

“THE FEDERAL CORNER”

Even Dead Men Can Be Compensated For Lost Income

Buck Files

Perhaps it is because La Cosa Nostra cases have never been prosecuted in the Tyler division of the Eastern District of Texas that I usually enjoy reading the opinions in LCN cases, both as to the facts and the legal issues. And, I was not disappointed in my reading of *U.S. v. Messina*, __ F.3d __, 2015 WL 7005546 (2nd Cir. 2015) [Panel: Circuit Judges Calabresi, Cabranes and Raggi (Opinion by Raggi)].

This is yet another case in which a defendant received more punishment than he bargained for -- including an order of restitution -- and unsuccessfully appealed his sentence, only.

A Brief Synopsis of the Facts

Neil Messina was an associate of the Bonanno crime family of La Cosa Nostra. He and three other defendants were charged with participating in a racketeering conspiracy in violation with 18 U.S.C § 1962. Messina and the Government entered into a plea agreement that contained two important stipulations. First, that Messina, in 2002, had agreed with his co-conspirators to commit a robbery of Joseph Pistone, Sr., when he knew that these co-conspirators would be armed; and, that during the robbery a co-conspirator shot and killed Joseph Pistone, Jr. Second, that Messina would have a total offense level of 40 with a criminal history category of II under the United States Sentencing Guidelines. This would have provided a sentencing range of 324-405 months. The statutory maximum, however, the offense of conviction was 240 months. In return for these stipulations, the Government agreed to recommend that the district court impose a sentence of 120 months. Messina and the Government understood that this was a non-binding plea agreement.

At the sentencing hearing, United States District Judge Kiyoo Matsumoto rejected the Government's suggested 120 month sentence and Messina's lawyer's suggested sentence of 5 to 7 years and imposed an 18 year sentence. Additionally, Judge Matsumoto determined that the victim had an average yearly income of \$5,105.65 for the three years prior to his murder and awarded the victim's family \$112,324.30 for income lost between 1992 and 2013 as a result of the murder; 5,225 in funeral expenses; \$2,990 in burial expenses; and, \$72 in court transcript costs, for a total restitution award of \$120,611.30. Judge Matsumoto refused to waive interest on this restitution amount.

Messina appealed his sentence, only.

Judge Raggi’s opinion reads, in part, as follows:

[An Overview of Messina’s Restitution Argument on Appeal]

Messina argues that the MVRA did not authorize the district court to order restitution for income that Pistone may have lost as a result of his death.

[The Court’s Response]

Our review necessarily begins with the language of the MVRA because we assume that “the ordinary meaning of that language accurately expresses” Congress’s intent. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

[An Analysis of the Mandatory Victims Restitution Act]

...we conclude that the language of 18 U.S.C. § 3663A(b)(2)(C) authorizes restitution to all victims of qualifying offenses resulting in bodily injury, both those who survive those injuries and those who die therefrom. Further, the MVRA’s lost income provision applies to future income lost as a result of the offense of conviction. [redacted] The three of our sister circuits to have considered this issue have all reached the same conclusions. *See United States v. Serawop*, 505 F.3d 1112, 1118–21, 1123–25 (10th Cir.2007) (holding that MVRA authorizes restitution award of lost future income to deceased infant victim of voluntary manslaughter); *United States v. Cienfuegos*, 462 F.3d 1160, 1163–69 (9th Cir.2006) (holding that plain language of MVRA contemplates restitution award to deceased victim for lost future income resulting from involuntary manslaughter); *United States v. Oslund*, 453 F.3d 1048, 1062–63 (8th Cir.2006) (holding that because future income is income lost to deceased victim as direct result of murder and armed robbery crimes of conviction, plain language of statute leads to conclusion that lost future income can be included in restitution order).

The MVRA, enacted in 1996, mandates restitution in specified circumstances, notably, for purposes of this case, when a defendant stands convicted of “a crime of violence ... in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.” 18 U.S.C. § 3663A(c)(1)(A)(i), (B). Messina does not dispute that he was convicted of a crime of violence. Nor is there any question that in the course of the armed robbery predicate, Pistone suffered a physical injury that caused his death.

Four conjunctive statutory provisions detail the restitution required by the MVRA, *see id.* § 3663A(b)(1)-(4), two of which are relevant here:

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

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

(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....

Id. § 3663A(b)(2)-(3). [Emphasis added]

[Messina’s Argument on Restitution for Lost Income and the Court’s Response]

Messina argues that § 3663A(b)(2)(C)—requiring reimbursement for lost income—is ambiguous as to whether it includes “lost *future* income,” particularly in cases of deceased victims. Def.’s Br. 57 (emphasis in original). He submits that use of the backward looking term “reimburse” signals Congress’s intent to remedy only “an existing harm, not a future harm.” *Id.* at 59. In short, Messina appears to argue that where a violent crime results in death, the deceased victim can no longer earn, and therefore has not “lost” any income for which he can be “reimburse[d]” or “paid back.” *Id.* This reasoning is unconvincing because the same might be said of a physically injured victim who is permanently incapacitated or, at least for a while, of a temporarily incapacitated victim.

