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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2014

ARGUED: OCTOBER 24, 2014

DECIDED: APRIL 16, 2015

Nos. 13-2543-cr(L), 13-4268-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

v.

ARNOLD MAURICE BENGIS, JEFFREY NOLL, DAVID BENGIS,
Defendants-Appellants,
GRANT BERMAN, SHAUN LEVY,
*Defendants.**

Appeal from the United States District Court for the Southern
District of New York.

No. 1:03-cr-00308 – Lewis A. Kaplan, *Judge.*

Before: WALKER, CABRANES, and CARNEY, *Circuit Judges.*

* The Clerk of Court is directed to amend the official caption to conform with the above.

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Arnold Bengis and Jeffrey Noll pleaded guilty to conspiracy to commit smuggling and violate the Lacey Act, which prohibits trade in illegally taken fish and wildlife, and to substantive violations of the Lacey Act. David Bengis pleaded guilty to conspiracy to violate the Lacey Act. The district court (Lewis A. Kaplan, *J.*) entered a restitution order requiring Arnold Bengis, Noll, and David Bengis (jointly, "defendants") to pay \$22,446,720 to South Africa. Defendants appeal the restitution order on a variety of grounds. In this opinion, we address only: (1) the government's contention that the appeal should be dismissed; (2) the defendants' contention that the restitution order violated their Sixth Amendment rights; and (3) David Bengis's contention that he should not be held liable for the entire restitution amount. We affirm the district court's judgment except as to the extent of David Bengis's liability and we remand the restitution order entered against David Bengis for further proceedings. Defendants' remaining arguments are resolved in a summary order filed simultaneously with this opinion.

MARK A. BERUBE, Mishcon de Reya New York
LLP, New York, NY, *for Defendants-Appellants.*

ERIC M. CREIZMAN, Creizman PLLC, New York,
NY, *for Defendant-Appellant David Bengis.*

1 JARED LENOW (Brent S. Wible, *on the brief*),
2 Assistant United States Attorneys, *for* Preet
3 Bharara, United States Attorney for the Southern
4 District of New York, New York, NY, *for Appellee*.

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7 JOHN M. WALKER, JR., *Circuit Judge*:

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9 commit smuggling and violate the Lacey Act, which prohibits trade
10 in illegally taken fish and wildlife, and to substantive violations of
11 the Lacey Act. David Bengis pleaded guilty to conspiracy to violate
12 the Lacey Act. The district court (Lewis A. Kaplan, *J.*) entered a
13 restitution order requiring Arnold Bengis, Noll, and David Bengis
14 (jointly, “defendants”) to pay \$22,446,720 to South Africa.
15 Defendants appeal the restitution order on a variety of grounds. In
16 this opinion, we address only: (1) the government’s contention that
17 the appeal should be dismissed; (2) the defendants’ contention that
18 the restitution order violated their Sixth Amendment rights; and (3)
19 David Bengis’s contention that he should not be held liable for the
20 entire restitution amount. We affirm the district court’s judgment
21 except as to the extent of David Bengis’s liability and we remand the
22 restitution order entered against David Bengis for further
23 proceedings. Defendants’ remaining arguments are resolved in a
24 summary order filed simultaneously with this opinion.

BACKGROUND

1
2 From 1987 to 2001, the defendants engaged in an elaborate
3 scheme to harvest large quantities of South Coast and West Coast
4 rock lobsters from South African waters for export to the United
5 States in violation of both South African and U.S. law. At all relevant
6 times, the South African Department of Marine and Coastal
7 Management maintained fishing season quotas and issued
8 harvesting and exporting permits for rock lobsters. Defendants,
9 through their company, Hout Bay Fishing Industries Ltd. (“Hout
10 Bay”), harvested rock lobsters in amounts that exceeded the
11 authorized quotas and exported those lobsters to the United States.

12 In May 2001, South Africa seized a container of unlawfully
13 harvested lobsters. South Africa declined to prosecute the individual
14 defendants because it determined they were beyond the reach of
15 South African authorities, but it charged Hout Bay with overfishing
16 of South and West Coast Rock Lobsters in violation of South Africa’s
17 Marine Living Resources Act 18 of 1998. Arnold Bengis returned to
18 South Africa and pleaded guilty on behalf of Hout Bay.

