



Restitution and Victims

2023 National Seminar

August 29, 2023

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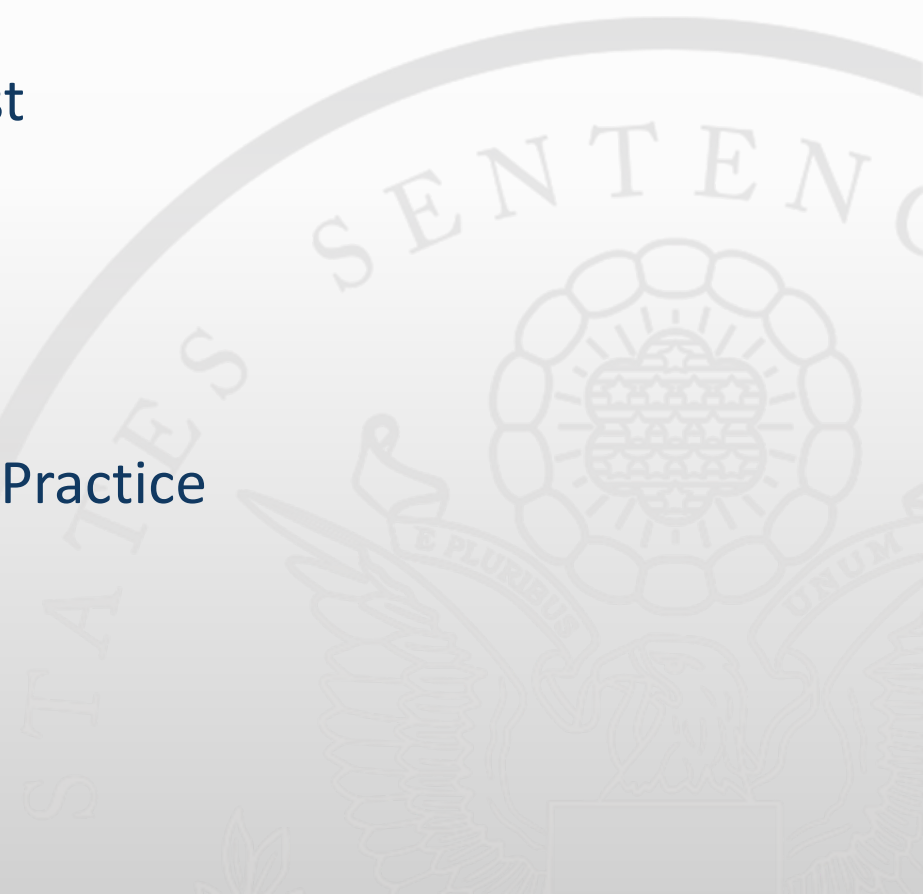
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What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



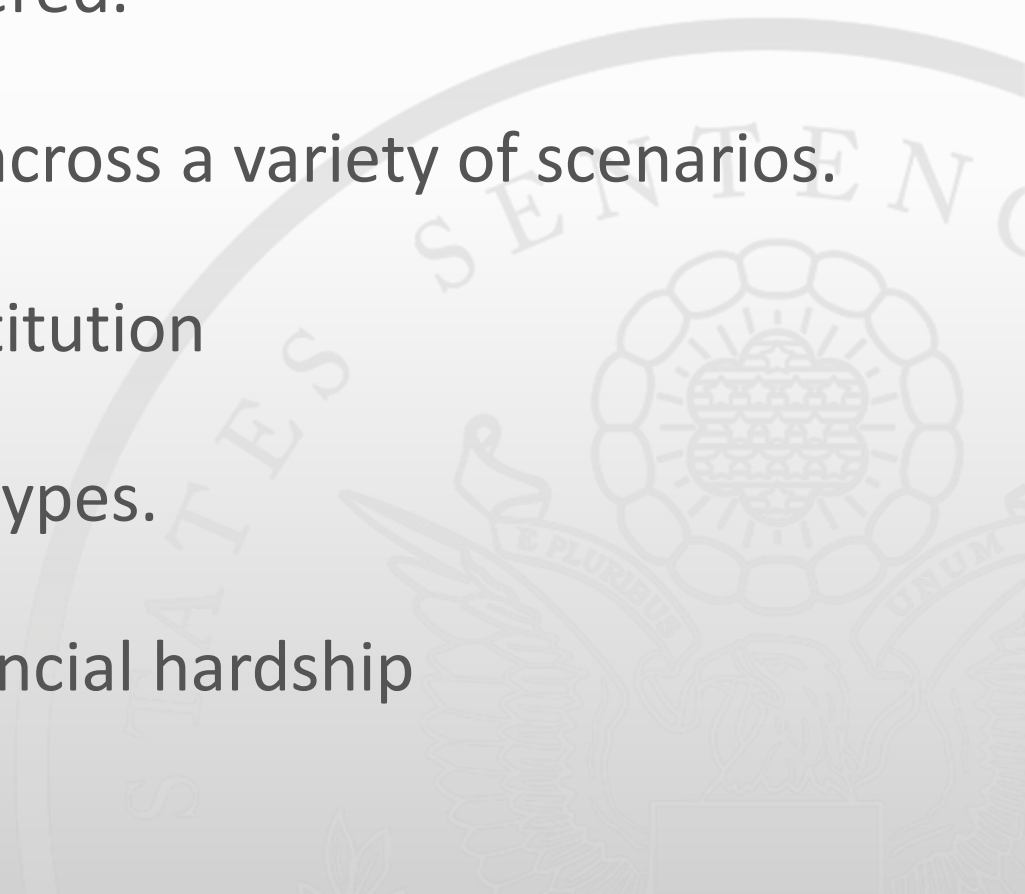
How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



