

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF ILLINOIS  
 EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 02 CR 1050
v.	)	
	)	Judge James B. Zagel
FRANK CALABRESE SR., <i>et al.</i>	)	

**MOTION FOR IMPOSITION OF RESTITUTION**

This cause comes before the Court on motion of the United States for imposition of restitution, pursuant to the Mandatory Victims Restitution Act (“MVRA”), in the above-captioned matter against defendants Frank Calabrese Sr., James Marcello, Joseph Lombardo, Paul Schiro, and Anthony Doyle.<sup>1</sup> For the reasons discussed below, these defendants are jointly and severally liable for a total restitution amount of \$3,909,166.30.<sup>2</sup>

**I. INTRODUCTION**

Defendants Frank Calabrese Sr., James Marcello, Joseph “The Clown” Lombardo, Paul “The Indian” Schiro, and Anthony “Twan” Doyle were convicted as a result of their criminal participation in a racketeering enterprise known as the Chicago Outfit. The charged conspiracy involved, among other categories of criminal conduct, the murders of 18 individuals. *See* Doc. #397 at 9-10. There is little dispute that these murders were part of the conspiracy, and were committed to advance the criminal objectives of the Chicago Outfit. *Id.* at 8.

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<sup>1</sup>Defendant Nicholas Calabrese at trial admitted his involvement in a number of Outfit murders. That testimony, however, was given pursuant to the Court’s grant of immunity. Tr. 2299-2300. Moreover, with the exception of the murder of John Fecarotta, the information provided by Nicholas Calabrese to law enforcement was at all times proffer-protected. *See* Tr. 2870. The government is restricting the instant restitution request to victims who were not life-long associates/members of the Chicago Outfit; the Fecarotta homicide is therefore not part of the government’s calculations, and accordingly no restitution is sought as to Nicholas Calabrese.

<sup>2</sup>This restitution amount is separate and distinct from defendants’ forfeiture liability. *See United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) (“Forfeiture and restitution are distinct remedies.”).

The jury in its Special Verdict forms, moreover, concluded that James Marcello, Joseph Lombardo, and Frank Calabrese Sr. personally participated in Outfit murders;<sup>3</sup> the jury was unable to reach a unanimous verdict on Paul Schiro's involvement in the Vaci homicide. In addition, Doyle, a long-time Chicago Police Officer and member of the conspiracy since the 1960's, knew full well that the Outfit committed homicides. Doyle in fact was taped discussing that the Outfit killed people with Calabrese Sr.,<sup>4</sup> and indeed personally attempted to obstruct the investigation of the Outfit homicide of John Fecarotta. It would therefore be frivolous to argue that it was not foreseeable to defendants that the racketeering conspiracy they joined in the 1950's and 60's, and never withdrew from, involved homicides. Because defendants were convicted for their involvement in a the Outfit's racketeering conspiracy, because the charged murders advanced the Outfit's illegal objectives, and because such murders were known and/or foreseeable to the defendants, defendants Calabrese Sr., Marcello, Lombardo, Schiro, and Doyle must be held jointly and severally responsible for restitution to the estates of the murder victims.

## **II. ARGUMENT**

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,*

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<sup>3</sup>Frank Calabrese Sr. was found to have participated in the murder of Michael Albergo, William Dauber, Charlotte Dauber, Michael Cagnoni, Richard Ortiz, Arthur Morwawki, and John Fecarotta; James Marcello was found to have participated in the murders of Anthony Spilotro and Michael Spilotro; and Joseph Lombardo was found to have participated in the murder Daniel Seifert.

<sup>4</sup>*See* 2-19-2000 Transcript (Doyle telling Calabrese Sr. how James LaPietra and John "Apes" Monteleone without authorization beat another mob associate and as a result were almost ordered killed by Outfit Boss "Skid" Caruso; Doyle: "Had it been where the Old Man was still alive, they'd of went.")

*any* person directly harmed by the defendant's criminal conduct *in the course* of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663A(a)(2) (2000) (emphasis added); *see also* 18 U.S.C. § 3663(a)(1)(A) (authorizing restitution for defendants “convicted of an offense under [Title 18]”). If, as here, the victims of the violent crimes are deceased, the Court must order restitution payable to the victims’ estates. 18 U.S.C. § 3663A(a)(1). Moreover, according to 18 U.S.C. § 3664(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.

