UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	
HARRY L. THOMAS, JR.,	)	**No. 1:12-cr-00003-001-JDB**
Defendant.	)	

DEFENDANT HARRY L. THOMAS, JR.'S
MEMORANDUM OF LAW REGARDING RESTITUTION

As the Court has requested, Defendant Harry L. Thomas, Jr., through undersigned counsel, respectfully submits this memorandum addressing the proper amount of restitution to be ordered pursuant to 18 U.S.C. § 3663A.

INTRODUCTION

The proper restitution figure in this case is $283,500: $353,500, the amount of District of Columbia funds that Count I of the Information specifically charged Mr. Thomas with misappropriating, less the $70,000 Mr. Thomas already has paid. The case law interpreting both 18 U.S.C. § 3663A (the Mandatory Victims Restitution Act or "MVRA") and identical language from 18 U.S.C. § 3663 provides that restitution is limited to the loss caused by the specific conduct that is the basis of the offense of conviction. The only pertinent exception to this general rule is where the offense of conviction "involves *as an element* a scheme, conspiracy, or pattern of criminal activity." 18 U.S.C. § 3663A(a)(2) (emphasis added). In such cases, restitution may be ordered for losses caused by the defendant's entire course of conduct. The "scheme, conspiracy or pattern or criminal of activity" provision in Section 3663A(a)(2) ("scheme provision") does not come into play here, however, because, unlike the offenses of

conviction in the wire and mail fraud cases the Court cited at Mr. Thomas' sentencing, the offense of conviction in this case, 18 U.S.C. § 666(a)(1)(A), does not involve a scheme, conspiracy or pattern of criminal activity as an *element*. *Compare* 18 U.S.C. § 666(a)(1)(A) (scheme, conspiracy or pattern not an element) *with* 18 U.S.C. § 1341 & 1343 (proscribing "any scheme or artifice to defraud …"). Accordingly, the general rule limiting restitution to the amount of loss caused by the specific conduct that is the basis of the offense of conviction obtains here. That amount – $353,500 in District of Columbia funds – is specified in the charging instrument to which Mr. Thomas pled guilty and is otherwise denominated in the plea agreement as the parties' mutual understanding of the proper restitution figure.

To the extent the Court disagrees with this analysis, Section 3663A must be regarded as ambiguous as applied to circumstances like those presented here. If the provision is ambiguous, the rule of lenity requires the Court to interpret it in Mr. Thomas' favor and limit restitution to $353,500 (less $70,000) – the amount that the Information specifically identifies, that Mr. Thomas specifically pled guilty to misappropriating, and that the plea agreement recognizes as the proper restitution figure.

BACKGROUND

On January 5, 2012, the United States Government filed a two count Information against Mr. Thomas, charging him with Theft Concerning Programs Receiving Federal Funds (18 U.S.C. § 666(a)(1)(A)) in Count 1 and with Filing a False Tax Return (26 U.S.C. § 7206(1)) in Count 2. Count 1 specifically alleged that Mr. Thomas knowingly misappropriated $353,500 in funds belonging to the District of Columbia. On January 6, 2012, Mr. Thomas appeared before this Court and entered a guilty plea to each of the charged offenses pursuant to a plea agreement. Subsequent to the guilty plea, the United States Probation Office issued its Presentence

Investigation Report, which calculated a loss amount of $446,000 for Sentencing Guidelines purposes. PSR ¶158. The Probation Office also fixed the recommended amount of restitution at $446,000, less the $70,000 in payments the District of Columbia already has received from Mr. Thomas. PSR ¶ 181.

At sentencing, the Court noted the difference between the loss amount for Sentencing Guidelines purposes and the loss amount for restitution purposes. *See, e.g., United States v. Reed,* 80 F.3d 1419, 1422 (9th Cir. 1996); *United States v. Frith*, 461 F.3d 914, 920 (7th Cir. 2006). The Court calculated the loss amount under the Guidelines to be $446,000. However, after hearing limited argument on the proper amount of restitution, the Court deferred a final decision on the restitution award, as authorized by 18 U.S.C. §3663(d)(5), and requested briefing on whether it should impose an award of $353,500, the amount of misappropriated funds identified in the charging instrument (and plea agreement), or $446,000, the figure the Probation Office has recommended.