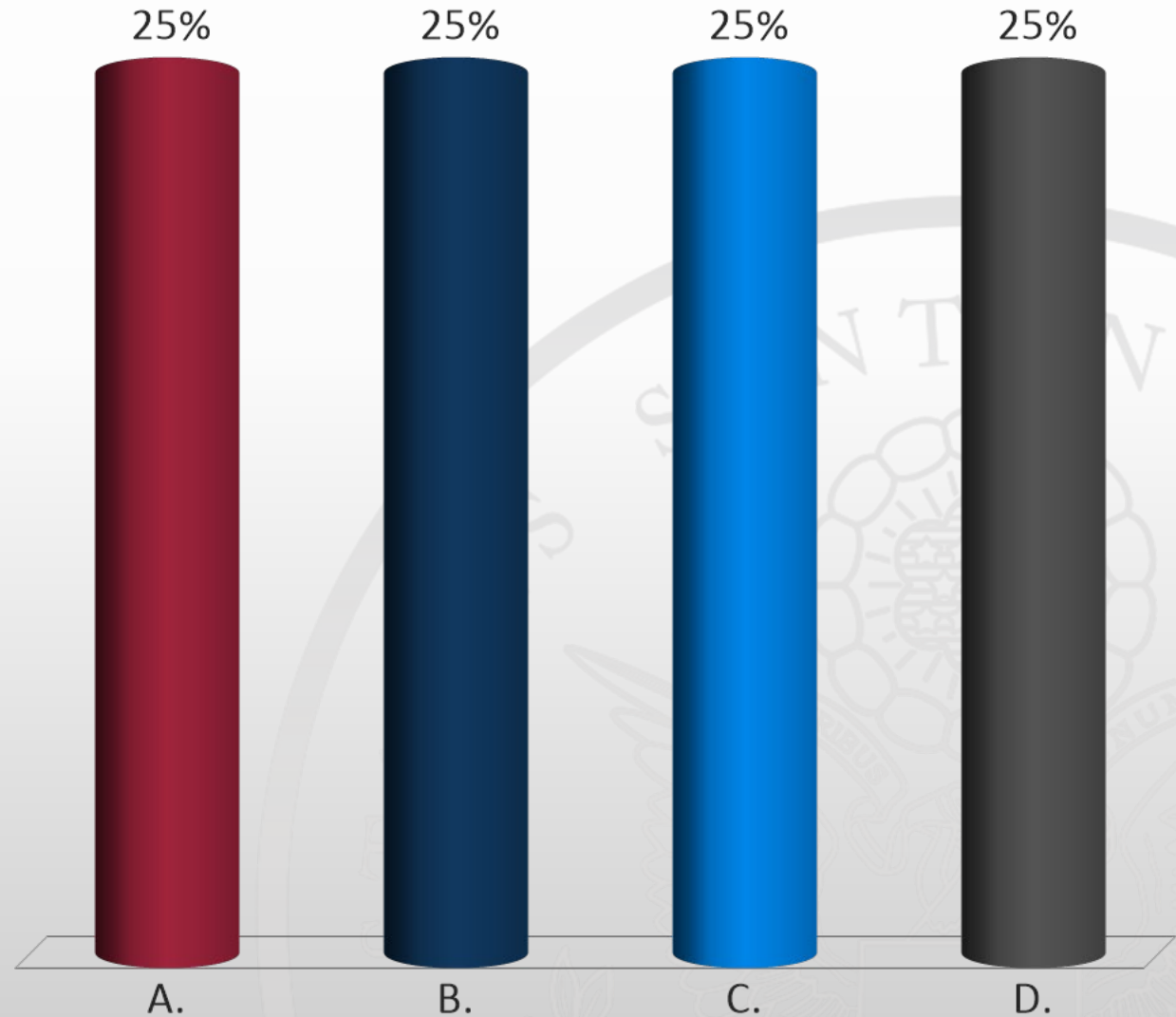
Learning Objectives

By the end of today's session, your active engagement will empower you to:

- Determine when restitution can be ordered.
 - Define key characteristics of a “victim” across a variety of scenarios.
 - Determine what is compensable for restitution
 - Determine restitution in select offense types.
 - Analyze the increase for substantial financial hardship
- 

What is the purpose of restitution?

- A. Punish the defendant
- B. Rehabilitation
- ✓ C. Make the victim whole
- D. Recover gain from the defendant



Restitution in a Nutshell

**Restitution is
about making a
victim of the
offense whole.**



“Five W’s” of Restitution



5w's

Who is a victim?

What is compensable?

Where is the authority to order restitution?

When is restitution ordered?

Why order restitution?

Where is the Authority to Order Restitution?