19 South Africa cooperated with a parallel investigation
20 conducted by the United States. The individual defendants were
21 eventually indicted in the United States District Court for the
22 Southern District of New York, and, on March 2, 2004, Arnold
23 Bengis and Jeffrey Noll pleaded guilty to: (i) violations of the Lacey

1 Act, 16 U.S.C. § 3372(a)(2)(A), which makes it a crime to, inter alia,
2 import fish taken in violation of foreign law; and (ii) conspiracy to
3 violate the Lacey Act and to commit smuggling, 18 U.S.C. § 545, in
4 violation of 18 U.S.C. § 371. On April 2, 2004, David Bengis pleaded
5 guilty to a misdemeanor count of conspiracy to violate the Lacey
6 Act. The defendants were sentenced principally to terms of
7 imprisonment of 46 months (Arnold Bengis), 30 months (Jeffrey
8 Noll), and 12 months (David Bengis) and to a forfeiture order of
9 \$13,300,000 to the United States. Although the plea agreements
10 acknowledged that restitution was a further possibility, the district
11 court deferred addressing restitution.

12 The United States thereafter sought restitution on behalf of
13 South Africa. In support of its application for restitution, the United
14 States submitted a report prepared by the Ocean and Land Resource
15 Assessment Consultants (“OLRAC”) that calculated restitution
16 under two separate methods. The first method calculated the cost to
17 South Africa of restoring the rock lobster fishery to the level that
18 would have existed if the defendants had not engaged in
19 overharvesting (the “catch forfeit” method); restitution under this
20 method amounted to \$46,775,150. The second method calculated the
21 market value of the overharvested lobsters (the “market value”
22 method); restitution under this method amounted to \$61,932,630.

1 The district court denied the government's request for
2 restitution under both the Mandatory Victims Restitution Act of
3 1996 ("MVRA") and the Victim and Witness Protection Act of 1982
4 ("VWPA") because it concluded that South Africa was not a
5 "victim" of the defendants' offenses. We vacated these orders on the
6 basis that South Africa had a property interest in the illegally
7 harvested lobsters and was therefore a "victim" under both the
8 MVRA and VWPA. Because of South Africa's property interest in
9 the lobsters, we held that the MVRA governed the restitution award
10 to South Africa and remanded for calculation of the appropriate
11 restitution amount. *United States v. Bengis*, 631 F.3d 33, 42 (2d Cir.
12 2011), *cert. denied*, 131 S. Ct. 2911 (2011).

13 On remand, the district court referred the government's
14 request for restitution to Magistrate Judge Andrew J. Peck. Using the
15 market value method, the magistrate judge recommended a
16 restitution award of \$54,883,550, which represented the market
17 value of the illegally harvested lobster offset by the \$7,049,080 the
18 defendants had already paid to South Africa.

19 On March 11, 2013, the government moved to restrain the
20 defendants from transferring their assets held in three trusts at the
21 SG Hambros Bank located in the Channel Islands in the United
22 Kingdom and to direct the defendants to deposit \$54,883,550 with
23 the Registry of the Court. On March 22, 2013, the Bengises made

1 substantial changes to the three trusts. Specifically, David Bengis
2 was removed as a beneficiary of two of the trusts, Arnold Bengis
3 resigned as protector, and the Bengises appointed their family
4 lawyer, Basil De Sousa, as the new protector.

5 On March 25, 2013, the district court entered an interim order
6 restraining transfer or disposition of the assets held at SG Hambros
7 except to the extent those assets exceeded \$54,883,550. On June 14,
8 2013, the district court adopted the magistrate judge's recommended
9 restitution order in part. The district court found that the
10 government only had shown that the West Coast (and not the South
11 Coast) rock lobsters were intended for the United States and that the
12 restitution order should be limited to the market value of those
13 lobsters. Therefore, the district court entered a restitution order of
14 \$22,446,720 and modified its restraining order to reflect the reduced
15 amount of restitution.

16 Meanwhile, on June 10, 2013, before the restraining order was
17 modified, the trustees of the SG Hambros trusts requested the bank
18 to transfer the trusts' assets to a Swiss bank. Relying on the district
19 court's restraining order, SG Hambros refused to comply with this
20 request. The trustees then sued SG Hambros in the Channel Islands
21 seeking to compel the transfer.

