

No. 17-____

IN THE
Supreme Court of the United States

ANNE MARIE HANKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

JOHN C. FISHER
767 Willamette Street
Suite 302
Eugene, OR 97401
(541) 485-3153

SHAY DVORETZKY
Counsel of Record
MARK C. SAVIGNAC
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

Under the Mandatory Victims Restitution Act of 1996, “when sentencing a defendant convicted of” any of a large number of federal crimes, “the court shall order ... that the defendant make restitution *to the victim* of the offense.” 18 U.S.C. § 3663A(a)(1) (emphasis added). The Act also provides that “[n]o victim shall be required to participate in any phase of a restitution order” and that the “*victim* may at any time assign the victim’s interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.” *Id.* § 3664(g) (emphasis added). The Act does not, however, state that a *district court* may assign restitution payments to the Crime Victims Fund if the victim neither accepts restitution nor makes such an assignment.

The question presented, which has divided the courts of appeals, is:

Where a victim entitled to restitution under the Mandatory Victims Restitution Act of 1996 neither accepts restitution nor assigns it to the Crime Victims Fund, may the district court nonetheless order the defendant to pay restitution to the Fund, despite the absence of statutory authority for such an order?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE WRIT	7
I. THE COURTS OF APPEALS ARE DIVIDED	7
A. The Seventh Circuit.....	8
B. The Second Circuit.....	10
C. The Tenth Circuit	12
D. The Ninth Circuit	15
II. THIS CASE MERITS THE COURT’S ATTENTION.....	17
III. THE DECISION BELOW IS WRONG	19
A. A federal court cannot order criminal restitution except as authorized by statute, and no statutory authority supports the District Court’s restitution order	19
B. The MVRA does not require a district court to unilaterally order restitution to the Fund	21

TABLE OF CONTENTS
(continued)

	Page
CONCLUSION	23
APPENDIX A: Opinion of the U.S. Court of Appeals for the Ninth Circuit (June 6, 2017)	1a
APPENDIX B: Opinion of the U.S. District Court, District of Oregon (October 30, 2015).....	16a
APPENDIX C: Judgment of U.S. District Court, District of Oregon (January 25, 2002).....	24a
APPENDIX D: Statutory Appendix.....	34a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Dolan v. United States</i> , 560 U.S. 605 (2010).....	18, 19
<i>Hughey v. United States</i> , 495 U.S. 411 (1990).....	19
<i>Manrique v. United States</i> , 137 S. Ct. 1266 (2017).....	18
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	19
<i>Roberts v. United States</i> , 134 S. Ct. 1854 (2014).....	3, 18
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990).....	8
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980).....	19
<i>United States v. Hankins</i> , 858 F.3d 1273 (9th Cir. 2017).....	1, 8
<i>United States v. Johnson</i> 378 F.3d 230 (2d Cir. 2004)	6, 10, 11
<i>United States v. Munoz-Flores</i> , 495 U.S. 385 (1990).....	2
<i>United States v. Pawlinski</i> , 374 F.3d 536 (7th Cir. 2004).....	<i>passim</i>
<i>United States v. Speakman</i> , 594 F.3d 1165 (10th Cir. 2010).....	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>United States v. Wolf</i> , 90 F.3d 191 (7th Cir. 1996).....	22
<i>Wright v. United States</i> , 134 S. Ct. 1710 (2014).....	8, 19
STATUTES	
18 U.S.C. § 3231	5
18 U.S.C. § 3663A.....	<i>passim</i>
18 U.S.C. § 3664	<i>passim</i>
28 U.S.C. § 1254	1
42 U.S.C. § 10601	2

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is published at 858 F.3d 1273 and reproduced in the appendix to this petition. Pet. App. 1a-15a. The District Court's order redirecting the restitution to the Crime Victims Fund and its original judgment sentencing Hankins to pay restitution are unpublished. Pet. App. 16a-33a.

JURISDICTION

The Ninth Circuit entered judgment on June 6, 2017. Pet. App. 1a. On August 17, 2017, Justice Kennedy granted Hankins's application to extend the time to file this petition to October 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A-3664, is reproduced at Pet. App. 34a-45a.

STATEMENT

1. Under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. §§ 3663A-3664, “when sentencing a defendant convicted of” an enumerated federal crime, “the court shall order ... that the defendant make restitution to the victim of the offense.” *Id.* § 3663A(a)(1). The MVRA applies to a wide range of federal crimes, including crimes of violence, property crimes, and offenses committed by fraud or deceit. *Id.* § 3663A(c)(1). “An order of restitution under [section 3663A] shall be issued and enforced in accordance with section 3664.” *Id.* § 3663A(d).

Section 3664, in turn, provides that “[n]o victim shall be required to participate in any phase of a restitution order.” *Id.* § 3664(g)(1). And it empowers the court to order restitution to be paid to someone other than the victim in just a handful of situations, which Congress was careful to delineate clearly and explicitly.

One of these situations is principally relevant to the statutory question in this case: “A *victim* may at any time assign the victim’s interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.” *Id.* § 3664(g)(2) (emphasis added). The Fund is a federal government account established to make grants to crime victim compensation programs and funded by fines imposed on persons convicted of federal crimes. 42 U.S.C. § 10601 *et seq.*; *see also United States v. Munoz-Flores*, 495 U.S. 385, 398-99 (1990).

The other situations in which the court is empowered to order restitution to be paid to someone other than the victim are as follows:

First, “if the victim is deceased,” then the court shall order restitution “to the victim’s estate.” 18 U.S.C. § 3663A(a)(1).

Second, “[i]n the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may

assume the victim's rights under this section." *Id.* § 3663A(a)(2).¹

Third, "[t]he court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense." *Id.* § 3663A(a)(3).

Fourth, "in the case of an offense resulting in damage to or loss or destruction of property," "[t]he order of restitution shall require that [the] defendant ... return the property to the owner of the property or someone designated by the owner." *Id.* § 3663A(b); *see also Robers v. United States*, 134 S. Ct. 1854, 1856 (2014) ("the specific property lost ... in the case of a fraudulently obtained loan, is the money lent").

Fifth, if the court orders restitution in the form of in-kind payments pursuant to § 3664(f)(3)(A) and "if the victim agrees," restitution may be ordered in the form of "services rendered to ... a person or organization other than the victim." 18 U.S.C. § 3664(f)(4).

Sixth, "[i]f a victim has received compensation from insurance or any other source ..., the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation." *Id.* § 3664(j)(1).

In each of these situations, the court's power to order restitution to anyone other than the victim is

¹ It is not entirely clear whether "the victim's rights" that the designated person may "assume" under this provision include the right to receive restitution. Because § 3663A(a)(2) has no bearing on this case, any ambiguity is irrelevant to the resolution of the question presented.

predicated on some precondition: that the victim “assign[s] the victim’s interest in restitution payments to the Crime Victims Fund”; that the victim “is under 18 years of age, incompetent, incapacitated, or deceased”; that the parties agreed “in a plea agreement” that restitution to those other persons should be ordered; that the victim designates another person to receive property; or that the restitution order requires in-kind payments and “the victim agrees” that services be performed for other persons.

2. In 2001, Petitioner Anne Marie Hankins was charged with bank fraud in the U.S. District Court for the District of Oregon. Pet. App. 2a, 16a-17a. The government alleged that Hankins had submitted a false application for a \$350,000 loan to U.S. Bank Special Assets Group (“U.S. Bank”). Pet. App. 2a. Hankins pleaded guilty and was sentenced to 30 days in jail. *Id.*

Pursuant to the MVRA (which applies to all federal fraud crimes, *see* 18 U.S.C. § 3663A(c)(1)(A)(ii)), the District Court also sentenced Hankins to pay \$350,000 in restitution to the victim, U.S. Bank. Pet. App. 2a. The restitution was to be paid “at the maximum installment possible, and not less than \$50 per month,” and was to be deposited with the clerk of the court “for transfer to the payee.” Pet. App. 2a-3a.

U.S. Bank assigned its interest in the restitution judgment to Horton & Associates LLC. Pet. App. 3a. The District Court entered an order substituting Horton for U.S. Bank as the victim. *Id.*

From 2002 to 2013, Hankins made monthly payments ranging from \$50 to \$400. *Id.* As of 2013, she had paid a total of \$13,044.30, leaving her with a balance of \$336,955.70. *Id.* That year, Hankins and Horton settled the balance for \$5000. *Id.* Hankins stopped making payments, and Horton filed with the District Court a notice acknowledging “Full Satisfaction of Judgment.” Pet. App. 3a-4a.

In 2015, after the federal government garnished an additional \$21,765 from Hankins to apply toward the restitution judgment, Hankins moved the District Court (which had jurisdiction over this criminal case under 18 U.S.C. § 3231) for an order acknowledging that she had satisfied the restitution judgment and was not obligated to make further payments. Pet. App. 4a.

