IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Hon. Sam A. Lindsay

UNITED STATES OF AMERICA	§	Case No: 3:12-CR-00317-L(1)
	§	3:12-CR-00413-L(1)
v.	§	
	§	RULE 35 MOTION FOR
BARRETT LANCASTER BROWN	§	AMENDMENT OF THE COURT'S
	§	RESTITUTION ORDER

RELIEF REQUESTED

Comes now Barrett Brown, by and through his attorney of record, Charles Swift, and seeks that the Court amend that portion of the PSR ordering restitution to Strategic Forecasting in the amount of $815,000, by removing the same and adjusting the total restitution amount to between $10,000 and $30,000, or in the alternative, to $75,250, as clear error under Fed. R. Crim. Pro. 35.

FACTS

On 28 January, 2014, in accordance with its in-court imposition of judgment, this Court ordered that the defendant, Barrett Brown, pay restitution in the amount of $890,250. The breakdown of restitution based on individual victims was $30,000 to Combined Systems, Inc., $45,250 to the Law Firm of Puckett and Faraj, and $815,000 to Strategic Forecasting, Inc. The court waived interest on the above amounts based on a determination that the defendant did not have the ability to pay such interest. The Court did not make factual findings with respect to the restitution amount ordered. The Court, however, had adopted the portion of the PSR related to restitution wherein the Probation office set out the above portions as mandatory. In the PSR, Probation offered no analysis beyond citing18 U.S.C. § 3663. Further, Probation failed to note that the plea agreement addressed potential loss for which Mr. Brown would be responsible for

in restitution. While Paragraph 5 of Mr. Brown's plea agreement attributed the loss for sentencing guideline purposes to be between $400,000 and $1,000,000, Paragraph 13 of the plea agreement attributed the loss for which Mr. Brown was responsible, based on his conviction for accessory after the fact, as being between $10,000 and $30,000. The language of paragraph 13 did not make it binding on the court. Despite the agreement in paragraph 1, neither the government nor Mr. Brown objected to this portion of the PSR pertaining to restitution.

ARGUMENT

Relief is appropriate in this case under Fed. R. Crim. Pro. 35. Rule 35 permits a court to, within 14 days after sentencing, correct a sentence that resulted from arithmetical, technical, or other clear error. Rule 35, extends "only to those cases in which an obvious error or mistake has occurred in the sentence, that is, *errors which would almost certainly result in a remand of the case to the trial court*." *U.S. v. Ross*, 557 F.3d 237, 241 (5th Cir. 2009) (internal quotation marks and citations omitted). For the reasons set forth below, Mr. Brown asserts that the Court's restitution order is plain error which would almost certainly result in remand.

Federal courts have no inherent power to award restitution, restitution orders are proper "only when and to the extent authorized by statute." *United States v. Evers*, 669 F.3d 645, 655-656 (6th Cir. 2012) (internal quotation marks omitted). In the present case, the statute relied on by the Court to award restitution is the Mandatory Victims Restitution Act of 1996 (MVRA) found at 18 U.S.C. §§ 3663A-3664. 18 U.S.C. § 3663A of the MVRA defines the circumstance where restitution is mandatory. *See* 18 U.S.C. § 3663A(a)(1) requiring that for crimes of violence, certain offenses against property, and crimes related to tampering with consumer products due to which a victim has suffered either a physical or pecuniary loss, "the court shall order, in addition

to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense." *Id*. The method for calculating the amount of restitution is set out by 18 U.S.C. § 3664.

The Court's failure to consider the pretrial agreements apportionment of liability to Mr. Brown of between $10,000 and $30,000 is plain error requiring adjustment of the restitution order.

Under § 3664, joint and several liability may be appropriate where there is more than one defendant and each has contributed to the victim's injury. If the court finds that more than [one] 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." 18 U.S.C. § 3664(h). In Mr. Brown's case the damages were primarily caused by Jeremy Hammond who, along with others, but not including Mr. Brown, hacked Strategic Forces and caused the $815,000 worth of damage to their computer systems. Subsequent to the hack of Strategic Forces, Jeremy Hammond also hacked Combined Systems and Puckett and Faraj. The PA agreement between the parties reflects the fact that Mr. Brown had a minimal role in the actual damage, e.g. the suggestion that Combined Systems website be defaced and similar suggestions with regards to Puckett and Faraj. Despite this agreed minimal role, Mr. Brown was awarded liability for restitution for all of the damage done to each of these without a contrary finding.

