

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

FATMIR MUSTAFARAJ

CRIMINAL ACTION
NO. 13-421-2

PAPPERT, J.

November 25, 2019

MEMORANDUM

Fatmir Mustafaraj went to trial for Racketeer Influenced and Corrupt Organizations Act (“RICO”) violations and other crimes in connection with a loan sharking and illegal gambling operation.¹ The jury found him guilty on twelve counts, including Count 1 alleging racketeering conspiracy in violation of RICO, 18 U.S.C. § 1962(d). (ECF No. 368.) After the trial, Judge Yohn entered a preliminary order of forfeiture holding Mustafaraj jointly and severally liable with his co-defendants for more than \$5 million of the RICO proceeds (ECF No. 414) and sentenced him to 147 months of imprisonment. (ECF No. 486.) Mustafaraj and co-defendant Ylli Gjeli appealed.

The Third Circuit affirmed their convictions and sentences but remanded for reconsideration of the forfeiture orders, citing the Supreme Court’s intervening decision in *Honeycutt v. United States*. *United States v. Gjeli*, 867 F.3d 418, 427-28 (3d Cir. 2017), *as amended* (Aug. 23, 2017) (citing 137 S. Ct. 1626, 1633 (2017)). *Honeycutt*

¹ Three other Defendants were tried with Mustafaraj. Five co-defendants entered guilty pleas prior to trial.

foreclosed joint and several liability under 21 U.S.C. § 853, 137 S. Ct. at 1630, and in *Gjeli*, the Third Circuit held that joint and several liability is unavailable under the RICO forfeiture provision, 18 U.S.C. § 1963, because it is “substantially the same as the one under consideration in *Honeycutt*.” *Gjeli*, 867 F.3d at 427-28. Accordingly, RICO “forfeiture is ‘limited to property each defendant himself actually acquired as a result of the crime.’” *Gjeli*, 867 F.3d at 428 (quoting *Honeycutt*, 137 S. Ct. at 1635.).

Because the initial preliminary order of judgment and forfeiture against Mustafaraj held him jointly and severally liable with his co-conspirators, the Government moves to amend it. This time, the Government pursues forfeiture only “pursuant to 18 U.S.C. Section 1963 based on Mustafaraj’s racketeering conspiracy conviction (Count 1).”² (Gov’t Mot., ECF No. 679 at 10.) He opposes the motion. (Def.’s Resp., ECF No. 685.) At the Court’s direction (ECF No. 706), the Government filed a supplemental brief. (Gov’t Supplemental Mem., ECF No. 711.) The Court makes the following findings of fact and conclusions of law and grants the Government’s motion in part and denies it in part.

I

RICO aims to “remove the profit from organized crime by separating the racketeer from his dishonest gains.” *Russello v. United States*, 464 U.S. 16, 28 (1983). A RICO “forfeiture claim contains at least two elements: a violation of [18 U.S.C.] § 1962 and a relationship between that violation and the property alleged to be forfeitable.” *United States v. Pelullo*, 14 F.3d 881, 901-02 (3d Cir. 1994). “The

² The Government has also moved to amend the judgment and preliminary order of forfeiture for *Gjeli*. (ECF No. 678.) The Court considers that motion in a separate opinion.

Government must prove the relationship between the property interest to be forfeited and the RICO violations beyond a reasonable doubt.”³ *United States v. Neff*, --- Fed. App’x ----, No. 18-2282, 2019 WL 4235218, at *8 (3d Cir. Sept. 6, 2019) (citing *Pelullo*, 14 F.3d at 906).

[T]here are good reasons for employing the reasonable doubt standard in the RICO context The RICO forfeiture provision is . . . far reaching, requiring the district court to order forfeiture of “any interest in,” “security of,” “claim against,” or “property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted or participated in the conduct of in violation of section 1962.”

United States v. Voight, 89 F.3d 1050, 1083-84 (3d Cir. 1996) (citing 28 U.S.C. § 1963(a)(3)). “[S]ince the identity and extent of property subject to forfeiture will not have been addressed in the course of proving the substantive RICO charge, a reasonable doubt burden of persuasion ensures greater accuracy in determining the scope of property subject to forfeiture.” *Id.* Following a trial, the Government may rely on the evidence already in the record for the forfeiture determination. Fed. R. Crim P. 32.2(b)(1)(B).⁴

II

The Government seeks a personal forfeiture money judgment against Mustafaraj pursuant to 18 U.S.C. § 1963(a)(3) in the amount of \$105,656 for “the illegal proceeds that Mustafaraj obtained as a result of the racketeering conspiracy, extortion, and

³ If the Government sought forfeiture for Mustafaraj’s other offenses – pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) for Counts 14, 15, 16, 22 and 24 and pursuant to 28 U.S.C. § 2461(c) for Count 25 – its burden would be the less stringent preponderance of the evidence. See *United States v. Sandini*, 816 F.2d 869, 877 (3d Cir. 1987).