The District Court denied the motion and, at the government’s request, ordered that Hankins make future payments to the Crime Victims Fund rather than to Horton. *Id.* In support of its decision, the District Court pointed to the provision of the MVRA that provides: “A victim may at any time assign the victim’s interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.” 18 U.S.C. § 3664(g)(2); *see* Pet. App. 21a-22a. Yet neither Horton nor the original victim, U.S. Bank, had purported to make an assignment to the Fund.

3. The Ninth Circuit affirmed. It first concluded that Hankins’ settlement with Horton could not extinguish the District Court’s original restitution order. Pet. App. 6a-7a. It then held that the District Court’s decision to redirect future

restitution payments to the Crime Victims Fund “makes practical sense within the spirit and confines of the MVRA” and that the court “had the flexibility under the MVRA to effect this solution.” Pet. App. 10a.

The Ninth Circuit reasoned that “[t]he MVRA is clear that the award of full restitution is mandatory.” *Id.* (citing 18 U.S.C. § 3664(f)(1)(A)). It allows the victim “at any time to assign the victim’s interest in restitution payments to the Crime Victims Fund.” 18 U.S.C. § 3664(g)(2). But “this provision does not extend beyond the victim’s ability to assign and cannot be read to constrain the district court’s authority to redirect payments.” Pet. App. 11a. The Ninth Circuit relied on the Second Circuit’s decision in *United States v. Johnson*, which held that “[a]lthough § 3664(g)(2) authorizes victims to make such an assignment, it does not preclude the Court from doing so” where the victim chooses not to. 378 F.3d 230, 245 (2d Cir. 2004). But while it reasoned that § 3664(g)(2) does not *prohibit* a district court from unilaterally redirecting restitution payments to the Crime Victims Fund, the Ninth Circuit did not point to any statutory provision that *authorizes* the court to enter such an order in the first place. Rather, the court thought that “[t]he statute’s silence gives us flexibility to construe the scope of the district court’s authority” Pet. App. 11a. The Ninth Circuit further reasoned that “allowing the district court to redirect restitution serves the MVRA’s compensatory and punitive purposes,” by ensuring that “the offender ... pays the debt owed to the victim *as well as to society*.” Pet. App. 12a (quoting S. Rep. No. 104-179, at 12 (1995)).

The Ninth Circuit recognized that its decision conflicted with “the two circuits that have determined that a district court cannot redirect restitution,” but it was “not persuaded” by their reasoning. Pet. App. 13a; *see* Pet. App. 13a-15a (discussing *United States v. Speakman*, 594 F.3d 1165 (10th Cir. 2010), and *United States v. Pawlinski*, 374 F.3d 536 (7th Cir. 2004)). The Court of Appeals concluded that, “[o]nce Horton disclaimed further interest in restitution, redirecting restitution to the Fund was within the district court’s power.” Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

The question whether a district court may redirect restitution payments to the Crime Victims Fund where the victim neither accepts restitution nor assigns it to the Fund has divided the federal courts of appeals. The question presented is also important, both in light of the frequency and significance of criminal restitution sentences, and because it encompasses a fundamental underlying disagreement regarding the power of a federal district court to impose criminal punishment that no statute authorizes. And the decision below is wrong: It ignores both the text of the MVRA and the essential principle that a court may not impose a criminal sentence absent statutory authorization.

This Court should grant the petition for a writ of certiorari and reverse the judgment of the Ninth Circuit.

I. THE COURTS OF APPEALS ARE DIVIDED

As the Government acknowledged below, the courts of appeals are divided on the question

presented. See Answering Brief for the United States, *United States v. Hankins*, 858 F.3d 1273 (9th Cir. 2017) (No. 15-30345), 2016 WL 2772771, at *12 (describing circuit split on “[t]he question of what happens if a victim declines restitution but does not assign it to the [Crime Victims Fund]”); see also Brief for the United States in Opposition, *Wright v. United States*, 134 S. Ct. 1710 (2014) (Nos. 12-8505, 12-8561), 2013 WL 6917438, at *26 (acknowledging that the “question” of the effect of a victim’s decision to decline restitution “has divided the courts of appeals” and citing *Johnson*, *Pawlinski*, and *Speakman*).

In the Second and Ninth Circuits, district courts can order defendants to pay restitution to the Crime Victims Fund even where the victim does not assign the payments to the Fund, despite the absence of any statutory authority for such an order. In the Seventh and Tenth Circuits, district courts are prohibited from doing so. The circuits have repeatedly acknowledged the split and have adopted their conflicting positions with full awareness of its existence. And they are not coalescing around one answer. Rather, each new decision has rejected the position taken by the preceding decision. That the decisions of the lower courts have ping-ponged between the two answers to the question presented indicates that the split is deeply entrenched. This Court’s intervention is therefore necessary to secure the “uniformity and consistency of federal criminal law.” *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990).

A. The Seventh Circuit

The defendant in *Pawlinski* was a local politician who was convicted of defrauding campaign contributors. 374 F.3d at 537. The district court

sentenced him to pay restitution to the defrauded contributors under the MVRA, but only a handful of them came forward to claim it. *Id.* at 537-38. So the district court amended the order to redirect the remaining restitution to the Crime Victims Fund. *Id.* at 538.

The Seventh Circuit reversed. It began by noting that an order of restitution under the MVRA “must go to victims of the defendant’s crimes, and the Crime Victims Fund is neither a victim of Pawlinski nor a representative of his victims.” *Id.* at 539.² The court acknowledged that the MVRA permits an order directing restitution to someone else “if the order is imposed pursuant to a plea agreement which provides for restitution to nonvictims, or if the victims assign their right to restitution to the Crime Victims Fund.” *Id.* at 539-40 (citing 18 U.S.C. §§ 3663A(a)(3), 3664(g)(2)). But neither exception applied to Pawlinski’s case. *Id.* at 540.

The Government argued that the absence of statutory authorization was irrelevant, because “in the absence of a clear statutory directive, the sentencing court was free to exercise its discretion in fashioning a restitution order.” *Id.* (internal quotation marks omitted). But the Seventh Circuit rejected the notion that “the district court has discretion to order restitution to nonvictims other than as authorized by the statute.” *Id.* “Federal

² The MVRA defines the term “victim” to mean “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” 18 U.S.C. § 3663A(a)(2).

courts cannot order restitution in a criminal case without a statutory basis,” and so “[t]he sentence was illegal.” *Id.* Indeed, the Seventh Circuit said that the district judge’s decision was “plain error, because there was not even an arguable basis for what he did.” *Id.*

B. The Second Circuit

In *Johnson*, the Second Circuit reached the opposite conclusion. It was reviewing a sentence that ordered restitution under the MVRA and provided that if the victim declined the restitution payments, then they would be redirected to the Crime Victims Fund. 378 F.3d at 245-46. The defendant argued that a district court has no authority to order payments to the Fund unless the “victim ... assign[s] the victim’s interest in restitution payments to the” Fund, as authorized by 18 U.S.C. § 3664(g)(2). 378 F.3d at 245. But the Second Circuit affirmed the sentence.

The Second Circuit reasoned that “a district court may—indeed, must—impose orders of restitution [under the MVRA] even if their victims decline restitution. To hold otherwise would be inconsistent with the MVRA’s statutory scheme of mandatory restitution.” *Id.* at 244. As for assigning the restitution payments to the Fund, the Second Circuit thought that “[a]lthough § 3664(g)(2) authorizes victims to make such an assignment, it does not preclude the Court from doing so.” *Id.* at 245. Indeed, the Second Circuit viewed § 3664(g) as irrelevant because § 3663A(a)(1), which provides that the court “shall order ... that the defendant make restitution to the victim,” indicates that it applies “notwithstanding any other provision of law.” 378

F.3d at 244-45. That phrase, the Second Circuit thought, made clear that “defendants’ victims may not veto the obligation of the District Court to impose orders of restitution” by declining to accept restitution themselves. *Id.* at 245. The Second Circuit did not point to any statutory provision authorizing the district court to redirect payments to the Fund in the absence of an assignment by the victim; in the Second Circuit’s view, it was enough that the MVRA does not expressly prohibit district courts from doing so.