This award presumably stems from a mistaken belief by Probation that under the MVA, this Court was mandated to require full restitution for all damage done to identified victims. There is some dispute as to whether joint and several liability may be imposed upon defendants in separate cases, as is the case here. The Fourth and Sixth Circuits have held, in unpublished opinions, that § 3664(h) does not apply to in cases where the defendants are tried in separate cases. *See United States v. McGlown*, 380 Fed. Appx. 487, 2010 WL 2294527, at *3 (6th Cir. 2010); *United States v. Channita*, 9 Fed. Appx. 274, 2001 WL 578140, at *1 (4th Cir. 2001). The Fifth Circuit, however, has held that a district court may order joint and several liability for a lone defendant in *Paroline v. Amy Unknown* (In re Amy Unknown), 636 F.3d 190, 201 (5th Cir. Tex. 2011), citing § 3664(m)(1)(A), which provides that a district court may "enforce[]" a restitution order "by all other available and reasonable means." *Id* at 201. See also *United States v. Monzel*, 641 F.3d 528, 539 (D.C. Cir. 2011)(recognizing that the 5th Circuit's holding permitted several liability even when a single defendant was in front of the court).

In light of *Paroline,* the Court's adoption of the PSR's recommendation regarding restitution is clearly erroneous. *See United States v. Crawley*, 533 F.3d 349, 358 (5th Cir. Tex. 2008), holding that with respect to restitution, (A) trial court abuses its discretion when its ruling is based on an *erroneous view of the law* or a clearly erroneous assessment of the evidence." (citations omitted). The only explanation for the lack of an explanation by the Court regarding its decision not to award restitution in accordance with a recommendation of the parties under the plea agreement is that the court was under the mistaken belief that it had no power to apportion the amount of restitution paid by Mr. Brown.

Even if the Court determined that Mr. Brown should be fully liable for restitution to Combine Systems and Puckett and Faraj, Mr. Brown is not liable for restitution for to Strategic Forces under the MVRA because his conduct did not proximately caused the damage to Strategic Forces.

The MVRA defines a victim as

> 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." Id. § 3663A(a)(2) (Emphasis added).

An important distinction is that the relevant conduct for restitution under the MRVA is unlike sentencing provisions for loss which can consider the relevant conduct of co-actors,[1] the determination of whether the defendant's criminal conduct was the proximate cause is limited to the criminal conduct which serves as the basis of the offense. *See United States v. Squirrel,* 588 F.3d 207, 212 (4th Cir. N.C. 2009) (Noting that the government had correctly conceded "that the accessory-after-the-fact offenses in this case do not have as an element a scheme, conspiracy, or pattern of criminal activity. *Id*. 212".)

While conviction for accessory after does not *per se* prevent the imposition of restitution on persons based on their convictions, it does require an analysis of whether the convicted conduct was the proximate cause of the damage. There are situations where, despite the criminal conduct

[1] Application Note 10 to §1B.1.3 of the Federal Sentencing Guidelines which directs that "(I)n the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant."

being complete and the damages therefore normally being likewise complete, that the accessory after the facts furthers the damages by preventing the victim from recovering the loss. This situation is typified by a financial crime wherein the accessory after the fact in aiding the primary perpetrator included aiding the perpetrator in hiding the stolen funds, thereby proximately causing the loss of the funds. *See United States v. Quackenbush,* 9 Fed. Appx. 264, 2001 WL 574649 (4th Cir. 2001) (per curiam) (unpublished)(upholding an order of restitution of stolen funds where the accessory after the fact had possession of the funds and therefore contributed to their loss).