⁴ Neither party requested an evidentiary hearing on the forfeiture issues. Noting this in its motion, the Government states that “the trial record is extensive and provides sufficient proof for the forfeiture” it seeks. (Gov’t Mot. at 11.)

illegal gambling business that he participated in, and for which he was convicted.” (Gov’t Mot. at 8, ECF No. 679) (emphasis omitted.) The total judgment sought includes \$2,456 representing the proceeds Mustafaraj received from his involvement in the RICO gambling operation. (Gov’t Mot. at 15-16.) Mustafaraj does not contest forfeiture of this amount. (Def.’s Resp. at 13.) In addition, the Government contends Mustafaraj should forfeit \$103,200 as the amount he earned from his involvement in the loan sharking operation. (Gov’t Mot. at 15-16.) Although Mustafaraj concedes that testimony “established that [he] acted as the ‘muscle’ of [Gjeli’s loan sharking] operation,” (Def.’s Resp. at 9), he contends he cannot be ordered to forfeit this amount because “[t]here is no evidence that money was exchanged when Mr. Mustafaraj acted as an enforcer and thus no way to calculate if and how Mr. Mustafaraj stood to benefit from this role.” (Def.’s Resp. at 9.)

The Government asserts that Mustafaraj was a member of Gjeli’s organization from 2007 through his arrest in August 2014 – or for approximately 344 weeks. (Gov’t Mot. at 15.) It maintains that Mustafaraj received \$300 for each week’s loan collections, “regardless of the amount collected in that particular week.” (*Id.*) Accordingly, it seeks a forfeiture money judgment for \$300 x 344 weeks, or \$103,200.

A.

RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO’s object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain.

United States v. Lizza Indus., Inc., 775 F.2d 492, 498 (2d Cir. 1985); *see also United States v. Roberts*, 660 F.3d 149, 166 (2d Cir. 2011) (holding “the law does not demand

mathematical exactitude in calculating the proceeds subject to forfeiture”); *United States v. King*, 231 F. Supp. 3d 872, 894 (W.D. Okla. 2017) (“[T]o-the-penny precision—within the general confines of a result produced by a reasonably rigorous analysis of the evidence— . . . is rarely possible and, if required, would hollow out much of the forfeiture legislation.”) However, the Government’s attempt to extrapolate an amount that Mustafaraj “himself actually acquired” from the loan sharking operation falls short.

Even if there is enough evidence to support a finding that Mustafaraj “himself actually acquired” some amount of proceeds from the loan sharking operation for a total of 344 weeks, the four loan collection sheets submitted as proof that he earned \$300 each week for loan collection (Gov’t Mem. Ex. C) are not enough to meet the Government’s burden to prove, beyond a reasonable doubt, that he “actually acquired” \$103,200. The Government argues that the “collection sheets showed that [Mustafaraj] received \$300 for each week’s collections, regardless of the amount collected in that particular week,” and that the four collection sheets alone permit the Court to “properly infer that [he] received a salary of \$300 per week for his loan collection work.” (Gov’t Mem. at 15.) Mustafaraj argues that the collection sheets are not reliable evidence to support the government’s proposed extrapolation. (Def.’s Resp. at 12.) Mustafaraj has the better argument.

An indispensable premise for any financial extrapolation is the proposition that the sample data set proffered as the jumping off-point for the extrapolation consists of transactions *known* to have the characteristic . . . that the government would have the court attribute to the dollar amount resulting from the proposed extrapolation.