The Second Circuit also rejected the defendant’s argument based on the legislative history of the MVRA. *Id.* at 245 n.21. According to the Senate Report, the Senate considered a version of § 3664(g)(1) that would have empowered district courts to redirect restitution to the Fund in the absence of an assignment by the victim: “No victim shall be required to participate in any phase of a restitution order. *If a victim declines to receive restitution made mandatory by this title, the court shall order that the victim’s share of any restitution owed be deposited in the Crime Victims Fund*” 378 F.3d at 245 n.21 (quoting S. Rep. No. 104-179, at 6 (Dec. 6 1995)). The Second Circuit rejected the inference that, in choosing not to enact the italicized language, Congress had chosen not to give district courts the power that the language would have conferred. “By removing this text before enacting § 3664(g)(1), Congress may have suggested that assignment to the Crime Victims Fund is not *mandatory*. It certainly did not suggest that assignment to that fund is *prohibited*.” *Id.*

C. The Tenth Circuit

In *Speakman*, the Tenth Circuit agreed with the Seventh Circuit and rejected the Second Circuit's view. *Speakman* was convicted of defrauding his wife. 594 F.3d at 1166-67. She declined restitution because she wanted to cut all ties with him. *Id.* at 1169. The district court believed that the MVRA required that *Speakman* pay restitution to someone, so it ordered him to pay the restitution that would have gone to his wife to the Crime Victims Fund. *Id.* *Speakman's* wife had not assigned her interest in the restitution payments to the Fund (as she could have done under § 3664(g)(2)), and *Speakman* argued that the district court lacked authority to do so unilaterally. *Id.* The Tenth Circuit agreed.

1. The “starting point of [the Tenth Circuit’s] analysis” was that “federal courts possess no inherent authority to order restitution, and may only do so as explicitly empowered by statute.” 594 F.3d at 1175 (internal quotation marks omitted). The court “agree[d]” that the MVRA requires courts “to order restitution in certain cases,” but it also recognized that the MVRA’s mandate refers only to restitution that is “ordered either to ‘the victim of the offense or, if the victim is deceased, to the victim’s estate.’” *Id.* (quoting 18 U.S.C. § 3663A(a)(1)). “[R]ead in isolation,” § 3663A(a)(1) mandated that the court order restitution to *Speakman's* wife, since she was alive. 594 F.3d at 1175. But as § 3663A(d) requires, the Tenth Circuit read § 3663A(a)(1) in light of § 3664(g)(1), “which permits a victim to decline restitution.” 594 F.3d at 1175. “Because restitution is only mandatory when ordered to the victim or the victim’s estate, see ... § 3663A(a)(1), and

because victims are not ‘required to participate in any phase of a restitution order,’ *see* ... § 3664(g)(1), courts are not required to order restitution if the victim declines the restitution without assigning her interest to the Fund.” *Id.*

2. Nor, in the Tenth Circuit’s view, did § 3664(g)(2) empower the district court to order restitution to the Fund. “By its own terms, that provision only permits restitution to be made to the Fund if the *victim* ‘assign[s] the victim’s interest in restitution payments to the Crime Victims Fund.’” 594 F.3d at 1175 (quoting § 3664(g)(2)).

“The statute could have been written so as to authorize the court to order restitution payments to the Fund even when the victim failed to assign her interest, or to require the victim to either accept restitution or assign her interest to the fund.” *Id.* But the statute that Congress actually wrote does neither: “[A]s written, the statute only authorizes restitution to (1) the victim (§ 3663A(a)(1)), (2) the victim’s estate, if the victim is deceased (§ 3663A(a)(1)), (3) ‘persons other than the victim’ if ‘agreed to by the parties in a plea agreement (§ 3663A(a)(3)), or (4) the Crime Victims Fund, *if the victim* assigns her interest to the Fund (§ 3664(g)(2)).” *Id.* Because “the predicates for (2), (3), and (4)” were not met and the victim had “renounced her interest in restitution,” there was “no statutory basis to support the district court’s award of restitution to the Fund.” *Id.* at 1176.

3. The Tenth Circuit next discussed how the legislative history of the MVRA “reinforce[d]” its conclusion. *Id.* First, the relevant provisions—§§ 3663A(a)(1), 3664(g)(1), and 3664(g)(2)—were

enacted together, which “underscores the importance of reading” them in conjunction with one another to conclude that “while Congress intended to order mandatory restitution *to victims*, ... it also expressly gave victims the right to decline that restitution.” *Id.* (emphasis added).

Moreover (as the Second Circuit also discussed), “the Senate considered and rejected a broader version of § 3664(g)(1): ‘(g)(1) No victim shall be required to participate in any phase of a restitution order. If a victim declines to receive restitution made mandatory by this title, *the court shall order that the victim’s share of any restitution owed be deposited in the Crime Victims Fund in the Treasury.*’” *Id.* (quoting S. Rep. No. 104-179). “[T]he proposed legislation would have explicitly authorized the restitution order entered by the district court here,” but the version that Congress actually enacted did not. *Id.* “While evidence of what Congress considered but did not enact may not be conclusive proof of the proper construction of the statute, this legislative history further underscores what we believe is the proper reading: that Congress only authorized courts to order a restitution payment to the Fund when the victim herself assigns her interest to the Fund.” *Id.*

4. Finally, the Tenth Circuit discussed the conflicting positions staked out by its sister circuits. *Id.* at 1176-77. It drew support from the Seventh Circuit’s decision in *Pawlinski*. Just as the Seventh Circuit had reasoned that “[f]ederal courts cannot order restitution in a criminal case without a statutory basis,” the Tenth Circuit held that the district court’s order “lack[ed] a statutory basis ...

and so the district court could not order Mr. Speakman to pay restitution to the Fund.” *Speakman*, 594 F.3d at 1176-77 (quoting *Pawlinski*, 374 F.3d at 540).

The Tenth Circuit “respectfully disagree[d]” with the Second Circuit’s decision in *Johnson*. *Id.* at 1177. “Because the MVRA only authorizes restitution payments to victims (except in certain specifically delineated circumstances), and because § 3664(g)(1) allows victims to decline restitution, the MVRA is expressly made subject to the victim accepting restitution. In other words, ... restitution payments under the MVRA are mandated only when the victim accepts them.” *Id.* The Second Circuit had “disregard[ed] the principle that ‘[f]ederal courts cannot order restitution in a criminal case without a statutory basis.’” *Id.* (quoting *Pawlinski*, 374 F.3d at 540).

D. The Ninth Circuit

In the decision below, the Ninth Circuit expressly rejected the decisions of the Seventh and Tenth Circuits and adopted the reasoning and conclusion of the Second Circuit, resulting in a 2-to-2 split.

1. The Ninth Circuit reasoned as follows: First, situations in which the victim declines restitution without assigning it to the Crime Victims Fund fall into a “gap” in the MVRA. Pet. App. 12a; *see also* Pet. App. 9a (“faced with a situation in which payment of mandatory restitution is continuing and the victim has declared its debt satisfied, the district court dealt with a dilemma—where does the money go?”). Second, “[t]he MVRA is clear that the award of

full restitution is mandatory,” which the Ninth Circuit took to mean that the victim could not relieve the defendant of her obligation to pay restitution (or the district court of its obligation to order restitution). Pet. App. 10a (citing 18 U.S.C. § 3664(f)(1)(A)). Third, while the MVRA expressly allows the victim to assign the restitution payments to the Fund, 18 U.S.C. § 3664(g)(1), it does not expressly *prohibit* the court from doing so unilaterally; the MVRA is simply silent on what the court may or should do in that situation. Pet. App. 11a (quoting *Johnson*, 378 F.3d at 245). Fourth, “allowing the district court to redirect restitution serves the MVRA’s compensatory and punitive purposes,” which it inferred from a statement in the legislative history that the MVRA is intended to ensure that “the offender ... pays the debt owed to the victim *as well as to society*.” Pet. App. 12a.

For these reasons, the Ninth Circuit concluded that allowing a district court to redirect payments to the Fund “makes practical sense within the spirit and confines of the MVRA,” Pet. App. 10a, and that “[t]he statute’s silence gives us flexibility to construe the scope of the district court’s authority” in order to “fill[] a gap in the MVRA,” Pet. App. 11a-12a.

2. The Ninth Circuit was “not persuaded by the two circuits that have determined that a district court cannot redirect restitution.” Pet. App. 13a. It acknowledged the Tenth Circuit’s reasoning in *Speakman*: Because the MVRA permits a victim to decline restitution, “restitution payments under the MVRA are mandated only when the victim accepts them.” Pet. App. 14a (quoting 594 F.3d at 1177). But the Ninth Circuit thought that the Tenth Circuit

had wrongly disregarded the “mandatory nature of restitution” and the principle that “[v]ictims cannot control the applicability of a penal statute.” *Id.*

The Ninth Circuit also recognized that, in *Pawlinski*, the Seventh Circuit reasoned that “[f]ederal courts cannot order restitution in a criminal case without a statutory basis,” 374 F.3d at 540, and concluded that a district court may not redirect restitution payments to the Crime Victims Fund except pursuant to a plea agreement or at the victim’s direction, since the MVRA provides no authority for such an order. The Ninth Circuit thought that the rule was irrelevant to this case because “[n]o one disputes that the district court entered a valid restitution order at the outset” when it ordered Hankins to pay restitution to U.S. Bank. Pet. App. 15a. In the Ninth Circuit’s view, “[t]he process of deciding where to send restitution payments already ordered is distinct from the authority to order restitution in the first instance.” *Id.* But *Pawlinski* too dealt with an initial sentence ordering restitution to the victims that the district court then amended to send the restitution payments to the Fund. 374 F.3d at 537-38. The Seventh Circuit did not treat the distinction between an initial sentence and a later order amending it as relevant to the district court’s power to send restitution to the Fund, and the Ninth Circuit did not explain why that distinction would make a difference.