There is substantial case law dealing situations where, as here, murder victims’ estates, the victims’ families, or the victims’ dependents, including widows and children, are entitled to receive restitution payments:

- *United States v. Douglas*, 525 F.3d 225, 253-54 (2d Cir. 2008) (affirming restitution award for funeral expenses and lost income under 18 U.S.C. § 3663A(b)(3), (4));
- *United States v. Serawop*, 505 F.3d 1112, 1125, 1128 (10th Cir. 2007) (defendant convicted of voluntary manslaughter ordered to pay restitution for lost income to estate of three-month old victim);
- *United States v. Cienfuegos*, 462 F.3d 1160, 1164 (9th Cir. 2006) (finding the victim’s estate was entitled to restitution);
- *United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006) (affirming restitution order awarding lost future income under the MVRA and stating that “[w]hen the crime causes the death of a victim, the representative of that victim’s estate or a family member may assume the victim’s rights”) (citing 18 U.S.C. § 3663A(a)(2));

- *United States v. Pizzichiello*, 272 F.3d 1232, 1240-41 (9th Cir. 2001) (victim’s surviving family members properly awarded lost income, funeral, and travel expenses under the MVRA);
- *United States v. Checora*, 175 F.3d 782, 795 (10th Cir. 1999) (defendants convicted of voluntary manslaughter ordered to pay restitution for the support of the victim’s minor children that were directly and proximately harmed as a result of the victim’s death);
- *United States v. Razo-Leora*, 961 F.2d 1140, 1146 (5th Cir. 1992) (defendants convicted of charges related to a murder-for-hire conspiracy ordered to pay restitution for lost income to the murder victim’s widow);
- *United States v. Jackson*, 978 F.2d 903, 915 (5th Cir. 1992) (“[T]he district court has the authority to order the defendants to pay the victims’ estates an amount equal to the victims’ lost income . . . .”);
- *United States v. Roach*, 2008 WL 163569, at \*3-5, 9 (W.D.N.C. Jan. 16, 2008) (restitution awarded for lost income based on reasonable assumptions that murder victim would work 40 hours per week for 50 weeks per year until age 65 at state minimum wage and receive two percent increase per year);
- *United States v. Visinaiz*, 344 F. Supp.2d 1310, 1312-13 (D. Utah 2004) (MVRA requires restitution for lost income in homicide cases; no *ex post facto* implication); and
- *United States v. Bedonie*, 317 F. Supp.2d 1285, 1288-90 (D. Utah 2004), *rev’d on other grounds*, 413 F.3d 1126 (10th Cir. 2005) (court appointed an expert to calculate lost income who made reasonable and reliable race- and sex-neutral projections of future lost income without any discount for possible “consumption” of income by the victims).

\_\_\_\_\_ In a conspiracy such as this, co-conspirators must be held jointly and severally liable for the total foreseeable restitution amount. *See generally United States v. Rand*, 403 F.3d 489, 495 (7th Cir. 2005) (“[Defendant] may be held responsible for losses caused by the foreseeable acts of his co-conspirators. Co-conspirators generally are jointly and severally liable for injuries caused by the conspiracy . . . .”), *citing United States v. Martin*, 195 F.3d 961, 968-69 (7th Cir. 1999); *United States v. Amato*, 540 F.3d 153, 163 (2nd Cir. 2008) (holding that it was “within the district court’s discretion to make [defendant] jointly and severally liable for entire loss that [victim] suffered as a result of conspiracy even while apportioning liability of some of [defendant’s] co-conspirators.”). The evidence at trial established the proposition, understood well by the co-conspirators, that an “authorized”/“okayed” murder was a powerful weapon in the Outfit’s punishment and control arsenal. In addition, the recorded February 11 and 12, 1962, discussions attached hereto as Government Exhibit A graphically highlight the Outfit’s long-standing use of murder to achieve its criminal objectives. During the two surreptitiously recorded Miami, Florida, meetings between Jack Cerone, Dave Yarras, Pete LNU, James Vincent “Turk” Torello, and others, the men discuss various Outfit murders (indeed, the men were assembled in Florida to kill union boss Frank Esposito). The foreseeability prong of the analysis therefore strongly favors a full restitution award.

