

APR 15 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRADLEY AG GARNER,

Defendant - Appellant.

No. 10-30064

DC CR No. 3:09-5088 BHS-2

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRADLEY AG GARNER,

Defendant - Appellant.

No. 10-30165

DC CR No. 3:09-05088 BHS-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 10-30211

DC CR No. 3:09-05088 BHS-2

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

BRADLEY AG GARNER,

Defendant - Appellant.

Appeals from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Submitted April 12, 2011**
Seattle, Washington

Before: KLEINFELD, TASHIMA, and SILVERMAN, Circuit Judges.

Bradley Garner appeals the district court's judgment of conviction and order of restitution. We have jurisdiction pursuant to 28 U.S.C. § 1291. We remand for amendment of the judgment and presentence investigation report (PSR). We affirm in all other respects.

The conviction on Count 1 remains valid because it is supported by the independently valid "money or property" theory. *United States v. Pelisamen*, No.10-10022, slip op. 5011, 5022 (9th Cir. Apr. 13, 2011). Because the government does not oppose Garner's request for a limited remand instructing the district court to delete all references to theft of honest services in the judgment and PSR, we grant such relief.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)(C).

The restitution order is proper. Because Garner was convicted of wire fraud and mail fraud, both of which have a “scheme” element, the restitution order correctly encompasses related but uncharged conduct. *See United States v. Brock-Davis*, 504 F.3d 991, 998-99 (9th Cir. 2007); *United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003).

We **REMAND** with instructions that the district court amend the judgment and PSR by deleting all references to theft of honest services, 18 U.S.C. § 1346.

We **AFFIRM** in all other respects.