IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8260
No. 91-8261
No. 91-8262

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

VERSUS

CHRIS A. CUMMINGS,
LAWRENCE M. BOWER, and
GEORGE WALLACE,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(EP-90-CR-318 (B)(2), EP-90-CR-318(B)(3) &
EP-90-CR-318(B)(4))

(February 6, 1995)

Before HIGGINBOTHAM, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Chris A. Cummings, Lawrence M. Bower, and George Wallace appeal their sentences imposed following pleas of guilty. Concluding that the district court did not err, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Defendants pled guilty to submitting false statements to Western Bank in El Paso, Texas, for the purpose of influencing the bank's decision to extend credit, in violation of 18 U.S.C. § 1014. Defendants, along with Barbara Chaney, originally were indicted in 1990 for various instances of bank fraud. Each defendant pled guilty to one of the ten counts in the indictment and was sentenced to two years' imprisonment, $1,926,681 in restitution, five years' supervised release, and a $50 special assessment. The amount of restitution later was reduced to $1,091,285.[1]

The defendants timely appealed their original sentence. They alleged that the restitution amount was not reasonably related to the offense of conviction and that the district court had erred in failing to enter findings that specified the relationship between the sentence and the loss that gave rise to it. The government agreed with the latter claim and filed a motion to remand for restitution findings.

The government's motion was granted by this court. The district court entered findings of fact and conclusions of law in January 1992 in accordance with the remand. The defendants then filed a motion for a second remand on the ground that the findings were issued without prior notice or a hearing. We remanded again, with an order that an evidentiary hearing be held for the purpose of establishing the legal basis for the previous restitution award.

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[1] For a full discussion of the details of the scheme in this case, see United States v. Chaney, 964 F.2d 437 (5th Cir. 1992).

The government's conduct at this hearing, which took place in October 1993, and the restitution award itself, are the subjects of this appeal.

II.

Defendants' first claim is that the government violated the express terms of the plea agreements at the evidentiary hearing. The provision in question states that the United States, in exchange for the guilty plea, agrees, among other things, to:

> Refrain from commenting on or recommending any amount of restitution to be made, if any; but, rather leave the determination of restitution entirely to the Court if the Court so chooses to impose it.

Whether the government breached the agreement is a question of law. United States v. Valencia, 985 F.2d 758, 760 (5th Cir. 1993). Defendant must prove by a preponderance of the evidence the underlying facts that establish a breach. United States v. Watson, 988 F.2d 544, 548 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994). The important question is "whether the government's conduct is consistent with the parties' reasonable understanding of the agreement." Valencia, 985 F.2d at 761. Defendants now ask that the district court specifically enforce the plea agreement by forbidding the government from commenting on the issue of restitution.

The government might conceivably have "commented" on restitution in two ways. The first was when the government responded to the defendants' arguments, made in a FED. R. CRIM. P. 35 motion after the original sentence was pronounced, that no legal basis for

restitution existed. The government argued that the facts of the case supported the court's restitution order. Second, at the evidentiary hearing that was called to establish a legal basis for the restitution award, the government called an FBI agent to supply testimony to support the court's restitution ruling.

Defendants argue that by virtue of these instances, the government has "taken a position" on restitution, in violation of the plea agreement. The reasonable understanding of the agreement, however, was not breached. The specific language of the provision prohibits "commenting on" or "recommending" any amount of restitution to be made, "if any." The next clause indicates, instead, that the "determination" of restitution is left entirely to the court. It seems plain that the agreement was meant to prohibit the government from suggesting to the court that restitution be ordered and that a certain amount be compelled.

The government did not make a restitution recommendation at the sentencing. The court, on its own, determined that restitution should be made. The later "comments" by the government were intended to support, against attack by the defendants, the court's prior determination of a restitution amount. The government never made an independent suggestion that restitution be made with respect to these defendants.

The court chose to impose the restitution and selected the amount itself. The later government evidence offered to support the validity of the order did not violate the plea agreement provision.

III.

The second issue on appeal is the defendants' challenge to the amount of the restitution assessed. They argue that the court's sentence is contrary to Hughey v. United States, 495 U.S. 411 (1990). According to Hughey, restitution under the Victim and Witness Protection Act of 1982 ("VWPA") is limited to losses caused by the conduct underlying the offense of conviction. Id. at 418.