II. THIS CASE MERITS THE COURT’S ATTENTION

1. Federal district courts enter thousands of restitution orders every year. For example, in fiscal

year 2015, district courts ordered restitution in more than 11,000 criminal cases. U.S. Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, tbl. 15 (20th ed.). The total value of fines and restitution ordered that year was close to \$11 billion. *Id.* Given the frequency and significance of these restitution orders, the proper and consistent interpretation of the laws governing criminal restitution is of substantial importance.

2. This Court has frequently granted certiorari to resolve conflicts among the courts of appeals on questions arising under the MVRA. *See Manrique v. United States*, 137 S. Ct. 1266 (2017); *Roberts*, 134 S. Ct. 1854; *Dolan v. United States*, 560 U.S. 605 (2010). This case presents another such conflict. In little more than a decade, four federal courts of appeals have taken conflicting positions on the question presented. The split is well-entrenched; it can be resolved only through this Court's intervention.

3. Finally, the conflicting decisions of the courts of appeals on the question presented reflect an even deeper disagreement about a basic issue of federal law: When it comes to criminal sentencing, is everything permitted unless expressly prohibited by law, or is everything prohibited unless expressly permitted? As discussed above, the Second and Ninth Circuits conclude that a district court can order restitution payments to the Crime Victims Fund because they believe that such an order is within the court's power unless expressly prohibited. The Seventh and Tenth Circuits, by contrast, start from the premise that a district court has no power to order criminal restitution unless authorized by

statute. The lower courts' disagreement on this fundamental issue should be resolved by this Court.

III. THE DECISION BELOW IS WRONG

A. A federal court cannot order criminal restitution except as authorized by statute, and no statutory authority supports the District Court's restitution order

A federal court has no authority to impose a criminal sentence, including a sentence of restitution, except as authorized by statute. *See, e.g., Paroline v. United States*, 134 S. Ct. 1710 (2014) (vacating restitution sentence imposed in excess of statutory authority); *Hughey v. United States*, 495 U.S. 411 (1990) (same); *Mistretta v. United States*, 488 U.S. 361, 364 (1989) ("Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control."); *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) ("a defendant may not receive a greater sentence than the legislature has authorized"); *see also Dolan*, 560 U.S. at 626 (Roberts, C.J., dissenting) ("a court lacks 'authority' to impose a sentence above the statutory maximum").

As discussed above, the MVRA authorizes a court to order restitution to persons other than the victim in only a handful of discrete scenarios, none of which is even arguably applicable here. In particular, the MVRA authorizes the court to order restitution to: (1) the victim's estate, if the victim is deceased, 18 U.S.C. § 3663A(a)(1); (2) a suitable representative of the victim, if the victim is under 18, incompetent,

incapacitated, or deceased, *id.* § 3663A(a)(2); (3) persons other than the victim, if the parties so agree in a plea agreement, *id.* § 3663A(a)(3); (4) a person designated by the victim, if the restitution consists of the return of property damaged by the offense, *id.* § 3663A(b); (5) a person or organization other than the victim, if the restitution takes the form of in-kind payments and the victim so agrees, *id.* § 3664(f)(4); (6) a third party (such as an insurer) who has compensated the victim or is obligated to do so, *id.* § 3664(j)(1); or (7) the Crime Victims Fund, if the victim “assign[s] the victim’s interest in restitution payments to the” Fund, *id.* § 3664(g)(2).

None of these narrow provisions could justify the order at issue here. Neither the victim (U.S. Bank) nor its assignee (Horton) is under 18, incompetent, incapacitated, or deceased, and in any event the Fund is not the estate or a representative of either entity. Hankins did not agree in her plea agreement that the Fund would receive restitution payments. The Fund has not compensated U.S. Bank or Horton for the \$350,000 loss and is not obligated to do so. And neither U.S. Bank nor Horton has designated the Fund to receive restitution or assigned its interest in restitution payments to the Fund. Indeed, U.S. Bank assigned its interest to Horton (as the District Court recognized), and Horton accepted a settlement to extinguish Hankins’s obligation to pay restitution.

In short, no provision of the MVRA authorized the District Court to enter the order at issue here. And neither the Government nor the courts below suggested that any other provision of federal law empowered the District Court to enter that order.

The order was not authorized by statute and was therefore unlawful.

B. The MVRA does not require a district court to unilaterally order restitution to the Fund

In reaching a contrary conclusion, the Ninth Circuit pointed out that, while § 3664(g)(2) permits the victim to assign restitution to the Fund, it does not prohibit the court from doing so unilaterally. Pet. App. 11a. That is true but irrelevant. As discussed above, the question is not whether the restitution order was *prohibited* by statute, but whether it was *authorized*.

The Ninth Circuit (and the Second Circuit in *Johnson*) further reasoned that the MVRA *requires* the court to order restitution in cases to which it applies, and that directing restitution to the Fund is a reasonable alternative means of complying with that requirement if the victim does not accept restitution. Pet. App. 10a.

This reasoning fails at the threshold because its premise—that the MVRA imposes a mandate that can be satisfied by ordering restitution *to the Fund*—is incorrect. The MVRA does not require the court to “order restitution” in the abstract (much less to “order restitution to the Crime Victims Fund”). Rather, it says that “the court shall order ... that the defendant make restitution *to the victim*.” 18 U.S.C. § 3663A(a)(1) (emphasis added). Even if, as the Second and Ninth Circuits believe, this provision creates an ironclad mandate, it simply cannot be satisfied by an order that the defendant pay restitution to someone other than the victim—be it

the Crime Victims Fund, the federal judiciary, or a charity of the judge's choice (as in *United States v. Wolf*, 90 F.3d 191 (7th Cir. 1996)).³

The Ninth Circuit's assertion that redirecting restitution to the Fund "reconcile[s] the mandatory nature of restitution with" the victim's right to decline it, Pet. App. 11a, is therefore a non sequitur: The "mandatory" nature of the MVRA cannot justify an order that the MVRA clearly does not mandate.

³ As discussed above, it is true that the MVRA allows the court to order restitution to persons other than the victim when certain specified preconditions are met. But none of the statutory preconditions is met in this case, and the Second and Ninth Circuits did not purport to rely on any of them. Rather, they grafted a new judge-made exception onto the statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. FISHER
767 Willamette Street
Suite 302
Eugene, OR 97401
(541) 485-3153

October 5, 2017

SHAY DVORETZKY
Counsel of Record
MARK C. SAVIGNAC
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

APPENDIX

APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i> v. ANNE MARIE HANKINS, as Primary Shareholder, President and Operations Officer of Emerald Powerline Construction, Inc, <i>Defendant-Appellant.</i>	No. 15-30345 D.C. No. 6:01-cr-60100- AA-1 OPINION
---	---

Appeal from the United States District Court for the
District of Oregon

Ann L. Aiken, District Judge, Presiding

Argued and Submitted November 10, 2016
Portland, Oregon

Filed June 6, 2017

Before: M. Margaret McKeown and William A.
Fletcher, Circuit Judges, and Jennifer A. Dorsey,*
District Judge.

Opinion by Judge McKeown

* The Honorable Jennifer A. Dorsey, United States District
Judge for the District of Nevada, sitting by designation.

* * *

OPINION

McKEOWN, Circuit Judge:

In this appeal we resolve two related questions of first impression in our circuit that arise out of the Mandatory Victims Restitution Act of 1996 (“MVRA”), a statute that requires certain criminal defendants to pay restitution to compensate and assist victims. We first determine whether a defendant may discharge a restitution judgment based on a private settlement between the victim and the defendant. The answer is no—restitution is a criminal sentence that cannot be extinguished by a victim’s disclaimer of benefits. Relatedly, we decide whether a district court may redirect restitution payments to the federal Crime Victims Fund, 42 U.S.C. § 10601 *et seq.*, (“the Fund”), when a victim later disclaims restitution without making a direct assignment to the Fund. The answer is yes—the statute provides leeway for the court to fashion this practical solution.

Background

The factual background here is not complicated. In 2001, Anne Hankins pled guilty to bank fraud under 18 U.S.C. § 1344 after submitting a false loan application for \$350,000 to U.S. Bank Special Assets Group (“U.S. Bank”). The district court sentenced Hankins to thirty days in jail and entered a judgment under the MVRA ordering her to pay Bank \$350,000 in restitution. The restitution, payable “in full immediately” or, if any unpaid balance remained at the time of Hankins’s release from custody, “at the

maximum installment possible, and not less than \$50 per month,” was to be deposited with the clerk of the court “for transfer to the payee.”

