in transactions intended to conceal the source of fraudulently obtained funds. *Supra* section 4. Moreover, given the closely related factual nature of the substantive offenses (fraudulently obtaining loans) and the laundering (transferring the fraudulently obtained loan funds through fictitious entities with fraudulent memo lines), Artur's relative role in the two conspiracies does not materially differ.

12. The district court plainly erred by failing to invite Artur's allocution at sentencing. Fed. R. Crim. P. 32(i)(4)(A)(ii); *United States v. Gunning*, 401 F.3d 1145, 1147–49 (9th Cir. 2005). We remand for Artur's allocution and resentencing, consistent with "our general rule" pursuant to which we "remand for resentencing without limitation on the district court." *Gunning*, 401 F.3d at 1148 (citation omitted); *see also United States v. Matthews*, 278 F.3d 880, 885 (9th Cir. 2002) (en banc) ("[A]s a general matter, if a district court errs in sentencing, we will remand for resentencing on an open record—that is, without limitation on the evidence that

the district court may consider.").

AFFIRMED in part; VACATED AND REMANDED in part.

APPENDIX D

FILED

OCT 25 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VAHE DADYAN, Defendant-Appellant.	No. 21-50237 D.C. No. 2:20-cr-00579-SVW-8 Central District of California, Los Angeles ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTUR AYVAZYAN, AKA Arthur Ayvazyan, Defendant-Appellant.	No. 21-50302 D.C. Nos. 2:20-cr-00579-SVW-3 2:20-cr-00579-SVW

Before: M. SMITH and DESAI, Circuit Judges, and AMON,* District Judge.

Appellants' petition for panel rehearing (No. 21-50237, Dkt. No. 103; No. 21-50302, Dkt. No. 107) is **DENIED**.

IT IS SO ORDERED.

* The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX E

Current through Public Law 117-130, approved June 6, 2022.

§ 3663A. Mandatory restitution to victims of certain crimes

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16 [*18 USCS § 16*];

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (*21 U.S.C. 856(a)*), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019 [*21 USCS § 2402*];

(iv) an offense described in section 1365 [*18 USCS § 1365*] (relating to tampering with consumer products); or

(v) an offense under section 670 [*18 USCS § 670*] (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) or (iii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664 [*18 USCS § 3664*].

History

HISTORY:

Added April 24, 1996, *P. L. 104-132*, Title II, Subtitle A, § 204(a), *110 Stat. 1227*; Oct. 17, 2000, *P. L. 106-310*, Div B, Title XXXVI, Subtitle A, Part I, § 3613(d), *114 Stat. 1230*; Oct. 5, 2012, *P. L. 112-186*, § 6, *126 Stat. 1430*; Dec. 4, 2020, *P.L. 116-206*, § 5, *134 Stat. 1000*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendment Notes

2000.

2012.

Current through Public Law 117-130, approved June 6, 2022.

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter [*18 USCS §§ 3661* et seq.], chapter 227 [*18 USCS §§ 3551* et seq.], and *Rule 32(c) of the Federal Rules of Criminal Procedure* shall be the only rules applicable to proceedings under this section.

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer 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.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the

defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572 [*18 USCS § 3572*], specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)

(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)

(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) 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.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations

of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)

(1)

(A)

(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title [*18 USCS §§ 3571* et seq. and *3611* et seq.]; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under *Rule 35 of the Federal Rules of Criminal Procedure* and section 3742 [*18 USCS § 3742*] of chapter 235 of this title;

(B) appealed and modified under section 3742 [*18 USCS § 3742*];

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A [*18 USCS § 3664(k)*, *3572*, or *3613A*]; or

(2) the defendant may be resentenced under section 3565 or 3614 [*18 USCS § 3565* or *3614*].

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A [*18 USCS §§ 2248*, *2259*, *2264*, *2327*, *3663*, and *3663A*] and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

History

HISTORY:

Added Oct. 12, 1982, *P. L. 97-291*, § 5(a), *96 Stat. 1255*; Oct. 12, 1984, *P. L. 98-473*, Title II, Ch II, § 212(a)(1), 98 Stat. 1987; Nov. 29, 1990, *P. L. 101-647*, Title XXXV, § 3596, *104 Stat. 4931*; April 24, 1996, *P. L. 104-132*, Title II, Subtitle A, § 206(a), *110 Stat. 1232*; Nov. 2, 2002, *P. L. 107-273*, Div B, Title IV, § 4002(e)(1), *116 Stat. 1810*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Amendment Notes

1984.