{ "pageset": "Sec Because the MVRA does not define “income lost,” we assume Congress intended for the term to be given its ordinary meaning. *See FCC v. AT & T Inc.*, 562 U.S. 397, 403, 131 S.Ct. 1177, 179 L.Ed.2d 132 (2011).

Because the common meaning of lost income is thus understood to encompass future income lost from death or injury, we conclude that the reference to “income lost” in § 3663A(b)(2)(C) bears that meaning. That conclusion is consistent, moreover, with the MVRA’s express mandate for

restitution “in the *full amount* of each victim's losses.”18 U.S.C. § 3664(f)(1)(A);

To be sure, a restitution award, whether for lost income or otherwise, cannot be based on mere speculation.

No such concern arises in this case because the district court conservatively calculated lost future income by reference to Pistone's modest recent taxable earnings, and Messina did not, and does not now, object to that calculation.

[The Requirement of a Causal Link]

The statutory language requiring a causal link between a victim's lost income and a defendant's qualifying offense also supports construing lost income to include future income without regard to whether the victim survives his injuries. The MVRA mandates restitution “for income lost by such victim [*i.e.*, the victim of an offense causing him bodily injury] *as a result of* such offense.”18 U.S.C. § 3663A(b)(2)(C) (emphasis added). Our sister circuits have recognized, and we agree, that “future income is income that is lost to the victim as a direct result of the crime” causing bodily injury. *United States v. Oslund*, 453 F.3d at 1063; *accord United States v. Serawop*, 505 F.3d at 1122 (quoting *Oslund* in reaching same conclusion); *see United States v. Cienfuegos*, 462 F.3d at 1164 (construing “as a result” clause in § 3663A(b)(2)(C) as “forward looking”). Messina's crime caused Pistone to suffer a “bodily injury” that ended his life. Insofar as Pistone will thus never work another day, he has “lost” future income “as a result of” the offense of conviction as much as a victim who has suffered a non-fatal bodily injury that will prevent him from ever working again.

[Messina's Argument on Congressional Intent]

In urging otherwise, Messina argues that other subdivisions of § 3663A(b)(2) demonstrate that Congress did not intend for lost future income to be included in a restitution order to a deceased victim.

[The Court's Response to Messina's Argument]

To read the statute [...more narrowly], as Messina urges, would yield the perverse result of allowing a defendant who successfully kills his victim to pay less restitution for lost income than a defendant whose victim survives the attack. It is no answer to say that a surviving victim needs support that a deceased victim does not. Injured victims—whether living or dead—may have lost income as a result of defendant's offense that they would use to support dependents. A defendant cannot argue that he need pay lost income restitution only to an injured father of four whom he maims but not to a similarly obligated father whom he kills. *See United States v. Cienfuegos*, 462 F.3d at 1164.

[Conclusion]

Thus, we construe the lost-income provision of the MVRA, 18 U.S.C. § 3663A(b)(2)(C), to apply to any victim of an offense resulting in bodily injury, whether the victim survives the injury or dies therefrom. We further construe the lost-income provision to mandate restitution for non-speculative future income lost as a result of a defendant's offense.



Because we construe the MVRA's lost income provision, *see* 18 U.S.C. § 3663A(b)(2)(C), to apply (a) to any victim who has sustained bodily injury as a result of a defendant's qualifying offense, including one who dies from his injury; and (b) for any income lost as a result of such offense, including future income, we conclude that the district court here acted within its discretion in ordering restitution with interest for income lost by Pistone as a result of the armed robbery offense that ended his life.

Accordingly, the district court's judgment of conviction is **AFFIRMED**

My Thoughts

- The restitution issue in any federal criminal case is the 800 pound gorilla in the room. Early on, every client should be made aware of his potential or actual liability for restitution if he or she is convicted. The MVRA and some other statutes mandate restitution for the benefit of the victim in most federal prosecutions. In our *Paroline* case, I remember the shocked look on my client's face when he learned that the victim in his child pornography case was seeking \$3.4 million from him.

- When I read the name Joe Pistone, I knew that it sounded familiar. I assumed that there was another Joe Pistone, a Mafioso who had garnered national publicity. Wrong. The other Joe Pistone was an FBI agent who worked undercover for six years infiltrating the Bonanno crime family. Donnie Brasco was the name that Pistone used during these six years and a movie by that name detailed his exploits. Eventually, some 200 indictments were returned and more than 100 convictions were secured as a result of his work.