22 On October 17, 2013, the district court ordered the defendants
23 and "all persons in active concert" with them to deposit funds up to

1 the restitution amount with the Clerk of Court (the “deposit order”)
2 and enjoined defendants and “all persons in active concert” with
3 them from encumbering or transferring to any entity other than the
4 Clerk of Court any property in which the defendants held an
5 interest. Defendants’ 2014 App’x 200. The defendants timely
6 appealed both the underlying restitution award and the deposit
7 order.

8 DISCUSSION

9 We review a district court’s order of restitution and deposit
10 order for abuse of discretion. *See United States v. Ojeikere*, 545 F.3d
11 220, 222 (2d Cir. 2008). The district court’s legal conclusions are
12 reviewed *de novo*, and its factual findings for clear error. *United*
13 *States v. Amato*, 540 F.3d 153, 158 (2d Cir. 2008).

14 I. Discretionary Dismissal of Appeal

15 Before turning to the merits of defendants’ appeal, we address
16 the government’s contention that the appeal should be dismissed
17 because the defendants tried to evade the court’s power to execute
18 its mandate. In support, the government points to the defendants’
19 refusal to comply with the deposit order and the trustee’s suit
20 seeking to compel a transfer of the SG Hambros assets to a Swiss
21 bank.

22 The government relies on *Stern v. United States*, 249 F.2d 720
23 (2d Cir. 1957). In *Stern*, we entered a provisional order dismissing an

1 appeal because the defendants showed “a determined effort to
2 deprive the court of power to execute its mandate.” *Id.* at 722.
3 Specifically, the defendants had liquidated their assets, abandoned
4 their U.S. citizenship, and fled to Czechoslovakia in a “successful
5 attempt to render the court powerless to enforce its decree.” *Id.*

6 In this case the actions of the defendants are more benign. The
7 defendants, who have served their sentences, have continued to
8 submit to the jurisdiction of the district court, have not renounced
9 their U.S. citizenship, and are in no sense fugitives. As the
10 government conceded at oral argument, the defendants have
11 continued to appear at court proceedings when required. In
12 addition, the defendants’ efforts to transfer assets from SG Hambros
13 to the Swiss bank were unsuccessful. Therefore, although we are
14 troubled by the defendants’ apparent efforts to place their assets
15 beyond the court’s reach rather than comply with the deposit order,
16 the SG Hambros assets appear to remain available to satisfy the
17 restitution award and the district court’s contempt power reaches
18 the defendants. Finally and significantly, the government has not
19 sought to hold the defendants in contempt. In these circumstances,
20 we decline to exercise our discretion to deny the defendants
21 appellate review. *See In re Feit & Drexler, Inc.*, 760 F.2d 406, 414 (2d
22 Cir. 1985) (declining to dismiss appeal where the defendant

1 remained subject to the court's jurisdiction and the contempt process
2 was available).

3 **II. Defendants' *Apprendi* Challenge to the Amount of**
4 **Restitution**

5 Turning to the merits of the defendants' attack on the
6 restitution order, we first address defendants' contention that the
7 order violated their Sixth Amendment protections under *Apprendi v.*
8 *New Jersey*, 530 U.S. 466 (2000). Under the sentencing scheme at issue
9 in *Apprendi*, a defendant found guilty by a jury beyond a reasonable
10 doubt for possession of a prohibited weapon was guilty of a second-
11 degree offense. If in addition, however, a judge found by a
12 preponderance of the evidence that the defendant's purpose for
13 unlawfully possessing the weapon was to intimidate his victim on
14 the basis of a particular characteristic the victim possessed, the judge
15 could impose punishment identical to that which New Jersey
16 provided for crimes of the first degree. *Id.* at 491. The effect of this
17 enhancement was to increase the maximum penalty the defendant
18 faced from 10 years to 20 years. *Id.* at 495. The Supreme Court held
19 that this scheme violated the defendant's Sixth Amendment rights
20 because "[o]ther than the fact of a prior conviction, any fact that
21 increases the penalty for a crime beyond the prescribed statutory
22 maximum must be submitted to a jury, and proved beyond a
23 reasonable doubt." *Id.* at 490.

1 In this case, the restitution amount reflects South Africa's loss,
2 which was calculated based on the market value of the illegally
3 harvested lobsters. The defendants' plea agreements did not specify
4 the value of the rock lobsters they illegally imported. Defendants
5 therefore argue that, under *Apprendi*, the restitution amount cannot
6 be based on the value of the lobsters because that fact was neither
7 admitted by the defendants nor found by a jury beyond a reasonable
8 doubt.