ARGUMENT

I. THE TEXT OF 18 USC § 3663A REQUIRES THE AMOUNT OF RESTITUTION TO BE FIXED AT $283,500.

In *Hughey v. United States,* the Supreme Court held that restitution under what is now 18 U.S.C. § 3663 may be awarded only for losses caused by "the specific conduct that is the basis of the offense of conviction." *Hughey v. United States,* 495 U.S. 411, 413 (1990). In *Hughey,* the defendant pled guilty to one count of a six count indictment alleging theft by a United States Postal Employee and use of unauthorized credit cards. *Id*. The district court ordered restitution based on the losses arising from all of the conduct charged in the indictment. The defendant appealed the restitution order, claiming that he should not have to pay restitution for losses other than those caused by the single offense to which he specifically pled guilty. *Id.* at 414. The

Supreme Court agreed. It interpreted Congress' use of the word "offense" in the identical precursor to Section 3663, *id.* at 413 n.1, as restricting the amount of restitution to the loss caused by the specific conduct underlying the offense of conviction. *Id.* at 420. Accordingly, it limited the restitution award to the losses stemming from the unauthorized use of the particular MBank credit card specified in the count of conviction, and disallowed restitution for any losses stemming from the use of 20 other MBank credit cards identified in counts to which the defendant had not entered a guilty plea. *Id.* at 422.

Congress responded to *Hughey* in 1990 by amending the language of Section 3663 to broaden the amount of restitution available in certain, limited situations. The new law provided for restitution for the losses caused by a defendant's entire course of conduct, and not simply for the losses caused by the specific conduct that is the basis for the offense of conviction, but *only* in cases where the offense of conviction "involve[d] *as an element* a scheme, conspiracy, or pattern of criminal activity." Pub. L. No. 101-647 § 2509, 104 Stat. 4789, 4863 (1990) (emphasis added); *United States v. Cothran,* 302 F.3d 279, 289 (5th Cir. 2002); *United States v. Kones*, 77 F.3d 66, 69-70 (3d Cir. 1996). Congress used this same scheme provision when it enacted the MVRA in 1996. *See, e.g., United States v. Maturin,* 488 F.3d 657, 661-662 & n.2 (5th Cir. 2007); *United States v. Gordon,* 480 F.3d 1205, 1211 (10th Cir. 2007). Both Section 3663 and Section 3663A, which have remained unchanged since 1996, now read: "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." 18 U.S.C.A. §§ 3663(a)(2) & 3663A(a)(2) (2012) (emphasis added).

Importantly, this language in the MVRA does not alter *Hughey*'s holding disallowing restitution for losses caused by conduct beyond the specific conduct that is the basis of the offense of conviction, except where a "scheme, conspiracy, or pattern of criminal activity" is an actual *element* of the offense of conviction.[1] *See, e.g., Maturin,* 488 F.3d at 661-662 ("a defendant's conviction on one count can support a broad restitution award encompassing additional losses *only* if the count of conviction requires proof of a scheme, conspiracy, or pattern of criminal activity as an element")(emphasis in original); *Gordon,* 480 F.3d at 1211 ("The MVRA, which amended the VWPA in 1996, did not change the general rule that restitution may only be ordered for losses caused by the offense of conviction," except where the offense of conviction involves a scheme, conspiracy or pattern as an element); *United States v. West,* 646 F.3d 745, 751 (10th Cir. 2011) (same, citing *Gordon*); *United States v. Fogg*, 409 F.3d 1022, 1028 (8th Cir. 2005) ("Unless the charged offense has a scheme, conspiracy, or pattern of criminal activity as an element, however, the restitution order may only cover losses from the specific offense for which the defendant was indicted and convicted."); *United States v. Davenport,* 445 F. 3d 366, 373-374 (4th Cir. 2006); *Kones,* 77 F. 3d at 70 ("By its own terms, however, § 3663(a)(2) [VWPA] applies only in cases where a scheme, conspiracy, or pattern of criminal activity is an element of the offense of conviction."). Because the scheme provision is restricted to cases where the offense of conviction includes "as an element" a scheme, conspiracy or pattern of criminal activity, courts have vacated restitution awards for losses caused by conduct other than the specific conduct that is the basis of the offense of conviction in cases involving, *inter alia*: larceny under 18 U.S.C. § 661, *Fogg,* 409 F.3d at 1028; fraudulent use of