**Federal courts may not
order restitution unless
empowered by statute**

Limited Exceptions

General Restitution Statutes

18 U.S.C. § 3663A | Mandatory Restitution “MVRA”

18 U.S.C. § 3663 | Discretionary Restitution

18 U.S.C. § 3664 | Procedures for issuance/enforcement



Specific Restitution Statutes

18 U.S.C. § 1593 | Peonage and Trafficking

18 U.S.C. § 2248 | Sexual Abuse

18 U.S.C. § 2259 | Sexual Exploitation of Children

18 U.S.C. § 2264 | Domestic Violence and Stalking



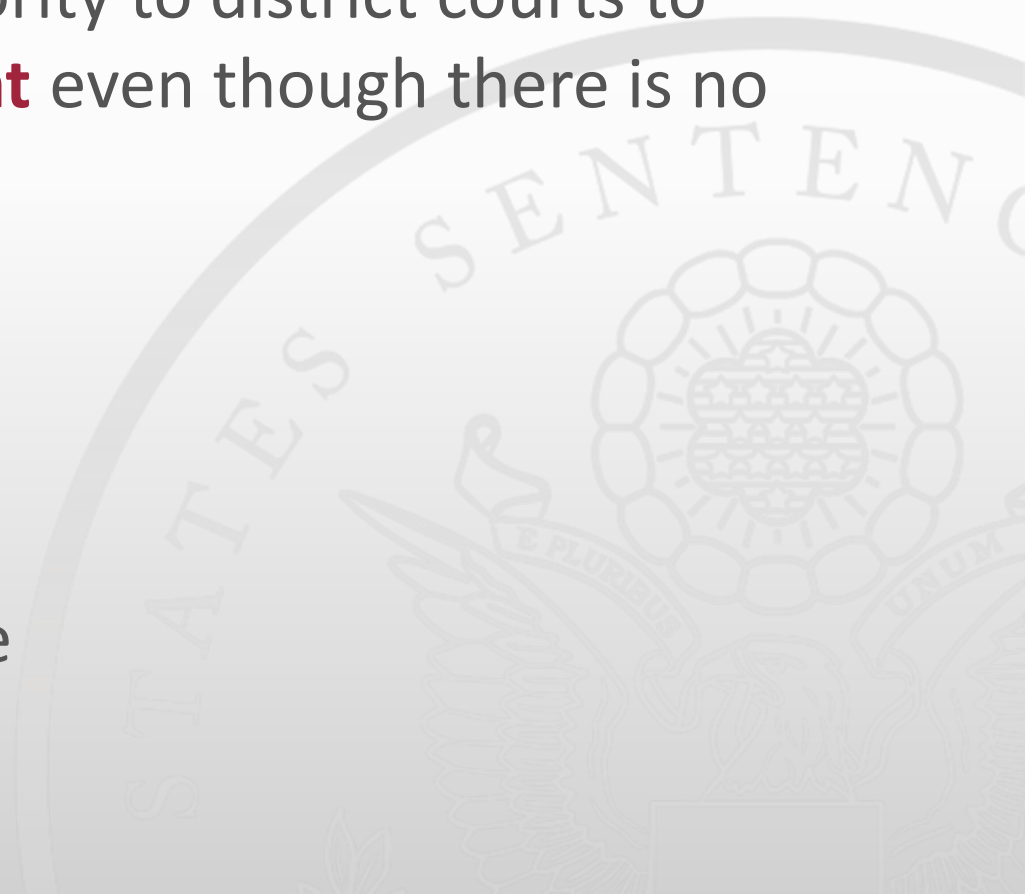
Exceptions to Statutory Basis

Plea agreement

18 U.S.C. § 3663(a)(3) grants statutory authority to district courts to award restitution based on a **plea agreement** even though there is no statutory basis to order

In re Doe, 57 F.4th 667 (9th Cir. 2023)

Condition of probation or supervised release



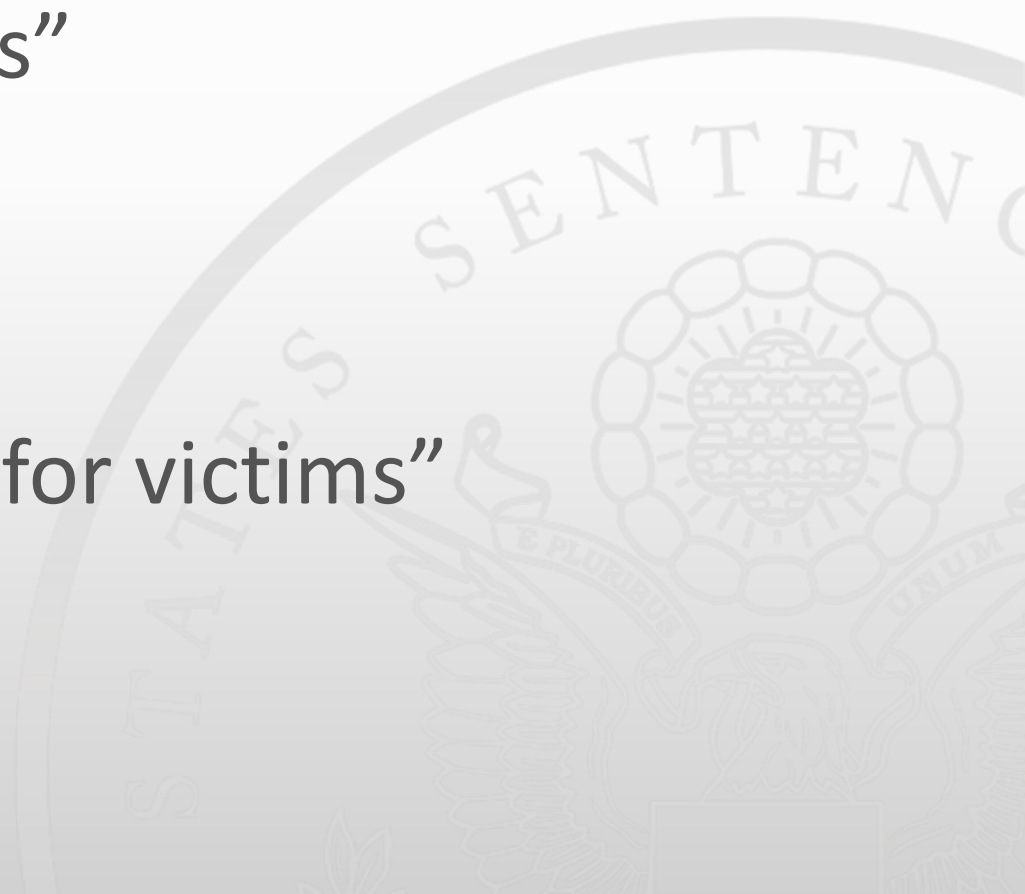
Differences between Restitution and §2B1.1 Loss

What can be considered loss and/or restitution

Key difference: “Intended Loss”

Who counts as a victim

Key difference: “Special rules for victims”



Scenario

The defendant opened 10 fraudulent credit cards. The defendant used 5 of the cards, charging \$1,000 on each.

The court determined the §2B1.1 loss amount as \$7,500, based on \$5,000 for the five cards used and another \$2,500 based on the \$500 per card rule at §2B1.1.

Assuming none of the stores where the cards were used were reimbursed at time of sentencing, what is the amount of restitution?

- ✓ A. \$5,000
- B. \$7,500
- C. \$10,000



Examples of Differences

	Restitution	Guidelines
Mortgage Interest	✓	X
Investigative Costs	✓	X



Key Points

Victim Differences



Determine independently!

Which of the following offenses is not listed at the MVRA?

- A. Crimes of violence
- B. Offenses against property committed by fraud or deceit
- C. Tampering with consumer products
- ✓ D. Tax offenses



Determine if Offense Qualifies Under the MVRA?

Crime of violence

- Categorical approach

Crimes against property

- Look to factual circumstances
 - *U.S. v. Hagan*, 60 F.4th 932 (5th Cir. 2020)
 - *U.S. v. Razzouk*, 984 F.3d 181 (2d Cir. 2017)
 - *U.S. v. Ritchie*, 858 F.3d 201 (4th Cir. 2017)
 - *U.S. v. Collins*, 854 F.3d 1324 (11th Cir. 2017)

Discretionary Restitution

Defendant been convicted of crime proscribed under Title 18 for which restitution is not mandatory



Who is a Restitution Victim?