In 2002, U.S. Bank assigned its interest in the restitution judgment to Horton & Associates LLC (“Horton”). In 2011, the district court entered an order substituting Horton as the assigned victim. Although neither the record nor the district court docket explains the time lag between the assignment and the substitution order, the delay is immaterial for our purposes.

From 2002 to 2013, Hankins made sporadic payments: she paid most months, and the payments ranged from \$50 to \$400. On several occasions between 2011 and 2013, the Treasury Offset Program also garnished funds, taking from Hankins as much as \$3,310.22 at a time.¹ By July 2013, Hankins had paid \$13,044.30 towards her \$350,000 judgment—leaving her with a remaining balance of \$336,955.70.

In September 2013, Hankins and Horton purported to settle the outstanding restitution obligation for a mere \$5,000. Soon after, Horton filed with the court a notice entitled “Full Satisfaction of Judgment.”²

¹ The Bureau of Fiscal Service administers the Treasury Offset Program and reroutes payments, such as federal tax refunds, to collect delinquent debts owed to federal agencies and states. *Treasury Offset Program (TOP)*, Bureau of the Fiscal Serv.: U.S. Dep’t of the Treasury, https://fiscal.treasury.gov/fsservices/gov/debtColl/dms/top/debt_top.htm (last visited Apr. 17, 2017).

² Horton is an inactive limited liability company according to the public record maintained by the Oklahoma Secretary of State. *Entity Summary Information*, Oklahoma Secretary of State,

The record reflects that neither the district court, Hankins, nor the government took any action in court in response to Horton's notice, although Hankins stopped making payments.

In April 2015, more than a year and a half after Horton filed its notice, the Treasury Offset Program garnished \$21,765 from Hankins to be applied towards her restitution balance. Hankins, likely displeased by this turn of affairs, filed a motion a few weeks later seeking full satisfaction of the restitution judgment. By that time, Hankins had paid only \$34,809.30, including the \$21,765 garnishment, of the \$350,000 judgment.

The district court denied Hankins's motion, reasoning that the MVRA dictates full mandatory restitution to the victim or the victim's assignee. Based on Horton's notice of "satisfaction in full of the Restitution Judgment," the district court assumed that Horton no longer wished to receive restitution payments and ordered that the money garnished by the Treasury Offset Program and all of Hankins's future restitution payments be deposited into the Fund.³ We review de novo the legal basis for the district court's ruling on restitution. *United States v. Luis*, 765 F.3d 1061, 1065 (9th Cir. 2014).

<https://www.sos.ok.gov/corp/corpInformation.aspx?id=35006447>
19 (last visited Apr. 17, 2017).

³ The Fund is separate from the General Fund of the U.S. Government, 42 U.S.C. § 10601(a), and administered by the U.S. Department of Justice, *id.* § 10605.

Analysis

I. THE MVRA FRAMEWORK

We begin with the statutory framework. The MVRA, 18 U.S.C. §§ 3663A–3664, mandates restitution to victims of certain offenses, including those “committed by fraud or deceit.” *Id.* § 3663A(c)(1)(A)(ii). Specifically, a district court, when sentencing a defendant convicted of a qualifying offense, “*shall order . . .* that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.” *Id.* § 3663A(a)(1) (emphasis added). This restitution order is part of a convicted defendant’s criminal sentence. The statute permits district courts to order “restitution to persons other than the victim of the offense” when “agreed to by the parties in a plea agreement.” *Id.* § 3663A(a)(3).

The restitution order is issued and enforced in accordance with § 3664. *Id.* § 3663A(d). Relevant here, “[a] victim may at any time assign the victim’s interest in restitution payments to the [Fund] without in any way impairing the obligation of the defendant to make such payments,” *id.* § 3664(g)(2), and “[n]o victim shall be required to participate in any phase of a restitution order,” *id.* § 3664(g)(1). When ordering restitution, the court must assign to each victim “the full amount of each victim’s losses” without regard to the defendant’s economic situation. *Id.* § 3664(f)(1)(A). And, finally, an order imposing restitution under the MVRA is a final judgment, *id.* § 3664(o), although there are some circumstances under which a district court may alter a final restitution order, *see, e.g., id.* § 3664(j)(2), (o)(1)–(2).

II. INVALIDITY OF PRIVATE SETTLEMENT OF RESTITUTION ORDERS UNDER THE MVRA

The first question we consider is the effect of Hankins’s settlement with Horton on the district court’s restitution order. In Hankins’s view, once Horton agreed to a “Full Satisfaction of Judgment” in exchange for payment of \$5,000, she was off the hook in terms of restitution payments. The government disagrees and claims that Hankins’s restitution order cannot be modified through private settlement. The government is correct.

Starting with the basics, “[a] sentence that imposes an order of restitution is a final judgment,” even though it can be corrected or amended in certain limited circumstances. *Id.* § 3664(j)(2), (o)(1)–(2).⁴ Once a restitution order is imposed, the MVRA leaves the district court with limited options to modify

⁴ For example, under § 3664(o)(1), a restitution order may be:

- (1) corrected, if there was clear error in the sentence or the defendant provides substantial assistance to the government;
- (2) modified, if the sentence is appealed under 18 U.S.C. § 3742;
- (3) amended, if the victim discovers further losses after sentencing; and
- (4) adjusted, if there is a material change in the defendant’s economic circumstances or if the defendant defaults on a restitution obligation.

Under § 3664(j)(2), a court may reduce the amount of restitution to account for compensatory damages later recovered in a civil proceeding. Finally, under § 3664(o)(2), a court may amend a restitution order upon resentencing if the defendant’s probation is revoked or if the defendant failed to pay restitution. None of these designated situations is applicable here.

restitution. See *United States v. Turner*, 312 F.3d 1137, 1143 (9th Cir. 2002). Ultimately, only the court—rather than the victim or the defendant—can impose or modify the defendant’s sentence. Neither the victim, nor the victim’s assignee, has the authority to settle, release, satisfy, or otherwise modify a restitution judgment. This conclusion follows from the principle that “private individuals should not be allowed to thwart the penal goals of the criminal justice system by entering into releases or settlements with wrongdoers.” *United States v. Bearden*, 274 F.3d 1031, 1041 (6th Cir. 2001).

Because restitution is a criminal sentence, its enforcement is distinct from a civil judgment that is left largely in the parties’ hands. “Private parties cannot simply agree to waive the application of a criminal statute.” *United States v. Savoie*, 985 F.2d 612, 619 (9th Cir. 1993).

We have previously held that restitution is not foreclosed even where a defendant and victim entered into a civil settlement *before* the defendant was sentenced under the MVRA. *United States v. Edwards*, 595 F.3d 1004, 1014 (9th Cir. 2010). There, we noted that “[c]riminal restitution is mandatory under the MVRA and cannot be waived by a prior civil settlement.” *Id.* Our holding here is a logical extension of the reasoning in *Edwards*: a victim cannot unilaterally extinguish a defendant’s obligation to pay restitution by privately settling that restitution order. See *id.* This reasoning is all the more powerful here because, unlike in *Edwards*, Hankins seeks to settle the restitution order itself—a criminal sentence entered following a criminal conviction.

Our conclusion accords with other circuits. The Eighth Circuit has observed that it is “clearly correct” that a victim and a defendant cannot settle a restitution obligation because allowing otherwise would “violate[] public policy.” *United States v. Boal*, 534 F.3d 965, 967–68 (8th Cir. 2008). This principle is echoed by the Fifth Circuit: “[The victim] could not waive the Government’s authority to collect restitution, as that bears uniquely on the State’s right to administer punishment.” *United States v. Ridgeway*, 489 F.3d 732, 738 (5th Cir. 2007) (discussing the MVRA’s predecessor statute, the Victim and Witness Protection Act of 1982 (“VWPA”)). And the Second and Sixth Circuits agree that a district court cannot reduce or eliminate restitution as a result of a victim’s waiver or prior settlement. *See United States v. Johnson*, 378 F.3d 230, 244–45 (2d Cir. 2004); *Bearden*, 274 F.3d at 1041. Stated differently, “the law will not tolerate privately negotiated end runs around the criminal justice system.” *Savoie*, 985 F.2d at 619 (discussing the VWPA).

Importantly, if we adopt the rule that Hankins suggests, there is a serious risk that defendants could coerce victims into settling or that defendants and victims would collude on settlements. Although this risk is less likely in Hankins’s case, as the victim was a bank, we are not convinced that other victims, such as victims of sexual assault, *see United States v. Palmer*, 643 F.3d 1060, 1068 (8th Cir. 2011) (affirming an award of restitution under the MVRA to a victim of commercial sex trafficking), would stand in such a detached bargaining position. In that situation, the power imbalance between the actors

may permit the defendant to coerce the victim to accept a nominal settlement. Taking restitution out of the hands of the criminal justice system and leaving it to private parties is not a result contemplated or countenanced by the MVRA.