[1] Under the MVRA, there is one other exception to the *Hughey* rule. It allows a court to order restitution to persons *other than* the victim of the offense of conviction if the parties agree to such restitution in a plea agreement. 18 U.S.C. § 3663A(a)(3); *Gordon,* 480 F.3d at 1211. That exception is inapplicable here.

an access device under 18 USC § 1029, *Gordon,* 480 F.3d at 2011; *Davenport,* 445 F. 3d at 373-374; and concealing assets in a bankruptcy proceeding under 18 U.S.C. § 152, *Maturin*, 448 F.3d at 661-62.

In *Maturin,* for instance, the defendant was charged with 28 counts of concealing assets in a bankruptcy proceeding for covertly establishing and making deposits into a bank account in order to hide funds that, as a matter of law, belonged to the bankruptcy estate. *Maturin,* 448 F.3d at 659. The defendant pled guilty only to Count 1, which involved one deposit of $54,384.43 into the account. *Id.* The district court, however, imposed a restitution order of nearly $165,000, which covered the entirety of the defendant's months-long course of conduct, rather than the single transaction charged in the count of conviction. *Id.* On appeal, the Fifth Circuit reversed. Because 18 U.S.C. § 152 does not involve a scheme, conspiracy or pattern as an element, the court limited the restitution award to the amount of loss specifically identified in the charge to which the defendant pled guilty, $54,384.43.[2] *Id.* at 661-62. Significantly, the court did so even though the defendant, in the factual basis for his plea and in a plea colloquy, admitted that his course of conduct spanned eight months, as the original indictment had alleged, acknowledged that the offense of conviction was only "one of the transactions" that he should have reported, and conceded that he had deposited roughly $130,000 in the concealed account, although he was unsure of the precise amount. *Id.* at 659.

In *Fogg,* the district court ordered restitution, *inter alia*, to the estate of a deceased bank account holder for the penalties incurred on 12 insufficient funds checks that the defendant had

[2] The Court also found that the VWPA's plea agreement provision, 18 U.S.C. § 3663(a)(3), did not justify the district court's award because the parties had not included in the plea agreement any amount of restitution, let alone the amount the district court awarded. *Id.* at 662-63. In this case, the plea agreement does contain the parties' assessment of the proper restitution amount, but because that amount is equal to, not greater than, what Mr. Thomas maintains is appropriate here, Section 3663(a)(3) is inapplicable.

stolen from the account holder and cashed. The defendant, however, had pled guilty to a superseding indictment that, by its terms, charged her with larceny offenses that encompassed cashing seven of the insufficient funds checks. The Eighth Circuit held that, because the offense of larceny does not include a scheme, conspiracy or pattern as an element, the scheme provision of the MVRA precluded an order of restitution that covered the account holder's losses from all 12 checks. Rather, the court limited restitution to "the amount of losses suffered by the victims of Fogg's larceny as charged in her superseding information," even though that amount did not fully compensate the account holder's estate (among others) for its losses. *Fogg,* 409 F.3d at 1028.

Traditional rules of statutory construction support the results in these cases. When the plain language of a statute is clear, courts must assume that Congress knew what it was doing and enforce the statute according to its terms. *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989) ("[W]here … the statute's language is plain, the sole function of the courts is to enforce it according to its terms."). The meaning of the scheme provision in the MVRA could not be more plain: restitution for losses beyond those caused by the specific conduct that is the basis of the offense of conviction must be limited to cases where a "scheme, conspiracy, or pattern of criminal activity" is "*an element*" of the offense. To excise the phrase "as an element" from the statute in order to permit restitution for losses resulting from any conduct that might be construed as a scheme, conspiracy or pattern would be impermissible. *Qi-Zhuo v. Meissner,* 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning.")

For two independent reasons, it is particularly appropriate to accord the MVRA's scheme provision its plain meaning. First, with the exception of the scheme provision (and the plea

agreement provision that is inapposite here, *see* note 1, *supra*), Congress used the same "offense" language in the MVRA that the Supreme Court, six years earlier, had narrowly interpreted to limit restitution awards to losses caused by the specific conduct that is the basis of the offense of conviction. If Congress had wanted to broaden the availability of restitution beyond what the scheme provision provides, the Supreme Court told Congress how to do it. *Hughey,* 495 U.S. at 413. Yet Congress demurred. That is undoubtedly why a number of courts have found that, with the exception of the scheme provision (and the plea agreement provision), the *Hughey* rule remains in full force. *See, e.g., Maturin,* 488 F.3d at 661-662; *Gordon*, 480 F.3d at 1211.