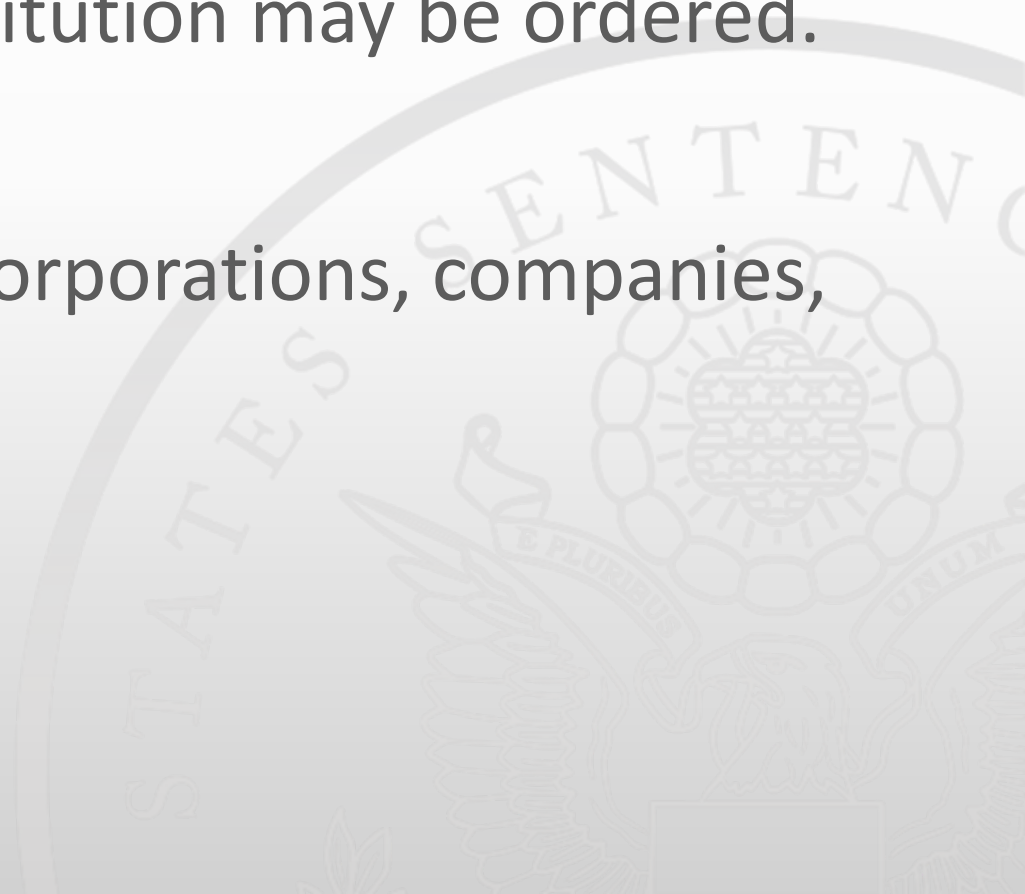
1. Start with the offense of conviction
2. Might be expanded by type of offense



Qualifying as a Restitution Victim

A person **directly and proximately** harmed as a result of the commission of an offense for which restitution may be ordered.

“Persons” can include legal guardians, corporations, companies, and the government.

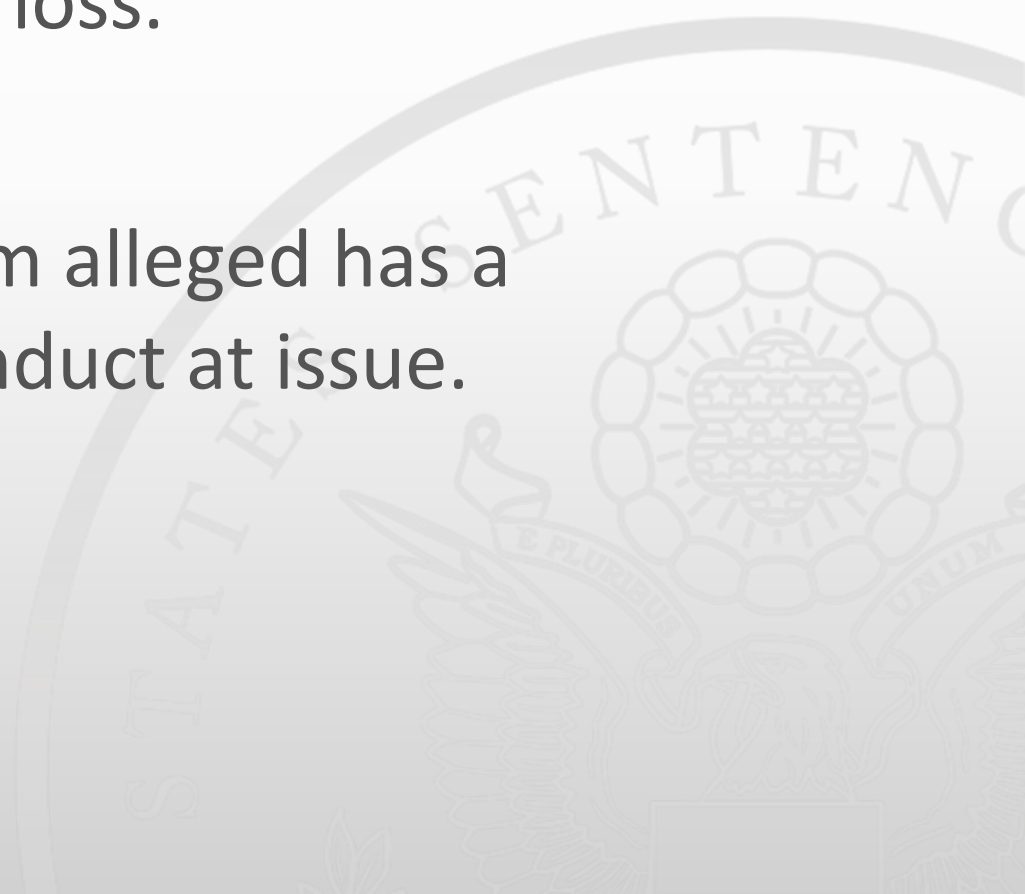


“But-For” and Proximate Cause

Defendant’s offense must be both actual cause of victim’s losses and the proximate cause of that loss.

Proximate cause asks whether the harm alleged has a sufficiently close connection to the conduct at issue.

Robers v. U.S. 572 U.S. 639 (2014)



During a high-speed chase, the defendant fired a gun that hit a car and then crashed into another car causing \$25,000 in damages

The defendant pled guilty to felon in possession under 18 U.S.C. § 922 and the court ordered \$25,000 in restitution to the owner of the cars.