Finally, the rule of lenity does not help Hankins. Considering the text, structure, history, and purpose of the statute, there is no “grievous ambiguity” that justifies invoking the rule here. *See Muscarello v. United States*, 524 U.S. 125, 138–39 (1998).

III. DISTRICT COURT’S AUTHORITY TO REDIRECT RESTITUTION PAYMENTS TO THE CRIME VICTIMS FUND

Once the district court determined that the attempted settlement between Hankins and Horton did not modify the restitution order and that Horton, as the victim’s assignee, had disclaimed further restitution through its filing of a notice of satisfaction, the district court directed payment of the restitution to the Fund. Hankins argues that this relief went beyond her request to satisfy the judgment and that the district court’s decision “destroy[s] the contractual arrangement between Hankins and Horton.” Hankins’s argument is misguided, because any claimed contract does not affect her liability for restitution. So, faced with a situation in which payment of mandatory restitution is continuing and the victim has declared its debt satisfied, the district court dealt with a dilemma—where does the money go? In *Turner*, a case that involved the validity of an assignment by a victim, we validated the assignment but noted, “What may or may not happen in the future [with the restitution

payments] was not before the district court. It ought not be before us.” 312 F.3d at 1144. That question is now before us.

Put simply, the district court ordered what makes practical sense within the spirit and confines of the MVRA: it did not modify the sentence itself but redirected payments to the Fund. We conclude that the district court had the flexibility under the MVRA to effect this solution. Three principles derived from the statute support this interpretation: the mandatory nature of restitution, the fact that the payment obligation is not contingent on the victim, and the purpose of restitution.

The MVRA is clear that the award of full restitution is mandatory. Although the victim is the beneficiary of restitution, the victim has only limited rights and may not dictate whether restitution is appropriate or the amount: “the court shall order restitution to each victim in the full amount of each victim’s losses.” 18 U.S.C. § 3664(f)(1)(A).

The restitution obligation is a continuous one that does not ebb and flow with the victim’s circumstances. The obligation is terminated only by “the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution” and not by any action on the part of the victim. *Id.* § 3613(b). Even when the defendant dies, her “estate will be held responsible for any unpaid balance of the restitution amount.” *Id.* And, when calculating restitution, the district court may not consider that the victim is entitled to compensation from insurance or another source. *Id.* § 3664(f)(1)(B). Nothing in the statute

provides that the defendant's liability ends with any change in the victim's circumstances. At the same time, a victim is not required to accept restitution, as "[n]o victim shall be required to participate in any phase of a restitution order." *Id.* § 3664(g)(1). To reconcile the mandatory nature of restitution with this provision, the statute must admit some flexibility as to where restitution money goes if the victim disclaims participation.

One other section of the MVRA bears analysis. Section 3664(g)(2) allows the victim to "at any time assign [its] interest" to the Fund "without in any way impairing the obligation of the defendant to make such payments." *See Turner*, 312 F.3d at 1144 (observing that a victim's assignment does not alter the defendant's restitution liability). It makes sense that the statute lays out the rights of the third-party victim since, without an explicit provision, the third party would be left up in the air as to the ability to assign. But this provision does not extend beyond the victim's ability to assign and cannot not be read to constrain the district court's authority to redirect payments.

In *Johnson*, one of the defendants made the same argument Hankins makes here—namely, that because § 3664(g)(2) gives victims authority to assign to the Fund, the statute should be read as cabining the district court's authority. Rejecting that approach, the Second Circuit was clear: "We disagree. Although § 3664(g)(2) authorizes victims to make such an assignment, it does not *preclude* the Court from doing so." 378 F.3d at 245 (emphasis added). The statute's silence gives us flexibility to construe the scope of the district court's authority. Indeed, as

the Supreme Court counsels, “There is a basic difference between filling a gap left by Congress’ silence and rewriting the rules that Congress has affirmatively and specifically enacted.” *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 625 (1978). Here, we are doing the former—filling a gap in the MVRA.

Finally, allowing the district court to redirect restitution serves the MVRA’s compensatory and punitive purposes. See *William A. Graham Co. v. Haughey*, 646 F.3d 138, 144 (3d Cir. 2011) (noting that federal courts filling statutory gaps “must do so with the statute’s policy goals in mind”). The MVRA’s legislative history describes the statute’s dual goals as “ensur[ing] that . . . victims . . . receive the restitution that they are due” and that “the offender . . . pays the debt owed to the victim *as well as to society*.” S. Rep. No. 104-179, at 12 (1995) (emphasis added). As we emphasized in *United States v. Rich*, “we have held repeatedly that restitution payments have both compensatory and penal purposes.” 603 F.3d 722, 729 (9th Cir. 2010) (internal quotation marks and citation omitted); see also *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (describing the MVRA as having “hybrid” purposes). Redirecting the defendant’s restitution payments to the Fund supports the MVRA’s compensatory goal of supporting crime victims, even if the victims compensated are not the defendant’s actual victims. This solution also serves the MVRA’s penal purpose of requiring the defendant to “pay[] the debt owed to . . . society.” S. Rep. No. 104-179, at 12.

Conversely, adopting an interpretation that prohibits the district court from redirecting

restitution to the Fund would thwart the goals of the MVRA. Hankins’s sentence explicitly directs her to make restitution payments payable to “the U.S. District Court Clerk, for transfer to the payee.” *See* 18 U.S.C. § 3611 (stating that restitution payments may be directed to the Clerk of the Court). Because Hankins is obligated to continue paying restitution under her sentence, absent redirection, her payments would have nowhere specific to go. The funds would revert at some point to the U.S. Treasury’s federal unclaimed property fund⁵ and eventually may even escheat to the state. *See United States v. Klein*, 303 U.S. 276, 281–82 (1938) (affirming Pennsylvania’s escheat of unclaimed money deposited in the registry of a federal court even though the money had already been transferred to the U.S. Treasury). But, in any event, the funds would accrue without supporting any victims of crime. Surely Congress did not intend this result. *See United States v. Webster*, 108 F.3d 1156, 1158 (9th Cir. 1997) (opting for the construction that would avoid “undesirable results”).

We are not persuaded by the two circuits that have determined that a district court cannot redirect restitution. *See United States v. Speakman*, 594 F.3d 1165, 1175–76 (10th Cir. 2010); *United States v. Pawlinski*, 374 F.3d 536, 541 (7th Cir. 2004).

To begin, the court in *Speakman* sidesteps the MVRA and invents language that permits a victim to

⁵ Under the Guide to Judiciary Policy, after the passage of time unclaimed restitution payments are transferred to the Treasury, either to the Unclaimed Funds or the Forfeitures of Unclaimed Money and Property Fund. 13 Guide to Judiciary Policy §§ 1020.10.30, 1020.30.20 (2013); *see also* 28 U.S.C. § 2042.

dictate whether the defendant will pay restitution at all. When the victim in *Speakman* declined restitution prior to sentencing, the district court ordered the defendant to pay restitution to the Fund. 594 F.3d at 1168–69. On appeal, the Tenth Circuit held that “the MVRA is expressly made subject to the victim accepting restitution. In other words, construing §§ 3663A and 3664(g)(1) together means that restitution payments under the MVRA are mandated only when the victim accepts them.” 594 F.3d at 1177. According to *Speakman*, ordering restitution when a victim declines it “punishes the defendant without in any way compensating the victim” and renders the policy supporting the MVRA “simply inapplicable.” *Id.* at 1178–79. This analysis flatly contradicts both the mandatory nature of restitution and the conclusion of multiple circuits that restitution under the MVRA does not rest on the victim’s concurrence. Victims cannot control the applicability of a penal statute. *See Bearden*, 274 F.3d at 1041.

Pawlinski involved a politician who was ordered to pay restitution to defrauded campaign contributors. 374 F.3d at 537. When only a handful of contributors claimed the money, the district court directed the remaining balance to the Fund, although Pawlinski suggested it be restored to his campaign fund. *Id.* at 538. In contrast to the Second Circuit and our view, the Seventh Circuit deemed the revised sentence “illegal” and stated that the district court “ignore[d] the statutory limits” of the MVRA. *Id.* at 540. The Seventh Circuit read the statute to permit an award to non-victims in only two situations: first, when restitution is imposed pursuant to a plea agreement

that directs restitution to non-victims and, second, when the victim assigns its rights to the Fund. *Id.* at 539–40. The Seventh Circuit did not address the practical effect of its holding; it simply said that “[w]hat happens to the money” would be an issue for the federal and state governments. *Id.* at 541.