Second, at the time Congress enacted the MVRA, there existed a number of federal criminal statutes that included, *as an element*, "scheme[s]," "conspirac[ies]" and "pattern[s] of criminal activity." The mail, wire and bank fraud statutes proscribed "any *scheme* or artifice to defraud." 18 U.S.C. §§ 1341, 1343 & 1344 (emphasis added). Numerous provisions of the U.S. Code made it unlawful to "conspire" to commit a crime. *See, e.g.,* 18 U.S.C. § 241 (conspiracy against rights); 18 U.S.C. § 286 (conspiracy to make false claims), 18 U.S.C. § 371 (general statute outlawing conspiracy to commit offense against or defraud the United States); 21 U.S.C. § 846 (conspiracy to commit drug crimes). The RICO statute criminalized "a *pattern* of racketeering *activity*." 18 U.S.C. § 1961(5) & 1962 (emphasis added). Because it enacted the scheme provision against the backdrop of the precise language that these laws contain, Congress cannot have intended the scheme provision to do anything more than its specific terms provide – that is, Congress cannot have intended the scheme provision to require restitution, beyond what *Hughey* authorizes, for losses flowing from offenses of conviction that do not include, as an element, a scheme, conspiracy or pattern of criminal activity.

The offense of conviction in this case, 18 U.S.C. § 666(a)(1)(A), does not include as an element a scheme, conspiracy or pattern of criminal activity. Accordingly, the scheme provision does not apply here. *See, e.g., Fogg,* 409 F.3d at 1028; *Maturin,* 488 F.3d at 661-62; *Gordon,* 480 F.3d at 1211. Consistent with the general rule announced in *Hughey*, the amount of restitution must be limited to losses caused by "the specific conduct that is the basis of the offense of conviction." *Hughey,* 495 U.S. at 413.

Count 1 of the Information specifically charged that Mr. Thomas "embezzled, stole, obtained by fraud, without authority knowingly converted to the use of a person not the rightful owner, and intentionally misapplied … $353,500 in District of Columbia funds." When Mr. Thomas pled guilty to the Information, he thus pled guilty to knowingly misappropriating $353,500 in District of Columbia funds. He did not plead guilty to knowingly misappropriating $446,000 in District of Columbia funds. Accordingly, "the loss caused by *the specific conduct that is the basis of the offense of conviction*" is $353,500, not $446,000. *Hughey,* 495 U.S. at 413 (emphasis added). This fact is also reflected in the plea agreement, which contains the parties' mutual understanding, albeit non-binding on the Court, that restitution should be set at $353,500. Under Section 3663A, *Hughey* and related cases, the proper amount of restitution is $353,500. *See, e.g., Maturin,* 488 F.3d at 661-62 (for the offense of concealing assets in a bankruptcy proceeding, which does not involve a scheme, conspiracy or pattern as an element, the amount of restitution is limited to the specific amount charged in the count of conviction); *Fogg*, 409 F.3d at 1028 ("The offense of larceny does not have a scheme, conspiracy or pattern as an element … and therefore the District Court was limited to ordering restitution for the amount of losses suffered by the victims of Fogg's larceny as charged in her superseding

information."). After crediting the $70,000 Mr. Thomas already has paid, the amount of restitution to be ordered is $283,500.

Respectfully, the cases to which the Court directed counsel's attention at sentencing do not alter this conclusion. Each of those cases involved an offense of conviction that included a "scheme" as an element. *United States v. Karam,* 201 F. 3d 320, 323 (4th Cir. 2000) (wire fraud); *United States v. Cothran,* 302 F. 3d 279, 281 (5th Cir. 2002) (mail fraud); *United States v. Grice,* 319 F.3d 1174, 1178-79 (9th Cir. 2003) (mail fraud); *United States v. Emor,* 2012 WL 983152 (D.D.C. 2012) (wire fraud). The scheme provision of Section 3663A thus required the court in each case to impose a restitution order that accounted for the losses flowing from all of the actions taken in furtherance of the scheme, not just those reflected in the specifically charged offense conduct to which the defendant pled guilty. As explained above, this case is different. Because the offense of conviction here does not involve a scheme as an element, *Hughey* and its progeny limit restitution to the specific conduct that is the basis of the offense of conviction, *i.e.,* the knowing misappropriation of $353,500.