Can the court order restitution?

- ✓ A. Probably not
- B. Probably



Elements of the Offense of Conviction

“The specific conduct underlying the elements of the felon-in-possession offense does not include use of a firearm or flight from police. As a result, neither the owner of the car nor the owner of the fence is a ‘victim’ of Penn's conviction.”

U.S. v. Penn, 969 F.3d 450 (5th Cir. 2020)

See also, U.S. v. West, 646 F.3d 745 (10th Cir. 2011)

But see, U.S. v. Ruiz-Lopez, 53 F.4th 400 (6th Cir. 2022)

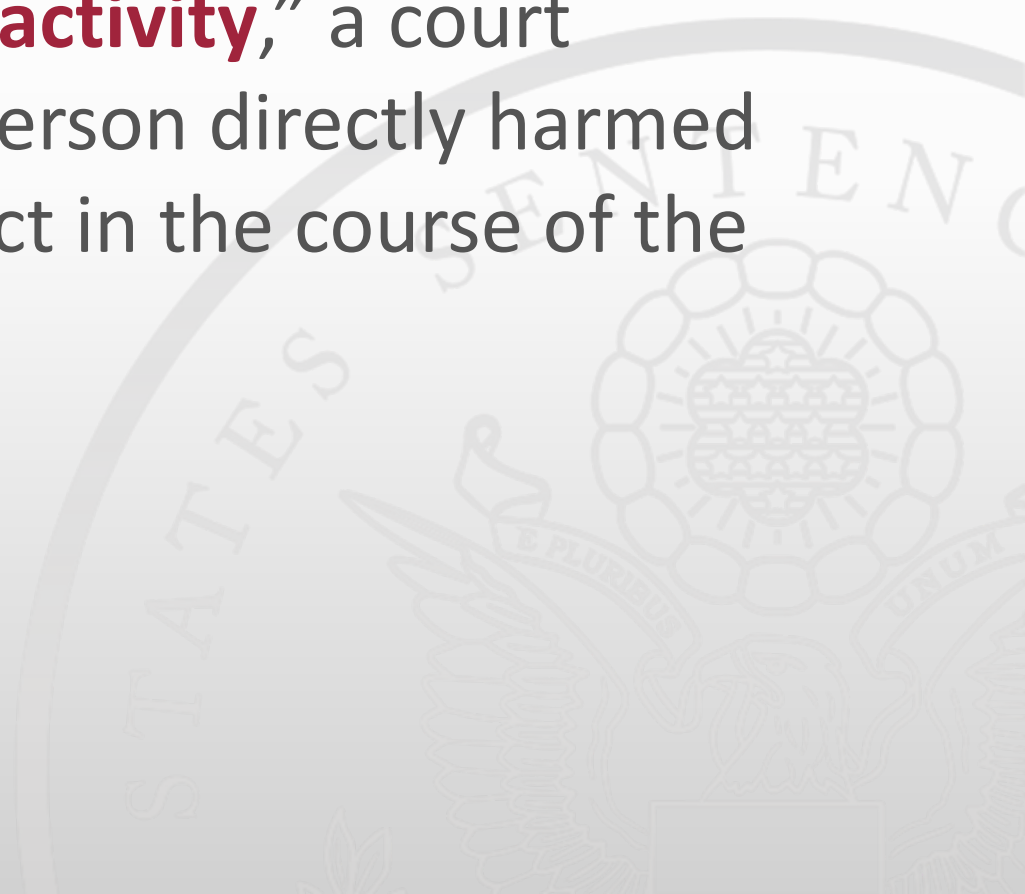
Expanding Who is A Victim

1. Does the offense involve a scheme **as an element**?
2. Is the offense a conspiracy?
3. Plea bargain



Expanding Who is a Victim?

“When the offense “involves as an **element a scheme, conspiracy, or pattern of criminal activity,**” a court should order restitution for “any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.”



Two Questions

1. Does the offense involve a scheme **as an element**?
2. If so, what is the **scope** of the scheme?



Examples of Statutes with Scheme

Mail Fraud

(18 U.S.C. § 1341)

Wire Fraud

(18 U.S.C. § 1343)

Bank Fraud

(18 U.S.C. § 1344)

RICO

(18 U.S.C. § 1962)

Indictment

Restitution can be imposed for victims not in the indictment so long as they are victims of the scheme of which defendant is convicted, and **the charge** describes the nature and duration of the scheme.

If offense involves as an element a scheme, conspiracy, or pattern of activity, then any person directly harmed by the defendant's criminal conduct **in the course of the scheme,** conspiracy, or pattern is a victim.

Conspiracy Scenario

The defendant was convicted of conspiracy to commit healthcare fraud. The defendant, a physician, and his partner physicians, wrote false prescriptions that were filled by pharmacists.

The indictment states the dates of the conspiracy spanned from January 1, 2018 to December 31, 2022. The doctor joined the conspiracy on January 1, 2020.

The court concluded that the total amount of restitution for the entire five-year conspiracy was \$1,500,000 (\$300,000 a year in fraudulent billing).

Can the defendant be held liable for the entire amount of restitution?