Simply aiding the perpetrators, however, is insufficient to establish proximate cause. The leading case for this proposition is *United States v. Squirrel*, 588 F.3d 207, (4th Cir. N.C. 2009). In *Squirrel*, the appellants had pled guilty to accessory after the fact to murder. The facts related to the appellants' pleas included that the appellants had driven the perpetrator to the site of the murder, witnessed the murder, driven the perpetrators from the crime scene, aided in disposing of the murder weapon, and agreed in fabricating a story about it. *Id*. at 214. The Court nevertheless found that an order of restitution to the victim's family for funeral expenses and lost income was erroneous because none of their offense conduct "contributed to or exacerbated any lost income that might potentially have been earned by the victim had she not been killed by (the perpetrator)." *Id.* In making this finding, the Court specifically rejected the argument by the government that appellants' conduct of obstructing the apprehension of the perpetrator was sufficient to constitute proximate cause of the loss of her income, finding that "their (the appellants) criminal activity, unlike Quackenbush's (which did increase the financial harm to the bank), did nothing to cause or increase the financial harm." *Id* at 215. Finally, because the

appellants had failed to raise the argument during sentencing, the court necessarily found that the imposition of restitution in a case where there was no evidence of proximate cause was plain error.

Mr. Brown is similarly situated to the appellants in *Squirrel.* Like the appellants in *Squirrel*, the factual record establishes some basis for foreknowledge of the Strategic Forces hack. Mr. Brown's criminal conduct, however, as an accessory after the fact had no proximate relationship to the actual damage caused to Strategic Forces. The hackers completed the damage to Strategic Forces' computer system before they announced the fact of the hack, and critically before Mr. Brown took an active role by offering to contact the company. Mr. Brown's actions after the fact were limited to aiding the hackers in concealing their identity, and in gaining favorable publicity. While these actions combined with a question by Mr. Brown that caused Hammond to deface the website of Combined Systems and advice regarding what materials to take, may be said to have proximately cause the subsequent damages to Combined Systems and Puckett and Faraj, these actions did not proximately cause the harm to Strategic Forces computer system any more than the appellant's actions in *Squirrel* had caused the losses to the victim's family. Absent proximate cause, it was clearly erroneous to order restitution on the part of Mr. Brown to Strategic Forces in any amount.

COMPLIANCE WITH CONFERENCE

Counsel contacted AUSA Candina Heath, and she indicated that the government does not agree with this Motion.

PRAYER FOR RELIEF

For the reasons given above, Mr. Brown prays that this Honorable Court amend its order to order restitution to reflect that restitution be paid in a partial amount to Combined Systems Inc. and the Law Firm of Puckett and Faraj in an amount of between $10,000 and $30,000, in accordance with the recommendation set out in his plea agreement, or alternative if the Court believed that despite the party's recommendation that Mr. Brown should be fully liable for the damage done to Combined Systems Inc. and the Law Firm of Puckett and Faraj, despite the parties agreement that Mr. Brown be responsible for $30,000 of loss, that Brown be order to make restitution to Combined Systems Inc. in the amount $30,000, and restitution in the amount of $45,200 to the Law Firm of Puckett and Faraj.

Respectfully submitted this 11th day of February, 2015,

/s/ Charles Swift
CHARLES SWIFT
Pro Hac Vice
Swift & McDonald, P.S.
833 – E. Arapaho, Ste 102
Richardson, TX 75081

MARLO P. CADEDDU
TX State Bar No. 24028839
Law Office of Marlo P. Cadeddu, P.C.
3232 McKinney Ave., Suite 700
Dallas, TX 75204
214.744.3000
214.744.3015 (facsimile)
mc@marlocadeddu.com

CERTIFICATE OF SERVICE

I certify that today, February 11, 2015, I filed the instant motion using the Northern District of Texas's electronic filing system (ECF) which will send a notice of filing to all counsel of record.

/s/ Charles Swift
CHARLES SWIFT
Attorney for Barrett Brown

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	
	NO: 3:12-CR-317-L
V.	3:12-CR-413-L
BARRETT LANCASTER BROWN	

GOVERNMENT'S REQUEST TO DISMISS
BROWN'S FED. R. CRIM. P. 35 MOTION

The defendant's motion must be dismissed for lack of jurisdiction:

The defendant filed a motion requesting relief pursuant to Fed. R. Crim. P. 35. The United States of America respectfully requests this Honorable Court to dismiss the defendant's motion for lack of jurisdiction. Fed. R. Crim. P. 35(a) provides that "[w]ithin 14[1] days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." "As used in this rule, 'sentencing' means the *oral announcement*[2] of the sentence." (Fed. R. Crim. P. 35(c); Emphasis added.) This Honorable Court orally announced the defendant's sentence on January 22, 2015: The defendant filed the instant motion twenty (20) days later, thus beyond the statute of limitations. Furthermore, the fourteen (14) day statute of limitation applies to the Court's action, not to the filing of the defense's motion. *United States v. Higgs*, 504 F.3d 456, 458 (3rd Cir. 2007). Thus, on February 6, 2015, this Honorable Court lost jurisdiction to consider the merits of the motion, to act on the motion, or even to "rule" on the motion.