At sentencing, the Court expressed the policy concern that awarding restitution in the amount of $353,500 might not permit the District of Columbia to recoup all of its claimed losses, even if the award accurately reflected the specific amount that Mr. Thomas acknowledged misappropriating when he pled guilty to the Information, as well as the specific amount of restitution that the parties identified in the plea agreement. The *Hughey* Court addressed this precise issue. In *Hughey,* the government maintained that, if the Court were to strictly interpret the word "offense" as employed in the restitution statute, prosecutorial practice might result in undercompensating victims because (i) the government often charges only those offenses it knows it can prove and (ii) the government usually drops charges and makes other compromises

when a defendant agrees to plead guilty. The Court acknowledged that these concerns were "not insignificant," but concluded that they were not "unique to the issue of victim compensation" and that "[n]othing in the statute suggests that Congress intended to exempt victims of crime from the effects of [the plea] bargaining process." *Hughey,* 413 U.S. at 421. Congress could have legislatively altered the general rule announced in *Hughey* to address the policy concerns the government articulated, but with the limited exceptions discussed above, it did not.

II. THE RULE OF LENITY OTHERWISE REQUIRES THE AMOUNT OF RESTITUTION TO BE FIXED AT $283,500.

The rule of lenity requires courts to resolve an ambiguity in a criminal statute in favor of the defendant. *See, e.g., United States* v. *Bass*, 404 U. S. 336, 347– 349 (1971). The rule of lenity applies not only to substantive criminal laws, but to criminal penalties as well. *Bifulco v. United States,* 447 U.S. 381, 387 (1980) ("In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *United States v. Santos,* 553 U.S. 507, 514 ("This venerable rule … vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.") (plurality). In fact, in *Hughey,* the Supreme Court applied the rule of lenity to the restitution statute itself, finding that "longstanding principles of lenity … preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Hughey,* 495 U.S. at 422.

If the Court does not agree that the text of Section 3663A plainly limits the amount of restitution to the $353,500 in loss that flowed from the specific offense conduct to which Mr. Thomas pled guilty, counsel respectfully submit that the Court must recognize Section 3663A as ambiguous as applied to the circumstances that this case presents. Specifically, if the

text of Section 3663A does not clearly limit the amount of restitution as set forth in Section I, *supra*, then Section 3663A is ambiguous as to whether, in cases involving an offense of conviction that does *not* include a scheme, conspiracy or pattern as an element, it authorizes restitution beyond the amount of loss specifically identified in the offense of conviction as charged in the information or indictment.

Applying the rule of lenity, Section 3663A must be construed as confining the amount of restitution in this case to $353,500 (less $70,000). This is the specific amount of District of Columbia funds that Mr. Thomas was charged with misappropriating, that Mr. Thomas formally pled guilty to misappropriating and that the plea agreement denominates as the proper amount of restitution. Imposing a restitution order greater than $353,500 would subvert Mr. Thomas' reasonable expectations upon pleading guilty to having misappropriated a specific amount of funds and upon entering into a plea agreement recognizing that precise amount as the restitution figure. In other words, contrary to the vital purposes that the rule of lenity intends to serve, imposing a restitution order greater than $353,500 would improperly "subject[] [Mr. Thomas] to punishment that is not clearly prescribed" and constitute the "making [of] criminal law in Congress' stead." *Santos*, 553 U.S. at 514 (plurality). *See also Bass,* 404 U.S. at 347-49 (observing that the rule of lenity arises from the need to give fair warning of what the law intends and from the democratic wisdom that legislatures, not courts, should define criminal activity and its attendant punishment).

CONCLUSION

For the foregoing reasons, Mr. Thomas respectfully requests that this Court order restitution in the amount of $353,500, less the $70,000 he already has paid, or $283,500.

Respectfully submitted,

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DATE: May 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to the following:

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