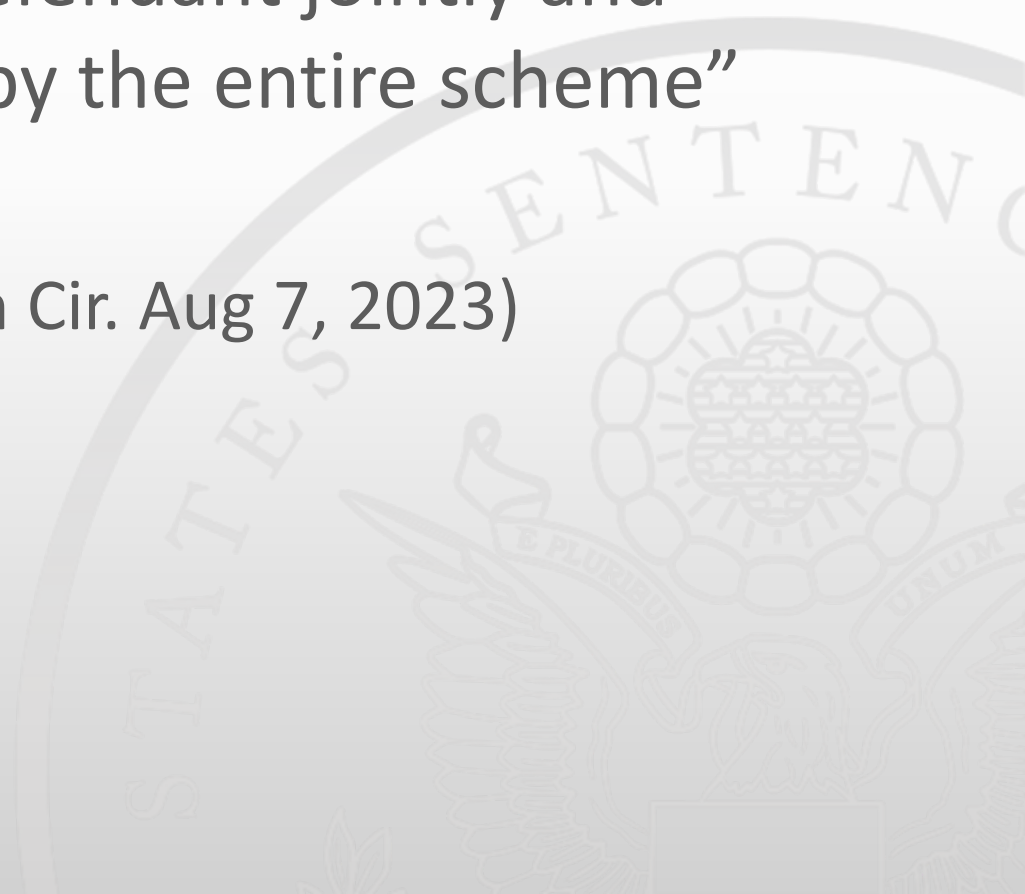
- ✓ A. Yes
- B. No



Conspiracy

“Where a defendant is convicted of conspiracy, the MVRA authorizes a district court to hold the defendant jointly and severally liable for all [victims] harmed by the entire scheme”

U.S. v. Dayden, -F.4th-, 2023 WL 5008204 (9th Cir. Aug 7, 2023)



Conspiracy/Joint and Severally

“Under the MVRA, members of a conspiracy may be “held jointly and severally liable for all foreseeable losses within the scope of their conspiracy regardless of whether a specific loss is attributable to a particular conspirator.”

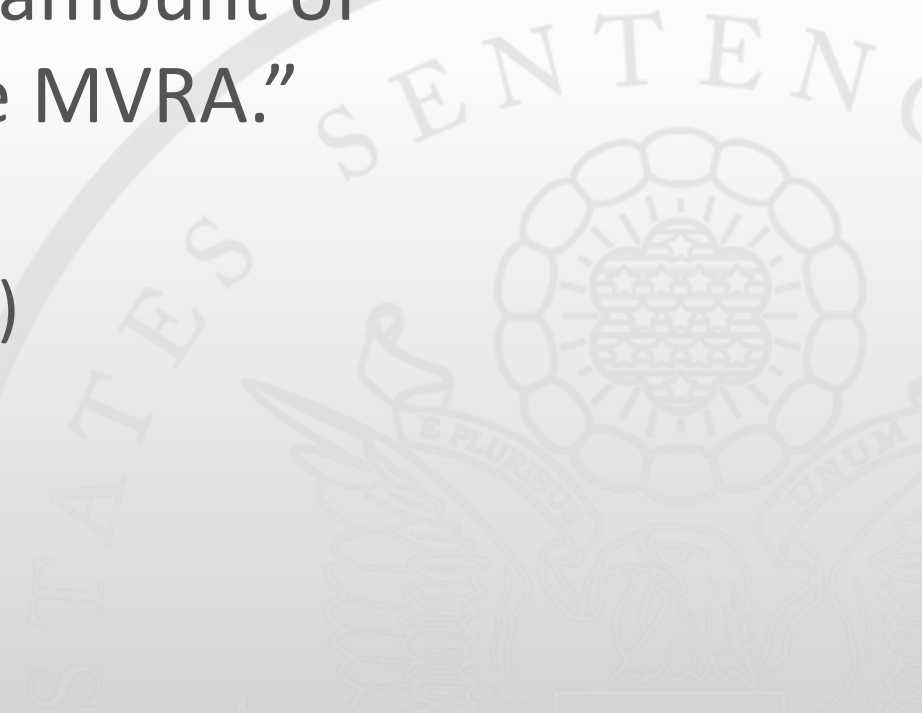
“And the court's discretion does not vanish into thin air simply because a particular defendant received a smaller share of the swindled funds than was received by other co-conspirators.”

U.S. v. Ochoa, 58 F.4th 558 (1st Cir. 2023)

Temporal Limits of Conspiracy

“On remand, the district court must be careful to take into account not only the objects of the charged conspiracy, but also its temporal limits, in calculating the amount of restitution owed by Alisuretove under the MVRA.”

U.S. v. Alisuretove, 788 F.3d 1247 (10th Cir. 2015)



Scope of Conspiracy

Restitution amount remanded so court can find whether a defendant knew or should have known of the scope and impact of the past activities of the conspiracy prior to joining the conspiracy.

U.S. v. Bengis, 783 F.3d 407 (2d Cir. 2015)



Examples of Conspiracy Cases

U.S. v. Pena, 910 F.3d 591 (1st Cir. 2018)

U.S. v. Brazier, 933 F.3d 796 (7th Cir. 2019)

U.S. v Rodriguez, 915 F.3d 532 (8th Cir. 2019)

U.S. v. Sexton, 894 F.3d 787 (6th Cir. 2018)



The defendant produced images of child pornography of Minor A and Minor B. The defendant pleads guilty to production of child pornography of Minor A, and the court determines the guidelines based only on Minor A.

The defendant agrees to pay restitution in the plea agreement to Minor B.

Can the court order restitution to Minor B?

- A. No because defendant only pled guilty to images of Minor A
- B. No because guidelines determined only on minor A
- C. Yes



What is Compensable for Restitution?