Neither *Speakman* nor *Pawlinski* affects our reasoning. We do not view the redirection of restitution as violating the rule that a district court cannot order restitution absent explicit statutory authority. *See United States v. Gossi*, 608 F.3d 574, 577 (9th Cir. 2010). No one disputes that the district court entered a valid restitution order at the outset. The process of deciding where to send restitution payments already ordered is distinct from the authority to order restitution in the first instance. And we do not interpret the MVRA’s silence regarding redirection as a limit on the district court’s power to craft a solution that is consistent with the purposes of the MVRA and the Fund and that fosters the compensatory and punitive goals of the statute. *See Johnson*, 378 F.3d at 245.

In short, Hankins cannot extinguish her restitution sentence through settlement with the victim’s assignee, Horton. Once Horton disclaimed further interest in restitution, redirecting restitution to the Fund was within the district court’s power.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF
AMERICA,

Case No.
6:01-cr-60100-AA

Plaintiff,

OPINION AND ORDER

v.

ANN MARIE HASKINS
[sic],

Defendant.

AIKEN, Chief Judge:

Defendant, Anne Marie Haskins [sic] moves the Court for an Order acknowledging full satisfaction of the Restitution Judgment for \$350,000 imposed against her by Judge Michael R. Hogan for violation of 18 U.S.C. § 1344. Def.'s Mot. to Satisfy Restitution J. 1. Plaintiff, the United States of America, represented by Billy J. Williams, Acting United States Attorney for the District of Oregon, and through Assistant United States Attorney, Kathleen L. Bickers, opposes defendant's motion. Pl.'s Resp. to Def.'s Mot. 1.

BACKGROUND

On January 23, 2002, defendant pleaded guilty to bank fraud, 18 U.S.C. § 1344. *Id.* On January 24,

2002, defendant was sentenced to thirty days imprisonment and received credit for time served. *Id.* at 2. Defendant was also ordered to pay \$350,000 in restitution to the U.S. District Court for transfer to the payee, U.S. Bank Special Assets Group (U.S. Bank). Affidavit of John C. Fisher in Supp. of Mot. to Satisfy Restitution J. 9. Defendant was ordered to pay the entire \$350,000 immediately and any unpaid balance at the time defendant was released from custody was to be paid at the maximum installment possible, but not less than \$50 per month. *Id.*

On or about November 20, 2002, U.S. Bank assigned all its rights and claims against defendant to Horton & Associates LLC (Horton). Pl.'s Resp. to Def.'s Mot. 2. On November 4, 2011, an order to substitute the victim from U.S. Bank to Horton was entered by Judge Hogan. Affidavit of John C. Fisher in Supp. of Mot. to Satisfy Restitution J. 2. On September 26, 2013, defendant advised plaintiff that Horton accepted a settlement offer from her in the amount of \$5,000 on September 6, 2013. Pl.'s Resp. to Def.'s Mot. 2; *Id.* at Ex. D, 2. At that time, plaintiff had satisfied \$13,044.30 of the Restitution Order, leaving a balance of \$336,955.70. *Id.* at Ex. A, 2

On April 28, 2015, plaintiff received an offset from the Treasury Tax Offset Program (TOP) that was taken from defendant in the amount of \$21,782. *Id.* On May 8, 2015, defendant submitted a motion to this Court for an order acknowledging full satisfaction of the restitution judgment pursuant to the settlement agreement she made with Horton on September 26, 2013. Def.'s Mot. to Satisfy Restitution J. 1. On May 22, 2015, \$21,765 of the TOP offset was posted to defendant's restitution debt

(\$21,782 less a \$17.00 processing fee), resulting in a total restitution payment to date of \$34,809.30, and a remaining balance of \$315,190.70. Pl.'s Resp. to Def.'s Mot. 2. On May 28, 2015, plaintiff filed a response in opposition to defendant's instant motion. *Id.*

DISCUSSION

Plaintiff opposes defendant's motion to satisfy the Restitution Judgment for the reduced amount of \$5,000 and argues that pursuant to the Mandatory Victim Restitution Act (MVRA) (18 U.S.C. §§ 3663A and 3664), full restitution is mandatory. *Id.* at 3. Moreover, plaintiff asserts that it has no detailed information on defendant's income, but argues that the \$21,782 TOP offset from April 28, 2015 suggests that defendant is generating significant income, which Horton may not have been aware of when it entered into the agreement to settle defendant's outstanding debt for "pennies on the dollar." *Id.* Finally, plaintiff argues that even if Horton has elected not to receive any additional restitution payments, the \$21,782 offset that was posted to defendant's restitution debt after the agreement, as well as any future funds recovered as part of defendant's sentence, should be ordered deposited into the Crime Victims Fund (CVF) pursuant to 18 U.S.C. § 3664(g)(1)(2).

Defendant argues that "there is nothing in the [MVRA] that forbids an assignee, or even a victim, from executing a satisfaction of judgment or from reaching a separate settlement of its claim" and, therefore, "satisfaction of judgment is permissible because it is not forbidden." Def.'s Mem. in Supp. of

Mot. to Satisfy J. 2. Moreover, defendant cites *United States v. Turner*, for the proposition that what a third party transferee of an interest in restitution payments “elects to do with the stream of payments he has purchased is for him to say” and, therefore, the satisfaction of judgment agreement between her and Horton should be honored. *Id.* (quoting *United States v. Turner*, 312 F. 3d 1137, 1144 (9th Cir. 2002)).

The MVRA provides for mandatory restitution and covers “any offense committed by fraud or deceit... in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.” 18 U.S.C. § 3663A(c)(1). The MVRA states that “[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.” *Id.* § 3664(f)(1)(A). Further, a court “may increase restitution on petition by the victim.” *Turner*, 312 F.3d at 1143 (citing 18 U.S.C. § 3664(d)(5)). A court “may also resentence a defendant upon a finding that the defendant has defaulted upon h[er] restitution obligation.” *Id.* (citing 18 U.S.C. §§ 3613A, 3614). Finally, a victim may designate her restitution to another person or organization, *id.* (citing 18 U.S.C. § 3663(b)(5)), or may assign her “interest in restitution payments to the CVF in the Treasury without in any way impairing the obligation of the defendant to make such payments.” 18 U.S.C. § 3664(g)(2).

Here, the main thrust of defendant’s argument is that because the MVRA does not expressly forbid satisfaction of judgment agreements, her agreement

with Horton should be honored and the remainder of her restitution discharged. Moreover, defendant quotes part of the Ninth Circuit's holding in *Turner* to support her claim. However, defendant's reliance on *Turner* is misplaced. Specifically, the *Turner* court held that:

It appears that the government, and perhaps the district judge, fear that . . . the deterrence intended in the original restitution order will, in the future, somehow be avoided. *Turner is subject to the full amount of restitution.* It is to be paid to the court registry and supervised by the probation office. That office should, pursuant to 18 U.S. C. § 3663(b)(5), recognize and honor as valid the assignment of restitution by the banks to Sandall [the assignee of the restitution asset]. The banks' sale of their restitution asset is the banks' business. What Sandall elects to do with the stream of payments he has purchased is for him to say. What may or may not happen in the future was not before the district court.

Turner, 312 F.3d at 1144 (emphasis supplied).

A plain reading of this holding makes clear that a defendant must pay the full amount of restitution to the victim, or the assignee of the victim's restitution asset. Accordingly, defendant's restitution obligation is not discharged by the satisfaction agreement she entered into with Horton. *Turner* also makes clear that the assignee of the restitution asset may do what she chooses with the stream of payments she has purchased. Thus, this Court must also determine whether the \$21,782 offset from the TOP on April 28,

2015, as well as all future restitution payments, which Horton states it is no longer owed in the aforementioned satisfaction agreement, shall nonetheless be paid to Horton, or instead be paid to the CVF.

Plaintiff makes two arguments in support of the restitution payments going to the CVF rather than to Horton. Plaintiff first argues that the \$21,782 offset likely suggests that defendant is generating significant income, which Horton may not have been aware of when it entered into the agreement to settle defendant's outstanding debt. This argument is fails [sic] for two reasons. First, plaintiff's logic is flawed because defendant and Horton entered into the satisfaction agreement on September 6, 2013 and plaintiff did not receive the TOP offset until April 28, 2015. Thus, even if the offset signaled an increase defendant's income as plaintiff suggests, such an increase did not create the offset plaintiff relies on as evidence of this increase until over a year and a half after the agreement was formed. Second, prior to entering into the settlement agreement with defendant, pursuant to 18 U.S.C. § 3664(d)(5), Horton could have petitioned the Court to increase the restitution payment if it suspected that defendant had increased income at that time. However, plaintiff presents no evidence that Horton ever submitted such a petition. Accordingly, plaintiff's first argument with regard to this issue fails.

Next, plaintiff argues that the restitution should be paid to the CVF pursuant to the permissive language in 18 U.S.C. § 3664(g)(2) because a Second Circuit case, *United States v. Johnson*, held that "although § 3664(g)(2) authorizes victims to make ... an

assignment [to the CVF], it does not preclude the Court from doing so.” *United States v. Johnson*, 378 F.3d 230, 244 (2nd Cir. 2004).

