

UNITED STATES OF AMERICA,

Plaintiff,

v.

Michael Forrest,

Defendant,

'05 NOV 28 A10:12

Case No. 04-CR-232
L. SKY, CLERK
MAIL-REC'D

MOTION FOR CONSIDERATION OF RESTITUTION FACTORS

Now Comes Michael Forrest (hereinafter “defendant”) through appointed counsel Brian Mullins (or in the alternative *pro se* ^{1/}), respectfully moving this Honorable Court to consider an order for restitution only in accord with the following legal factors.

A Complete Accounting Of Losses Is Necessary

18 U.S.C. § 3663A; “An order of restitution under this section shall be issued and enforced in accordance with section 3664.”

18 U.S.C. § 3664; “The [presentence] report shall include, to the extent practicable, a complete accounting of the losses to each victim”

Defendant asserts that the presentence report did not provide a complete accounting of the losses to each victim as § 3664 requires, and that the Court cannot order restitution based on an estimate of total losses, only on a complete accounting. The following provides more support: **U.S. v. Farr**, 419 F.3d 621, p 625, 7th Cir 2005; “The district court had ordered restitution based on an estimate of total loss, rather than on a calculation of each victim’s losses. We vacated the order because the district court had exceeded its authority by failing to comply with § 3664(f)(1)(A).”

^{1/} In the event that appointed counsel refuses to file this motion in its entirety, defendant respectfully requests the Court accept it from him *pro se*, as it is of utmost importance.

18 U.S.C. § 3664 discloses how the distinct calculation needs to be ascertained;

“The probation officer shall... provide notice to all identified victims of -

the opportunity of the victim to submit information to the probation officer concerning the amount of the victim’s losses;

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 provide the victim with an affidavit form to submit”

U.S. v. Boyle, *10 F.3d 485* (7th Cir. 1993);

“The restitution amount must be ascertained and delineated with an accurate computation, cannot exceed the loss actually caused, and must be clearly set out with specific findings.”

Restitution Only to Persons Harmed by True Loss

In **18 U.S.C. § 3663A** we read;

“the court shall order... the defendant make restitution to the victim”

“the term “victim” means a person... harmed as a result... of the offense”

Definitions from the Merriam-Webster Dictionary:

Victim: a person cheated, fooled or injured

Harmed: injured

Injury: hurt, damage, or loss sustained

Investment: the outlay of money for income or profit

Profit: a valuable return

Defendant believes he has not cheated/fooled/injured any person (nor has he admitted guilt of doing so), and that none of his clients sustained a true loss because they derived a valuable return (a profit), in the form of a medical device capable of delivering much physical benefit (by relief of symptoms), which makes the transaction an **investment**, not a loss. Only if the persons received devices incapable of delivering physical benefit could it be said that they suffered financial loss. Whether or not they have suffered a true loss should not be the decision of the court, but rather of the persons that have bought the devices. Only they can tell whether or not they lost money or made a wise investment in their health. Defendant therefore asks that the device purchasers be asked to request restitution only if they have not received value from the devices in the form of physical benefit of alleviation of symptoms of ailments.

This, the defendant believes, would most accurately fulfill the requirements of the law for restitution only to true victims. Defendant realizes this is an unusual request, but it is believed by him to be appropriate for this unusual case concerning medical devices with much anecdotal evidence of efficacy.

Defendant's Ability to Pay Must Be Considered

The defendant desires the Court to be aware of the following information about his economic circumstances which is additional to that disclosed in the PSI;

#1. Defendant's original profession was that of electronics technician, but he hasn't worked for an electronics company for 20 years which makes it nearly impossible to gain employment in such a manner again. His past experience job hunting taught him that continual recent employment as a technician is a very necessary factor that companies require from a job applicant. Companies don't like to see "self employed" as part of an applicant's work history because they feel he is likely to readily quit in order to work for himself again. Defendant has experience doing mechanical repairs on VCR's, but that was back when the mechanical systems were prone to failure and need of maintenance. They are now different and very reliable.