**Damage or Loss to
Property**



Bodily Injury

What can be Included in Order

Medical Expenses

Lost Income

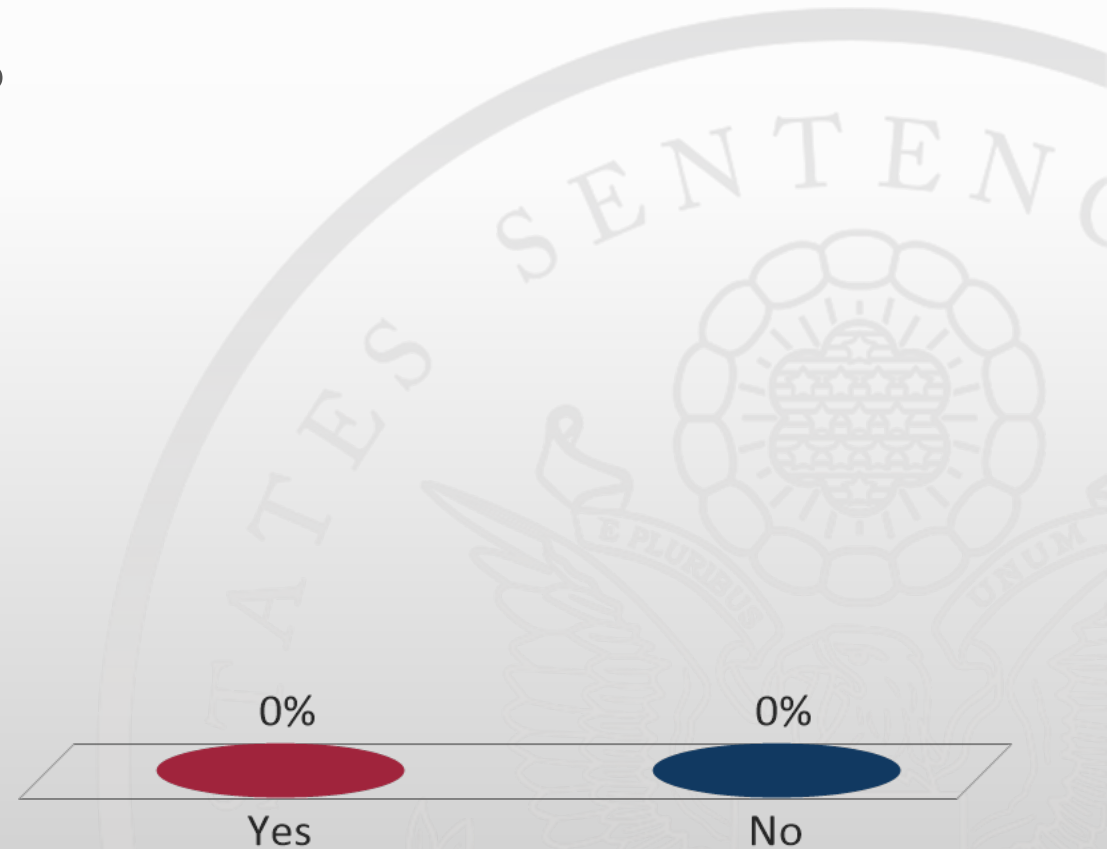
Rehabilitation

**Funeral and Related
Expenses**

The defendant, a former police officer, sexually assaulted a 19-year male he arrested. The government provided evidence that the sexual assault harmed C.L.'s mental health, which in turn prevented C.L. from keeping his job at the pizzeria or obtaining other work for one year.

Can the court order restitution for lost wages?

- ✓ A. Yes
- B. No



Lost income

Court could include lost wages because the defendant's conduct had proximately caused the lost income.

U.S. v. Sepulveda, 64 F.4th 700 (5th Cir. 2023)



Medical Expenses

Physical, psychiatric and psychological care.

U.S. v. Keelan, 786 F.3d 865 (11th Cir. 2015)

U.S. v. Church, 731 F.3d 530 (6th Cir. 2015)

U.S. v. Schmidt, 675 F.3d 1164 (8th Cir. 2015)



Medical Expenses

A district court can order restitution to be paid to third-party when the party bears the cost of providing necessary medical care to a victim of a covered offense who suffered bodily injury because of the offense.

U.S. v. Johnson, 400 F.3d 187 (4th Cir. 2005)

The defendant is convicted of Hobbs Act robbery. The defendant robbed a drug dealer of \$25,000 cash that included money made from drug dealing and \$5,000 worth of cocaine.

The court can order restitution for which amounts?

- A. \$30,000
- ✓ B. \$25,000
- C. Only the amount of the cash that was not from drug dealing
- D. Zero



United States v. Taylor

62 F.4th 146 (4th Cir. 2023)

A defendant convicted of Hobbs Act robbery owed restitution where some of the victims' losses included cash and personal property they had obtained through illegal activity.



How to Value Items for Restitution

Although the fair market value of property will ordinarily compensate a victim for his or her loss, that metric may at times “inadequately measure” the relevant harm. In such a case, replacement cost may be “best suited to make [the] victims whole.”

U.S. v. Munoz, 2023 WL 3582684 (5th Cir. 2023)

Investigation Expenses

Victims attorneys' fees and other expenses incurred during an investigation and proceeding relating to offense of conviction only applies to government investigations and proceedings and not to private investigations or civil proceedings.

Lagos v. U.S. 138 S. Ct. 1684 (2018)

United States v. Afriyie

27 F.4th 161 (2d Cir. 2022)

Even after *Lagos*, victims of certain offenses may recover under 18 U.S.C. § 3663A(b)(4) attorneys' fees incurred while participating in government investigations of the offenses.

However, expenses incurred while participating in a noncriminal investigation by the Securities and Exchange Commission are not recoverable under the MVRA.

Specific Offenses



Restitution for Sex Offenses

Andy, Vicky, Andy Act (AVAA)

- Minimum amount of restitution is \$3,000

Title 18, U.S.C. 2259 (Mandatory Restitution)

Paroline factors



Mandatory Restitution 18 U.S.C. § 2259

“Full amount of the victim’s losses” includes any costs related to:

- A. physical, psychiatric, or psychological services/care;
- B. physical therapy or rehabilitation;
- C. transportation, temporary housing, and childcare expenses;
- D. lost income;
- E. attorneys’ fees; and
- F. other losses suffered as a proximate result of the offense.