9 This argument is unavailing because, unlike the terms of
10 imprisonment at issue in *Apprendi*, the MVRA and VWPA specify no
11 maximum restitution amount. Therefore, a judge cannot find facts
12 that would cause the amount to exceed a prescribed statutory
13 maximum. *See United States v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006)
14 (holding that restitution is an indeterminate system that "fixes no
15 range of permissible restitutionary amounts and sets no maximum
16 amount . . . that the court may order").

17 Defendants also argue that the district court's calculation of
18 South Africa's loss required it to engage in the same type of
19 factfinding as the district court that imposed the fine held to violate
20 *Apprendi* in *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012).
21 In that case, the jury found that the defendant had violated an
22 environmental statute, but it was not asked to determine the precise
23 duration of the violation. The district court nevertheless determined

1 that the defendant had violated the statute for 762 days and assessed
2 an \$18 million fine based on a statutory maximum of \$50,000 per
3 day. *Id.* at 2349. The Court held that, under *Apprendi*, the district
4 court's sentence could not exceed the \$50,000 statutory maximum
5 fine because it relied on facts that were not reflected in the jury
6 verdict or admitted by the defendant. *Id.* at 2350.

7 *Southern Union* is inapposite. In *Southern Union*, but for the
8 district court's finding that the defendant had violated the statute for
9 762 days, the maximum fine the defendant would have faced was
10 \$50,000. *Id.* at 2349. Thus, the district court imposed the fine above a
11 statutory maximum. In this case there never was a determinate
12 maximum restitution amount that defendants faced; under the
13 MVRA, restitution is always determined with respect to the value of
14 property that is lost. *See* 18 U.S.C. § 3663A(b). The district court
15 could not, and did not, exceed a maximum that did not exist. *See*
16 *Southern Union Co.*, 132 S. Ct. at 2353 ("Nor, *a fortiori*, could there be
17 an *Apprendi* violation where no maximum is prescribed.").
18 Therefore, any factfinding by the district court was not only
19 permissible under *Apprendi* but was required to determine the
20 appropriate amount of restitution under the MVRA.

21 Defendants' final argument is that restitution is similar to a
22 fine whose maximum is determined with reference to the victim's
23 loss. As defendants point out, the Court in *Southern Union*

1 referenced statutes in which the fine may be pegged to some factor
2 of actual loss. 132 S. Ct. at 2351 n.4 (citing, inter alia, 18 U.S.C.
3 § 3571(d), 18 U.S.C. § 645, and 18 U.S.C. § 201(b)). But each of those
4 statutes posits two alternative fine amounts: a determinate statutory
5 maximum and an amount based on the value of loss caused by the
6 defendant. *See, e.g.*, 18 U.S.C. § 3571 (prescribing maximum fines
7 based on the class of offense and “*alternative fines*” based on gain or
8 loss) (emphasis added).

9 The Court determined that *Apprendi* was implicated when the
10 district court chose to exercise its discretion to use an alternative
11 valuation that exceeded the statutory maximum based on facts not
12 found by the jury. *See Southern Union Co.*, 132 S. Ct. at 2351 (“[O]ur
13 decisions broadly prohibit judicial factfinding that increases
14 maximum criminal sentences, penalties, or punishments. . . .”
15 (internal quotation marks and alterations omitted)). In contrast,
16 restitution under the MVRA and VWPA has only one valuation—
17 the amount of the victim’s loss. There is no alternative maximum
18 penalty. In sum, where, as here, there is no determinate statutory
19 maximum that a district court can exceed, there is no range
20 prescribed by statute and thus there can be no *Apprendi* violation.

21 For these reasons, we adhere to our decision in *United States v.*
22 *Reifler* and join our sister circuits in concluding that judicial
23 factfinding to determine the appropriate amount of restitution under

1 a statute that does not prescribe a maximum does not implicate a
2 defendant's Sixth Amendment rights. *See United States v. Day*, 700
3 F.3d 713, 732 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2038 (2013); *United*
4 *States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013), *cert. denied*, 134 S.
5 Ct. 658 (2013); *see also United States v. Wolfe*, 701 F.3d 1206, 1217 (7th
6 Cir. 2012), *cert. denied*, 133 S. Ct. 2797 (2013) (finding that restitution
7 is not a criminal penalty). Therefore the district court did not abuse
8 its discretion by fixing the restitution amount at \$22,446,720.