1 In 2009, Fed. R. Crim. P. 35(a) was amended to extend the jurisdiction limitation from 7 days to 14 days.
2 In 2004, Fed. R. Crim. P. 35(c) was added to clarify the committee's intent that the *oral* announcement of sentencing, as opposed to the physical filing of the judgment, be used as the triggering event to determine the starting point for the Court's limited post-conviction jurisdiction.

Therefore the motion must be dismissed for lack of jurisdiction.

The Fifth Circuit Court of Appeals strictly construes Fed. R. Crim. P. 35(a) and (c). *United States v. Lopez*, 26 F.3d 512, 515 (5th Cir. 1994); United States v. Bridges, 116 F.3d 1110, 1112-1113 (5th Cir. 1997); *United States v. Hafeez*, 2013 WL 4501065 *1-2 (E. D. La. 2013). The time period is jurisdiction and cannot be extended. *United States v. Coe*, 482 Fed. Appx. 957 (5th Cir. 2012)(citing *Lopez* 26 F.3d at 5118-23).

The defendant's motion failed to state a cognizable claim:

Assuming arguendo that we can travel back in time and the Court could consider and rule on a Fed. R. Crim. P. 35(a) motion *on or before* February 5, 2015 (the fourteen day deadline), the defendant's motion still fails. The defendant failed to state a claim cognizable under Fed. R. Crim. P. 35(a), in that in this case, the Court's imposition of the defendant's sentence was *neither arithmetically, technically, nor clearly erroneous*. Rule 35(a) does not permit the Court simply to recalculate, reconsider, reapply, or reinterpret the sentencing guidelines. Rule 35(a) does not relax the defense's obligation to present its objections to the sentence imposed (or to be imposed) at or before the sentencing hearing.

The defendant failed to timely object to the order of restitution. Except for the findings during sentencing hearings, this Honorable Court adopted the Presentence Report (PSR) and the Addendum. The Court ordered that the defendant pay restitution as prescribed by PSR, i.e.

> Combined Systems - $30,000.00
> Strategic Forecasting Inc. - $815,000.00
> Puckett and Faraj - $42,250.00

When filing his objections to the PSR and to the Addendum, the defendant *failed* to address

or even mention "restitution." Even when the defendant filed his sentencing memorandum, he *failed* to address or even mention "restitution." During the verbal pronouncement of the sentence, the undersigned does not recall the defense objecting to the order of restitution.

The defendant misrepresented that the parties 'agreed' to a restitution figure:

The defendant made a couple of serious material misrepresentations in his motion. First, he attempted to re-vive paragraph 13 of the Plea Agreement. As stated in a prior filing and as acknowledged by the Court during the first sentencing hearing in December 2014, paragraph 13 was an inadvertently included remnant of a previously discussed plea agreement,[3] that being a plea to a violation of 18 U.S.C. § 1029(a)(3). The paragraph 13 loss figure, of between $10,000 and $30,000, related to the loss associated to the credit cards stolen from Strategic Forecasting Inc.,[4] in the defendant's possession, and used after the defendant posted the link to the file containing the credit cards. All parties agreed during the hearing in December 2014, that paragraph 5 constituted the agreement between the parties as to the loss.[5] Specifically, paragraph 5 provided

> "[p]ursuant to Fed. R. Crim. P. 11(c)(1)(B), the government recommends that the appropriate sentencing guideline range for a loss relating to Brown's violation of 18 U.S.C. § 3 is more than $400,000.00 but less than $1,000,000.00 based on Strategic Forecasting Inc.'s estimated loss relating to the remediation of its computer system."