King, 231 F. Supp. 3d at 894 (emphasis in original). At trial, Brian Davis, a forensic

examiner from the FBI's Racketeering Records Laboratory, testified that with respect to the first of the cited collection sheets (Gov't Mem. Ex. C at 1-2), he "did not identify who this record was associated with." (Tr. 4178.) The collection sheet, which reflected a date range of 21 to 27, but no month, reflected "an offset of \$300 with a name there" that "looks like it might be Tom or Tony," Tony being Mustafaraj's nickname. (*Id.*) Davis explained that the offset was "consistent with offsets that would be of . . . payments that are paid. . . to the collector," but cautioned that he could not "identify exactly what everything means here in this particular case" because the collector did not identify himself on the sheet, and "there's also two offsets . . . instead of one." (Tr. 4179.) Davis said he was "not able to specify" what each of the offset "numbers means." (*Id.*) His testimony casts doubt on whether the first collection sheet can be used as proof of Mustafaraj's earnings. Similarly, the other three collection sheets lack the name of a collector, bear apparent dates not connected to any particular month, and are written in handwriting that creates doubt as to whether a listed \$300 offset is attributed to someone named Tom or Tony. Moreover, the Government cites no other evidence that would permit the Court to conclude that the sheets substantiate the Government's claim that Mustafaraj earned \$300 a week. The Government's extrapolation is unsupported by the evidence, precluding the Court from being able to find that Mustafaraj "himself actually acquired" \$103,200 in proceeds from the RICO loan operation.

III

In addition to the forfeiture money judgment, the Government seeks direct forfeiture of the following specific property: \$112,242 in United States currency seized

by law enforcement in August 2013; one Smith & Wesson, 638 Model, .38 special revolver bearing serial number CEP9363, seized from a large safe located in the closet of the Lion Bar basement; and one yellow 2006 Hummer, Model H2; bearing Pennsylvania license plate GDK2140, and titled to Ylli Gjeli (Title No. 62432160).⁵ (Gov't Mot. at 18.) Mustafaraj does not challenge the Government's motion with respect to any of these items. (*See* Def.'s Resp.)

Absent a challenge from Mustafaraj, the Court will enter an order requiring forfeiture of the U.S. currency and the revolver.⁶ However, the Court will not enter an order of forfeiture against Mustafaraj with respect to the Hummer because it is titled to his co-defendant Gjeli. "RICO forfeiture is an *in personam* sanction against the individual, not an *in rem* action; so § 1963 forfeiture reaches only the criminal defendant's interest in the property." *U.S. v. Totaro*, 345 F.3d 989 (8th Cir. 2003); *see also Pelullo*, 14 F.3d at 902 ("Section 1963(a) is a criminal forfeiture mechanism, enacted as a provision for *in personam* criminal penalties."); *cf. United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) ("[T]he scope of *in personam* judgment in forfeiture is more limited than a general judgment *in personam*").

⁵ The RICO forfeiture statute provides that

[w]hoever violates any provision of section 1962 . . . shall forfeit to the United States, irrespective of State law. . . any property. . . affording a source of influence over [] any enterprise which the person has established, operated, controlled, conducted, or participated in the contract of, in violation of section 1962.

18 U.S.C. § 1963(a)(2)(D).

⁶ The Government concedes that it "does not appear that any of these funds belonged to Mustafaraj;" it seeks forfeiture to "extinguish any claim that Mustafaraj may attempt to make in the future to these funds." (Gov't Mot. at 20 n.7.) Because Mustafaraj does not challenge the Government's motion with respect to the seized currency, the Court will require its forfeiture.

IV

For the reasons stated above, Mustafaraj will be required to forfeit \$2,456 as proceeds of the RICO conspiracy charged in Count 1 pursuant to 18 U.S.C. § 1963(a)(3). Mustafaraj also will be directed to forfeit the following property: \$112,242 in United States currency seized by law enforcement in August 2013 and one Smith & Wesson, 638 Model, .38 special revolver bearing serial number CEP9363, seized from a large safe located in the closet of the Lion Bar basement.

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

FATMIR MUSTAFARAJ

CRIMINAL ACTION
NO. 13-421-2

AMENDED JUDGMENT AND PRELIMINARY ORDER OF FORFEITURE

AND NOW, this 25th day of November, 2019, upon consideration of the Government's motion pursuant to Federal Rule of Criminal Procedure 32.2(b)(2) requesting an Amended Judgment and Preliminary Order of Forfeiture as to Defendant Fatmir Mustafaraj (ECF No. 679), Defendant's response in opposition (ECF No. 685), the Government's supplemental memorandum in support of its motion (ECF No. 711) and relevant testimony and exhibits, and for the reasons set forth in the accompanying memorandum, it is **ORDERED** that the motion is **GRANTED in part** and **DENIED in part** and the April 6, 2015 Preliminary Order of Judgment and Forfeiture (ECF No. 414) is **AMENDED** to reflect the following:

1. As a result of defendant Fatmir Mustafaraj being found guilty of Count 1¹ of the indictment, charging racketeering conspiracy in violation of Title 18, United States Code, Section 1962(d), for which the Government sought forfeiture, Mustafaraj is required to forfeit to the United States any interest acquired or maintained in violation of section 1962; any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which Mustafaraj

¹ In its motion, the Government asserts that it seeks forfeiture only pursuant to this Count. (Gov't Mot. at 10.)

has established, operated, controlled, or participated in the conduct of, in violation of Section 1962; and any property constituting or derived from, any proceeds obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962, pursuant to Title 18, United States Code, Section 1963(a).

2. Based on the record, and for the reasons set forth in the accompanying memorandum, the Court finds, beyond a reasonable doubt, that the following property is subject to forfeiture pursuant to 18 U.S.C. Section 1963 as a result of the illegal acts alleged in Count 1 for which Mustafaraj was found guilty:

- a. \$2,456, representing the proceeds Mustafaraj received from his involvement in the RICO gambling operation;
- b. \$112,242 in United States currency seized by law enforcement in August 2013;
- c. One Smith and Wesson, 638 Model, .38 special revolver, bearing serial number CEP9363, seized from a large safe located in the closet of Lion Bar Basement.

3. A personal forfeiture money judgment in the amount of \$2,456 is hereby entered against Defendant Fatmir Mustafaraj.

4. Any property of Mustafaraj located and forfeited by the Government, after any third-party claims to the property have been resolved, shall reduce Mustafaraj's outstanding liability on the personal forfeiture money judgment.

5. Upon entry of this Order, the Attorney General or a designee, is authorized to conduct any discovery necessary to identify, locate, or dispose of property subject to this Order pursuant to Federal Rule of Criminal Procedure 32.2(b)(3).

6. Pursuant to Federal Rule of Criminal Procedure 32.2(b)(6) and Title 21, United States Code, Section 853(n)(1), the United States shall place on an official

Government forfeiture website (www.forfeiture.gov) for 30 consecutive days, notice of the Government's intent to dispose of the property in such manner as the Attorney General may direct and notice that any person, other than Mustafaraj, having or claiming a legal interest in any of the property subject to this Order must file a petition with the Court within 30 days of the receipt of actual notice or within 30 days after the last day of publication on the official Government forfeiture website, whichever is earlier.

7. The United States, to the extent practicable, also shall provide direct written notice to any person known to have alleged an interest in the property that is subject to this Amended Judgment and Preliminary Order of Forfeiture, or to their attorney, if they are represented, as a substitute for published notice as to those persons so notified. If direct written notice is provided, any person having or claiming a legal interest in any of the property subject to this Order must file a petition with the Court within 30 days after the notice is received.

8. Any person other than Mustafaraj asserting a legal interest in the subject property may, within the time periods described above for notice by publication and for direct written notice, petition the Court for a hearing without a jury to adjudicate the validity of his or her alleged interest in the subject property and for further amendment of the Order of Forfeiture pursuant to Title 21, United States Code, Section 853(n)(6).

9. Any such petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title or interest in each of the forfeited properties and any additional facts supporting the petitioner's claim, and the relief sought.

10. After the disposition of any motion filed under Federal Rule of Criminal Procedure 32.2(c)(1)(A), and before a hearing on the petition, discovery may be conducted in accordance with the Federal Rules of Civil Procedure upon a showing that such discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56. *See* Fed. R. Crim. P. 32.2(c)(1)(B).

11. The United States shall have clear title to the subject property following the Court's disposition of any third-party interests.²

12. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Federal Rule of Criminal Procedure 32.2(e).

13. The Clerk of Court shall deliver a certified copy of this Amended Judgment and Preliminary Order of Forfeiture to the Federal Bureau of Investigation, the United States Marshals Service, and counsel for the parties.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

² The Government shall file a motion seeking a final forfeiture order following the disposition of any third-party claims or, if there are none, following the expiration of the time permitted for the filing of such claims. *See* Fed. R. Crim. P. 32.2(c)(2); *see also* *United States v. Bennett*, 423 F.3d. 271, 276 (3d Cir. 2005) (holding that “a ‘final order of forfeiture’ that is not part of the judgment of sentence has no effect”).