9 **III. David Bengis's Liability for Restitution**

10 The district court ordered Arnold Bengis, Jeffrey Noll, and
11 David Bengis to "pay restitution to the Republic of South Africa,
12 jointly and severally, in the amount of \$22,446,720." Defendants'
13 2013 App'x 325. Separately from the other defendants, David Bengis
14 argues that, because he allocuted to misdemeanor involvement in a
15 conspiracy only from 1999 through August 1, 2001, the restitution
16 ordered against him must exclude losses caused by the acts of the
17 other defendants prior to 1999. The government responds that,
18 because the primary purpose of the MVRA is to make victims of
19 crime whole, the district court acted within its discretion by holding
20 David Bengis jointly and severally liable for the entire restitution
21 amount.

22 In general, "one who joins an existing conspiracy takes it as it
23 is, and is therefore held accountable for the prior conduct of co-

1 conspirators.” *United States v. Sansone*, 231 F.2d 887, 893 (2d Cir.
2 1956). In the context of sentencing for drug conspiracies, however,
3 we have held that “[t]he late-entering coconspirator should be
4 sentenced on the basis of the full quantity of narcotics distributed by
5 other members of the conspiracy only if, when he joined the
6 conspiracy, he could reasonably foresee the distributions of future
7 amounts, or *knew or reasonably should have known what the past*
8 *quantities were.*” *United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d
9 Cir. 1991) (emphasis added).

10 Restitution must be determined in a similar manner. *See*
11 *United States v. Boyd*, 222 F.3d 47, 51 (2d Cir. 2000) (per curiam)
12 (finding no plain error where the district court imposed a restitution
13 order holding the defendant “liable for the reasonably foreseeable
14 acts of all co-conspirators”). Thus, if David Bengis’s understanding
15 of the scope of the conspiracy he joined in 1999 was such that he
16 knew or reasonably should have known about some or all of the
17 conspiracy’s past imports, his restitution order should encompass
18 those amounts. However, if David Bengis joined the conspiracy
19 without reasonable knowledge of his co-conspirators’ past activities,
20 then he should not be held liable for the loss caused by those
21 activities. Of course, he would remain jointly and severally liable for
22 the losses caused by the conspiracy after he joined it.

1 On the record before us, we cannot determine whether David
2 Bengis, when he joined the conspiracy in 1999, understood the scope
3 of the conspiracy, such that he knew or should have known the
4 extent of its adverse economic impact. Accordingly, we remand this
5 matter to the district court in accordance with the procedures we set
6 forth in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), to
7 determine whether David Bengis knew or reasonably should have
8 known the scope and impact of any or all of the past activities of the
9 conspiracy he joined.

10 On remand, if the district court finds that a preponderance of
11 the evidence shows that David Bengis knew or should have known
12 of the scope and impact of the conspiracy prior to joining it, then the
13 restitution order that has been entered against him may stand. *See*
14 *United States v. Martinez*, 987 F.2d 920, 926 (2d Cir. 1993)
15 (preponderance of the evidence standard applies to determination of
16 whether defendant reasonably should have known the quantities of
17 drugs sold by the conspiracy). If the district court determines,
18 however, that the full scope and impact of the past activities of the
19 conspiracy would not have been reasonably known to this
20 defendant, then the district court should vacate the judgment and
21 enter a new order reflecting the appropriate amount of restitution
22 for which David Bengis is liable. This amount should include the
23 amount of losses that occurred after David Bengis joined the

1 conspiracy and may include any amounts of prior losses of which he
2 would have been reasonably aware. In the interest of judicial
3 economy, this panel will retain jurisdiction over any subsequent
4 appeal from the district court; either party may notify the Clerk of a
5 renewed appeal within fourteen days of the district court's decision.
6 *See Jacobson*, 15 F.3d at 22.

7 We have considered and find to be without merit the
8 defendants' other arguments, including that (1) the district court
9 abused its discretion by relying on the OLRAC Report and Ray
10 Declaration in determining the appropriate amount of restitution; (2)
11 South Africa was not a "victim" of David Bengis's offense; and (3)
12 the district court abused its discretion by entering the deposit order
13 against the defendants. The disposition of these arguments is set
14 forth in a summary order filed simultaneously with this opinion.

15 CONCLUSION

16 For the foregoing reasons, the judgment is AFFIRMED in part,
17 VACATED in part, and REMANDED for further proceedings
18 consistent with this opinion.