1990.

1996.

2002.

Other provisions:

Effective date of section:

This section became effective upon enactment, as provided by § 9(a) of Act Oct. 12, 1982, *P. L. 97-291*, which appears as *18 USCS § 1512* note.

Amendment Notes

Current through Public Law 117-130, approved June 6, 2022.

§ 5E1.1. Restitution

(a) In the case of an identifiable victim, the court shall—

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under *18 U.S.C. § 1593*, *§ 2248*, *§ 2259*, *§ 2264*, *§ 2327*, *§ 3663*, or *§ 3663A*, or *21 U.S.C. § 853(q)*; or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under *18 U.S.C. § 3663(a)(1)* but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply—

(1) when full restitution has been made; or

(2) in the case of a restitution order under *18 U.S.C. § 3663*; a restitution order under *18 U.S.C. § 3663A* that pertains to an offense against property described in *18 U.S.C. § 3663A(c)(1)(A)(ii)*; or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) In a case where there is no identifiable victim and the defendant was convicted under *21 U.S.C. § 841*, *§ 848(a)*, *§ 849*, *§ 856*, *§ 861*, or *§ 863*, the court, taking into consideration the amount of public harm caused by the offense and other relevant factors, shall order an amount of community restitution not to exceed the fine imposed under § 5E1.2.

(e) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See *18 U.S.C. § 3664(f)(3)(A)*. An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See *18 U.S.C. § 3664(f)(4)*.

(f) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(g) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former § 5E1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

Commentary

Application Note:

1. The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under Chapter 46 or 96 of Title 18, United States Code, or under the Controlled Substances Act (*21 U.S.C. § 801* et seq.). See *18 U.S.C. § 3663(c)(4)*.

Furthermore, a penalty assessment under *18 U.S.C. § 3013* or a fine under Subchapter C of Chapter 227 of Title 18, United States Code, shall take precedence over an order of community restitution under subsection (d). See *18 U.S.C. § 3663(c)(5)*.

Background: *Section 3553(a)(7) of Title 18, United States Code*, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under *18 U.S.C. §§ 1593*, *2248*, *2259*, *2264*, *2327*, *3663*, and *3663A*, and *21 U.S.C. § 853(q)*. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

Subsection (d) implements the instruction to the Commission in section 205 of the Antiterrorism and Effective Death Penalty Act of 1996. This provision directs the Commission to develop guidelines for community restitution in connection with

certain drug offenses where there is no identifiable victim but the offense causes "public harm."

To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.

History

HISTORY:

Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 53); November 1, 1989 (see Appendix C, amendments 278, 279, and 302); November 1, 1991 (see Appendix C, amendment 383); November 1, 1993 (see Appendix C, amendment 501); November 1, 1995 (see Appendix C, amendment 530); November 1, 1997 (see Appendix C, amendment 571); May 1, 2001 (see Appendix C, amendment 612); November 1, 2001 (see Appendix C, amendment 627).

Annotations

NOTES TO DECISIONS

1. Propriety of restitution order

Case would be remanded where district court, which found that defendant could not pay fine and imposed restitution, stated in its order that it was "required" to impose restitution, since under *18 USCS § 3663* and § 5E1.1, district court is not required to order restitution, and record did not contain any on-the-record consideration of *18 USCS § 3664* factors, which indicated that court may not have considered factors. *United States v. Sanders, 95 F.3d 449, 1996 FED App. 0299P, 45 Fed. R. Evid. Serv. (CBC) 597 (6th Cir. 1996)*.

Defendant who embezzled money when he was a government employee was properly ordered to pay restitution pursuant to § 5E1.1 and *18 USCS § 3664*, even though government had seized embezzled money in civil in rem proceeding, since full restitution had not been made in civil case because case had not been completed, final judgment had