\_\_\_\_\_ Turning to what evidence the Court can consider in its effort to determine the total loss, the MVRA specifically provides for restitution to “the victim for income lost by such victim as a result of the offense,” and states that the restitution amount shall represent “the full amount” of the victim’s loss. 18 U.S.C. § 3663A(b)(2)(C); § 3664(f)(1)(A); *see also Roach*, 2008 WL 163569, at \*8-9 (restitution awarded for lost income based on reasonable assumptions that murder victim would work 40 hours per week for 50 weeks per year until age 65 at state minimum wage and receive two percent increase per year). Applied to the present case, the inquiry thus centers on approximating

the future income of the above-described murder victims. *Cienfuegos*, 462 F.3d at 1164 (“Any victim suffering bodily injury or death necessarily incurs the income lost only after the injury, *i.e.* in the future, as a consequence of the defendant’s violent act.”).<sup>5</sup> This income figure must include prejudgment interest through the date of sentencing “to make up for the loss of the funds’ capacity to grow.” *United States v. Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (relying on 18 U.S.C. § 3663A(b)(1)(B)(i)(II) and *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1311-35 (7th Cir.1992)).

“The determination of appropriate restitution is by nature an inexact science.” *United States v. Williams*, 292 F.3d 681, 688 (10th Cir. 2002). Though not required to do so, the government has engaged Financial Forensic Expert and Certified Public Accountant Michael D. Pakter to prepare a report calculating the lost estimated earning capacity of the identified murder victims. *See generally Cienfuegos*, 462 F.3d at 1169 (requiring non-speculative basis for calculations). Michael D. Pakter’s twenty-two page report is attached hereto as Government Exhibit B.

### **III. CONCLUSION**

The calculations set forth in the attached report are based on conservative assumptions,<sup>6</sup> see Government Exhibit B at 16-18, and constitute the best available evidence of the proper restitution

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<sup>5</sup>Indirect loss or consequential damages should not be included in any restitution order; only direct, actual losses may be awarded. *United States v. Frith*, 461 F.3d 914, 921 (7th Cir. 2006), *citing* 18 U.S.C. § 3663A(a)(2); *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005) (“‘Loss’ means direct injury, not consequential damages.”). On the other hand, no expenses for consumption should be deducted from any potential claim for lost future wages; such deductions are not permissible under the MVRA, which provides only for an award of “income lost,” not *net* income lost. 18 U.S.C. § 3663A(b)(2)(C). Additionally, restitution must be ordered for necessary funeral and related services. 18 U.S.C. § 3663A(b)(3).

<sup>6</sup>The government reserves the right to submit an adjusted report if and when the government receives additional/revised income or other information for the victims.

amount under the MVRA. The government has therefore sustained its burden of demonstrating by a preponderance of the evidence the losses sustained by the victims, and has established that Outfit murders were at a minimum reasonably foreseeable to Calabrese Sr., James Marcello, Lombardo, Schiro, and Doyle. *See generally* 18 U.S.C. § 3664(e) (Court resolves restitution disputes by preponderance of the evidence standard); *Razo-Leora*, 961 F.2d at 1146 (“The prosecution has the burden of demonstrating the amount of loss sustained by the victim and proving this loss by a preponderance of the evidence.”); *see also* Doc. #839 (government’s summary of trial evidence presented against each defendant). The government therefore asks this Court to hold defendants Calabrese Sr., James Marcello, Joseph Lombardo, Paul Schiro, and Anthony Doyle jointly and severally liable for restitution in the amount of \$3,909,166.30. *See* Government Exhibit B at 7.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned Assistant United States Attorney hereby certifies that the following document:

**MOTION FOR IMPOSITION OF RESTITUTION**

was served on October 15, 2008, in accordance with FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing pursuant to the district court's Electronic Case Filing (ECF) system as to ECF filers.

Respectfully submitted,

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