The defendant in Hughey pled guilty to one count of credit card fraud but was ordered to pay restitution for losses relating to twenty-one other instances of credit card theft and unauthorized usage. The Court reversed and stated that the restitution should be limited to the specific losses that resulted from the offenses that formed the basis for the one count of fraudulent usage of a credit card to which the defendant pled guilty. Id. at 422.[2]

Defendants argue that the restitution order was excessive in light of Hughey. Under the plea agreement, the defendants agreed to admit to the following:

> On or about March 1, 1986, in the Western District of Texas, I submitted a false statement and report, a document entitled, "Statement of Financial Condition," to Western Bank, a financial institution whose accounts were insured by the Federal Deposit Insurance Corporation for

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[2] The holding of Hughey was limited by the Crime Control Act of 1990, as we indicated in United States v. Arnold, 947 F.2d 1236 (5th Cir. 1991). Judges can order restitution "in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3). In Arnold, the defendant pled guilty to only one count of an indictment but explicitly acknowledged that the crime of conviction included 14 other counts. The restitution amount was based upon all of the criminal conduct. 947 F.2d at 1238. In the present case, there is no indication in the plea agreement that the defendants acknowledged any guilty conduct other than the one count of making false statements. As a result, we are still bound by Hughey. The government says as much as well by stating, in its brief, that "Hughey applies."

> the purpose of influencing Western Bank, upon an application, advance, commitment and loan, and on any change, extension, renewal, deferment of action or otherwise on the same, knowing that the statement was false and fraudulent, in that it did not demonstrate a true and accurate depiction of my creditworthiness.

The district court ordered the defendants to pay restitution based upon a loan (the "Cassidy loan") that Western Bank had made to the defendants and that subsequently went unpaid.

The government alleges, and the district court found, that the Cassidy loan was renewed as a direct result of the false statements the defendants have admitted to making. Defendants argue that the Cassidy loan has nothing to do with the false statements and, therefore, that the court, bound by Hughey, could not order restitution based upon that loss.

The Cassidy loan was made to Richard T. Cassidy by Western Bank on June 27, 1985, for the benefit of the defendants and their related business entities. The court found that the land used to collateralize the loan was actually owned by the defendants as reflected on their own financial records. Moreover, the court found that the Cassidy loan was always the debt of the defendants, as reflected in the financial records that they submitted to their accountant.

The false statements to Western Bank occurred on March 1, 1986. The court found that one of the false statements was the defendants' failure to state their liability for the Cassidy loan. According to the district court, this failure to state liability resulted in the subsequent renewal and extension of the original Cassidy loan on May 14, 1986; June 27, 1986; and September 30,

1986. The court also found that had the true nature of the Cassidy loan been revealed, the bank would not have approved the extension of the note, as it would be violative of the bank's "loans to one borrower" policy and of federal and state regulations. Finally, the court concluded that the renewal and/or extension of the Cassidy loan resulted in a loss to the FDIC in the amount of $1,141,285.

We review factual findings for clear error. It is undisputed that defendants pled guilty to submitting false financial statements to Western Bank in March 1986. The Cassidy loan was nominally made to Cassidy, but there is no doubt that the defendants received the proceeds. They knew that they could not borrow money themselves from Western, because they would have exceeded the aggregate borrowing limits set by the Texas Department of Banking ("TDB").[3] Defendants, nevertheless, pledged to Cassidy that they would pay the loan amount. Defendants, in fact, reported this obligation to the IRS.

Western Bank was examined by the TDB and the FDIC in June 1986. It was not error for the district court to have determined that the Cassidy loan would not have been renewed had the defendants not filed false financial statements that did not indicate the true nature of the Cassidy obligation.

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[3] In the spring of 1985, Chaney realized that a bank examination was imminent and that defendants had already borrowed enough to exceed the legal limitations. As a result, she determined that certain outstanding loans owed to Western by defendants had to be restructured. Cassidy agreed to allow his name to be used but did not receive any of the proceeds. See Chaney, 964 F.2d at 441-42.

IV.

The district court made an independent determination of restitution without a recommendation from the government, which was plainly contemplated by the plea agreement. Moreover, the restitution was ordered for losses that occurred as a direct result of the offense to which the defendants pled guilty. Accordingly, we AFFIRM.