---

3 In the spring of 2013, the government offered the defendant the opportunity to plead guilty to one count from each Indictment, as follows: Count Three of 3:12-CR-317-L; Count Two of 3:12-CR-413-L; and Count One of 3:13-CR-030-L. Count Two of 3:12-CR-413-L charged a violation of 18 U.S.C. § 1029(a)(3). The defense countered with a variety of plea options to include violations of 18 U.S.C. § 371 or 1030, etc. It was not until the spring of 2014 that the terms of the current Plea Agreement were discussed.

4 In most of its motion, the defense misidentifies Strategic Forecasting Inc., calling it Strategic Forces. Another victim not included in the restitution figure was Special Forces Gear. The defense appears to conflate these two victims.

5 The loss identified in the PSR was in excess of $3,600,000.00.

Attachment A, provided *in camera,* identified the expenses incurred by Strategic Forecasting Inc. for the remediation of its computer system due to the unauthorized access constituting the offense underlying the defendant's guilty plea. The parties understood that the $815,000.00 figure was the maximum loss associated with the unauthorized access of Strategic Forecasting Inc.'s computer systems. The $815,000.00 figure was broken down by the victim in Attachment A.

Thus, paragraph 13 of the Plea Agreement was not valid and did not affect the Court's order of restitution. Thus Court's "non-reliance" on paragraph 13 did not and could not constitute error.

As to restitution, the defendant signed the Plea Agreement and initialed each page. In paragraph 4(e), Brown acknowledged that "the Court may order additional restitution arising from all relevant conduct and not limited to that arising from the offense of conviction alone," and that restitution to the victim may be mandatory.

<u>The defendant misrepresented the Plea Agreement's reference to role:</u>

The second serious material misrepresentation was on page 3 when the defense claimed that the Plea Agreement provided that the defendant had a 'minimal' role. No where in the Plea Agreement did it suggest, infer, or reference the defendant's role as "minimal." In fact, the defense required a provision that if the government found the loss to be greater than $1,000,000.00 and attempted to withdraw its paragraph 5 recommendation regarding a maximum loss of $1,000,000.00,[5] the defendant would be allowed to withdraw his guilty plea. This provision is not consistent with the defense's current claim that the parties agreed that the defendant had a "minimal" role.

The restitution order was in accordance with the MRVA:

The defendant questions the restitution order as to Strategic Forecasting Inc., but not as to Combined Systems or Puckett and Faraj. The defendant's position is inconsistent at best, since all the three victims suffered losses related to an unauthorized access from a jointly undertaken criminal activity by the defendant in concert with others.

In addition to the application of U.S.S.G. § 5E1.1, the Mandatory Restitution to Victims Act (MRVA) under 18 U.S.C. § 3663A-3664 applies in "all sentencing proceedings for convictions of . . . any offense—(B) in which an identifiable victim or victims has suffered . . . a pecuniary loss." A victim is defined under the MRVA at 18 U.S.C. §3663A(a)(2) as:

> 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.

The MRVA requires that restitution be ordered to victims in the full amount of each victim's losses as determined by the court, and this Honorable Court ordered such restitution. The MRVA applies to violations of the 18 U.S.C. § 1030 (unauthorized access), the offense underlying the defendant's conviction for accessory after the fact. *United States v. Phillips*, 477 F.3d 215 (5th Cir. 2007). The actual losses, as to Strategic Forecasting Inc., were the costs associated with the remediation of its computer systems. Strategic Forecasting Inc. was directly and proximately harmed as a result of the commission of the offense underlying the Accessory count, i.e. the unauthorized access. The harm was caused by a jointly undertaken criminal activity by the defendant in concert

with others. Restitution was properly ordered.

However, this Honorable Court cannot consider the motion on its merits, it must dismiss the motion for lack of jurisdiction.

Respectfully submitted,

JOHN R. PARKER
ACTING UNITED STATES ATTORNEY

/s/ Candina S Heath
CANDINA S. HEATH
Assistant United States Attorney
State of Texas Bar No. 09347450
1100 Commerce Street, 3rd Floor
Dallas, Texas 75242
Tel: 214.659.8600
Fax: 214.767.2846
candina.heath@usdoj.gov

CERTIFICATE OF SERVICE

I certify that today, February 25, 2015, I filed the government's respons using the Northern District of Texas's electronic filing system (ECF) which will send a notice of filing to all counsel of record.

/s/ Candina S Heath
CANDINA S. HEATH
Assistant United States Attorney