Although not binding, this Court finds *Johnson* persuasive due to the statutory analysis it provides. Specifically, in reaching its decision, the *Johnson* court noted that the Senate considered a version of § 3664(g)(1) that read: “[n]o victim shall be required to participate in any phase of a restitution order. *If a victim declines to receive restitution made mandatory by this title, the court shall order that the victim’s share of any restitution owed be deposited in the [CVF] . . .*” *Id.* (citing S. Rep. No. 104-179, at 6 (Dec. 6, 1995), reprinted in 1996 U.S.C.C.A.N. 924, 925 (emphasis supplied)). The *Johnson* court further noted that by the time of the statute’s enactment, however, this italicized text had been removed. *Id.* (see Pub. L. 104-132, § 206(a), 110 Stat. 1214, 1234 (1996)). Finally, the *Johnson* court held that “by removing this text before enacting § 3664(g)(1), Congress may have suggested that assignment to the [CVF] is not *mandatory*. It certainly did not suggest that assignment to that fund is *prohibited*.” *Id.* (emphasis supplied).

This Court agrees with the analysis of in *Johnson*, insofar as it opines that the legislative history of § 3664(g)(1) does not support a conclusion that the assignment of rejected restitution funds to the CVF are not prohibited by Congress. Accordingly, the \$21,782 offset from the TOP on April 28, 2015, as well as all future restitution payments from defendant, shall be deposited into the CVF pursuant to 18 U.S.C. § 3664(g)(2).

CONCLUSION

For the foregoing reasons, defendant's motion for full satisfaction of restitution (ECF 28) is DENIED. Moreover the \$21,782 offset from the TOP on April 28, 2015, as well as all future restitution payments from defendant shall be deposited into the CVF pursuant to 18 U.S.C. § 3664(g)(2).

IT IS SO ORDERED.

DATED this 30th day of October 2015.

/s/ Ann Aiken

Ann Aiken
United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
District of Oregon**

UNITED STATES OF AMERICA **JUDGMENT IN A
CRIMINAL CASE**

v.

ANNE MARIE

HANKINS, as Primary
Shareholder, President
and Operations Officer
of Emerald Powerline
Construction, Inc.

Case Number:
CR 01-60100-01-HO

Norman Sepenuk

Defendant's Attorney

THE DEFENDANT

X pleaded guilty to count 1 of the Information.

Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number</u>
18 USC 1344	Bank Fraud	10/97 - 01/98	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X It is ordered that the defendant shall pay a special assessment of \$100.00, for count 1 of the Information, which shall be due immediately and

payable to the Clerk of the United States District Court, Eugene, Oregon.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [REDACTED]	<u>January 23, 2002</u>
Defendant's Date of Birth: [REDACTED]	Date of Imposition of Sentence
Defendant's Mailing Address: [REDACTED]	<u>s/ Michael R. Hogan</u> Signature of Judicial Officer <u>MICHAEL R. HOGAN,</u> <u>Chief U. S. District</u>
Defendant's Residence Address: [REDACTED]	<u>Judge</u> Name & Title of Judicial Officer
	Dated: January <u>24</u> , 2002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty (30) days, with credit for any time served as determined by the policies of the Bureau of Prisons.

- X The court makes the following recommendations to the Bureau of Prisons: Confinement to the Lane County CCC, Eugene, OR.
- X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
- X before 2 p.m. on March 25, 2002.

RETURN

I have executed this judgment as follows:

Defendant delivered on: _____ to
_____ at
_____,
with a certified copy of this judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

The defendant shall comply with the standard conditions that have been adopted by this Court (set

forth below). If this judgment imposes a restitution obligation or a fine, it shall be a condition of supervised release that the defendant pay any unpaid restitution or fine as ordered. The defendant shall comply with the following special conditions:

1. The defendant shall adhere to a home detention schedule as prescribed by the probation officer for a period of 5 months which shall include electronic monitoring as a means of verifying compliance. The defendant shall pay all or part of the costs of electronic monitoring as determined by the probation officer.
2. The defendant shall pay full restitution to the U. S. Bank, Special Assets Group, P. O. Box 3108, Portland, OR 97208-3108 in the amount of \$350,000. Interest is waived on this amount. If there is any unpaid balance at the time of the defendant's release from custody, it shall be paid at the maximum installment possible and not less than \$50 per month. The defendant shall further pay restitution to the private non-institution victims to be identified by the U. S. Probation Office, in such amounts and at such times to be determined by the U. S. Probation Office.
3. The defendant shall participate in a mental health treatment program approved by the probation officer.
4. As directed by the probation officer, the defendant shall take psychotropic medication, if medically approved, for the treatment of a mental or emotional disorder.

5. The defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer.
6. The defendant shall authorize release to the U.S. Probation Officer any and all financial information by execution of a release of financial information form, or by any other appropriate means, as directed by the probation officer.
7. The defendant's employment shall be subject to approval by the probation officer.
8. The defendant shall maintain a single checking account and/or savings account in his/her name. Defendant shall deposit into this account all income, monetary gains or other pecuniary proceeds, and make use of this account for payment of all personal expenses. All other accounts must be disclosed to the probation officer.
9. The defendant shall disclose all assets and liabilities to the probation officer. Defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the probation officer.
10. The defendant shall not make application for any loan, enter into any credit arrangement, or enter into any residential or business lease agreement without approval of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) The defendant shall report in person to the probation office for the district to which he or she is released within 72 hours of release from the custody of the Bureau of Prisons.
- 2) The defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. Revocation of probation or supervised release is mandatory for illegal possession of a controlled substance.
- 3) The defendant shall not possess a firearm, destructive, or dangerous device.
- 4) If the defendant illegally uses drugs or abuses alcohol, has a history of drug or alcohol abuse, or drug use or possession is determined to be an element of the defendant's criminal history or instant offense, the defendant shall participate in a substance abuse treatment program as directed by the probation officer which may include urinalysis testing to determine if the defendant has used drugs or alcohol.
- 5) The defendant shall submit to a search of his/her person, residence, office or vehicle, when conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
- 6) The defendant shall not leave the judicial district without the permission of the court or probation officer.

- 7) The defendant shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.
- 8) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer. The defendant may decline to answer inquiries if a truthful response would tend to incriminate him or her. Such a refusal to answer may constitute grounds for revocation.
- 9) The defendant shall support his or her dependents and meet other family responsibilities to the best of his or her financial ability.
- 10) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 11) The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
- 12) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. If the defendant's history or offense behavior includes drug abuse or possession of controlled substances, the defendant shall submit to one drug surveillance test with 15 days of release on probation or from custody and at least two additional periodic tests. If, at any time, the probation officer has reasonable cause to believe the defendant is using illegal drugs or is abusing alcohol, the defendant shall submit to urinalysis

testing, breathalyzer testing, or reasonable examination of the arms neck, face, and lower legs.

- 13)The defendant shall not knowingly frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 14)The defendant shall not knowingly associate with any persons engaged in criminal activity, and shall not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 15)The defendant shall permit a probation officer to visit him or her at any reasonable time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 16)The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
- 17)The defendant shall not enter into any agreement to act as an informant or special agent of a law enforcement agency without the permission of the court.
- 18)As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his or her criminal record or personal history and characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such a notification requirement. This requirement will be exercised only when the probation officer believes a reasonably foreseeable risk exists or a law mandates such notice. Unless the probation officer believes the defendant presents an immediate

threat to the safety of an identifiable individual, notice shall be delayed so the probation officer can arrange for a court hearing and the defendant can obtain legal counsel.

RESTITUTION

X The defendant shall make restitution to the following entity in the following amount:

<u>Name of Payee</u>	<u>Amount of Restitution</u>
U. S. Bank, Special Assets Group P. O. Box 3108 Portland, OR 97208-3108 Reference No.: 0410109904 Emerald Powerline Construction Co. Loss Amount: \$350,000.00	\$350,000.00

Interest is waived on this amount.

Payments of restitution are to be made to:

X the U. S. District Court Clerk, for transfer to the payee.

Restitution shall be paid:

X in full immediately. If there is any unpaid balance at the time of defendant's release from custody, it shall be paid at the maximum installment possible, and not less than \$50 per month.

IT IS FURTHER ORDERED that defendant pay restitution to the private, non-institution victims as identified by the U. S. Probation Office, and at the direction of the U. S. Probation Office.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

APPENDIX D

18 U.S.C. § 3663A**Mandatory restitution to victims of
certain crimes**

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term “victim” means 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, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3664

Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or

identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable--

(A) provide notice to all identified victims of--

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and
 (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those

losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of--

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of--

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(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.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be

paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in--

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in

subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

(1) such a sentence can subsequently be--

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.