#2. Defendant started working in health food stores after his original health crisis, but that was usually for slightly more than minimum wage. It will be very difficult for him to work in a store now as a felon, especially being convicted of fraud.

#3. Defendant's age and physical limitations preclude him from normal physical labor.

U.S. v. MENZA, 137 F.3d 533 (7th Cir. 1998)

"Under the VWPA, the district court must consider the defendant's ability to pay and not whether he can pay. *United States v. Viemont*, 91 F.3d 946, 951 (7th Cir. 1996) (emphasis added); *United States v. Ahmad*, 2 F.3d 245, 247 (7th Cir. 1993). The VWPA requires the district judge "to balance the victim's interest in compensation against the financial resources and circumstances of the defendant — all while remaining faithful to the usual rehabilitative, deterrent, retributive, and restrictive goals of criminal sentencing." *United States v. Lampien*, 89 F.3d 1316, 1323 (7th Cir. 1996) (citing *United States v. Mahoney*, 859 F.2d 47, 49 (7th Cir. 1988) (quoting *United States v. Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987))"

“Buy Money” Is Not An Authorized Loss Recoverable By Restitution

Defendant’s PSI said; “Pursuant to 18 USC § 3553(b) and § 3583(d) the Court may order restitution for buy money... \$540 is outstanding to the F.D.A.”

18 USC § 3553(b) lists only “the need to provide restitution to any victims”

18 USC § 3583(d) has no mention of restitution at all.

The following cases deny the right to order restitution for buy money:

U.S. v. Castillo, 406 F.3d 806, pg 809 (7th Cir. 2005)

“Mr. Castillo and Mr. Rodriguez challenge the portion of their respective written judgements ordering them to repay \$3,000 in “buy money” as restitution... We reverse and remand the orders regarding payment.”

U.S. v. Menza, 137 F.3d 533 (7th Cir. 1998)

“the government should bear its own costs in relation to its decisions to investigate and/or to prosecute. ...those costs incurred [by the DEA] may be classified as investigation costs, which pursuant to the VWPA are not authorized losses recoverable in the form of restitution.”

Gall v. U.S., 21 F.3d 107 (6th Cir. 1994)

“Specifically, we hold: ...the government is not a victim to which a district court may order a defendant to pay restitution for the purpose of recovering drug “buy money” and other costs of investigation voluntarily paid out.”

U.S. v. Mullins, 971 F.2d 1138 (4th Cir. 1992)

“We hold that an award of restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees expended to recover the property.”

When Restitution Shall Not Apply

18 U.S.C. § 3664 reads;

“This section shall not apply ... if the court finds, from facts on the record, that ... 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.”

respectfully submitted,

Dated: Nov 13, 2005



(Signature of Defendant)

To: Judge Rudolph Randa
From: Micheal Forrest
Re: Case 04-CR-232 Motion

Addendum to my **Motion For Consideration of Restitution Factors:**

Please consider these cases concerning my assertion that no true loss is suffered by customers when they received medically effective devices (as is claimed by same said customers). Fact finding from each said customer will reveal whether or not they experienced loss.

U.S. v. BHUTANI, 266 F.3d 661 (7th Cir. 2001)

“The Fourth Circuit, over dissent, reversed, finding that the defendant's gain was not the appropriate measure of loss because consumers got medically effective drugs that were exactly what they purported to be.” (U.S. v. Chatterji, 46 F.3d 1336 pg 1340-43 (4th Cir. 1995))

“However, the defendant points out that in Andersen we held that the defendant's gain was not the appropriate measure of loss when there was "no clear evidence that customers or consumers suffered any loss." (U.S. v. Andersen, 45 F.3d 217, 221 (7th Cir. 1995))

dated: Nov 13, 2005


Michael Forrest