Cases discussing 18 U.S.C. 2259

U.S. v. Osman, 853 F.3d 1184 (11th Cir. 2017)

U.S. v. Thunderhawk, 860 F.3d 633 (8th Cir. 2017)

U.S. v. Rothenberg, 923 F.3d 1309 (11th Cir. 2019)



Restitution in Child Porn Offenses

Paroline v. U.S., 134 S Ct. 1710 (2014)

“Restitution is proper under § 2259 only to the extent the defendant’s offense proximately caused a victim’s losses. Applying the statute’s causation requirements in this case, victims should be compensated and defendants should be held to account for their conduct on those victims, but defendants should only be made liable for the consequences and gravity of their own conduct, not the conduct of others.”

***Paroline* Factors**

Factors “need not be converted into a rigid formula”.

Moreover, the Supreme Court acknowledged that the analysis may be “difficult” when, as is the case here, the defendant is “one of thousands who have possessed and will in the future possess the victim's images but who has no other connection to the victim.”

U.S. v. Teijiero, 2023 WL 5116378 (5th Cir. Aug 10, 2023)

Future Therapy Costs

Court ordered \$67,000 for eight more years of therapy for kidnapping victim.

U.S. v. Protho, 41 F.4th 812 (7th Cir. 2022)

Court ordered \$150,000 for victims of “church-like” cult for PTSD.

U.S. v. Doak, 47 F.4th 1340 (11th Cir. 2022)

Health Care Fraud

Restitution for health care fraud under the MVRA had to be offset by value of services that defendant's hospitals rendered to patients.

Burden on defendant to show value of services.

U.S. v. Mahmood, 820 F.3d 177 (5th Cir. 2016)



Mortgage Fraud

Court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it.

Robbers v. U.S. 572 U.S. 639 (2014)

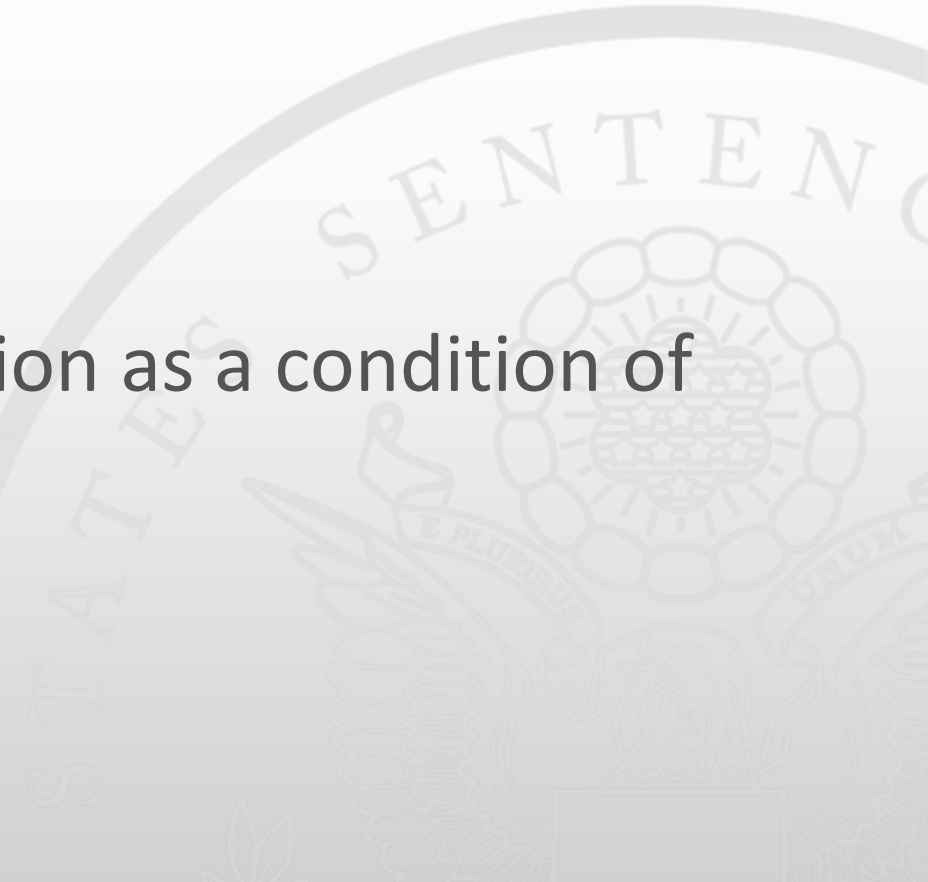


Tax Offenses

Courts cannot order restitution under MVRA or § 3663 for title 26 offenses.

U.S. v. Geddes, 71 F.4th 1206 (10th Cir. 2023)

For tax offenses, courts can order restitution as a condition of supervised release.



Identity Theft Cases

18 U.S.C. 3663(b)(6) permits the court to order those convicted of identity theft or aggravated ID theft to pay for the costs incurred by their victims to remedy the actual or intended harm associated with the offense.



Cyberstalking Offenses

Section 2264 requires restitution including “any costs incurred by the victim for ... attorneys' fees, plus any costs incurred in obtaining a civil protection order; ... [and] any other losses suffered by the victim as a proximate result of the offense.” 18 U.S.C. § 2264(b)(3).

U.S. v. Cardozo, 68 F.4th 725 (1st Cir. 2023)



Community Restitution

18 USC § 3663(c) authorizes community restitution in form of awards apportioned between state victim assistance agencies and state agencies dedicated to the reduction of substance abuse in limited drug trafficking cases.



Financial Considerations



The defendant is convicted of kidnapping and assault. The court orders \$50,000 in restitution under 18 U.S.C. § 3663. The defendant challenges the order because he is indigent and believes restitution should be waived.

Can the court waive the amount of restitution based on the defendant's inability to pay restitution?

- A. Yes
- B. Yes, but only if court makes finding of inability to pay
- ✓ C. No



Financial Considerations of Defendant

Court shall order restitution to each victim in the full amount of each victim's losses determined by the court and without consideration of the economic circumstances of the defendant.

A court only considers the defendant's financial circumstances only in specifying the manner and schedule of payment.

Payment: Substantial Resources

18 U.S.C. 3664(n)

[i]f a person obligated to provide restitution ... receives substantial resources from any source ... during a period of incarceration, such person shall be required to apply the value of such resources to any restitution ... still owed.

U.S. v. Saemisch, 70 F.4th 1 (1st Cir. 2023)

U.S. v. Stork, 56 F.4th 1039 (5th Cir. 2023)

Payment Schedule

One Lump Sum Payment

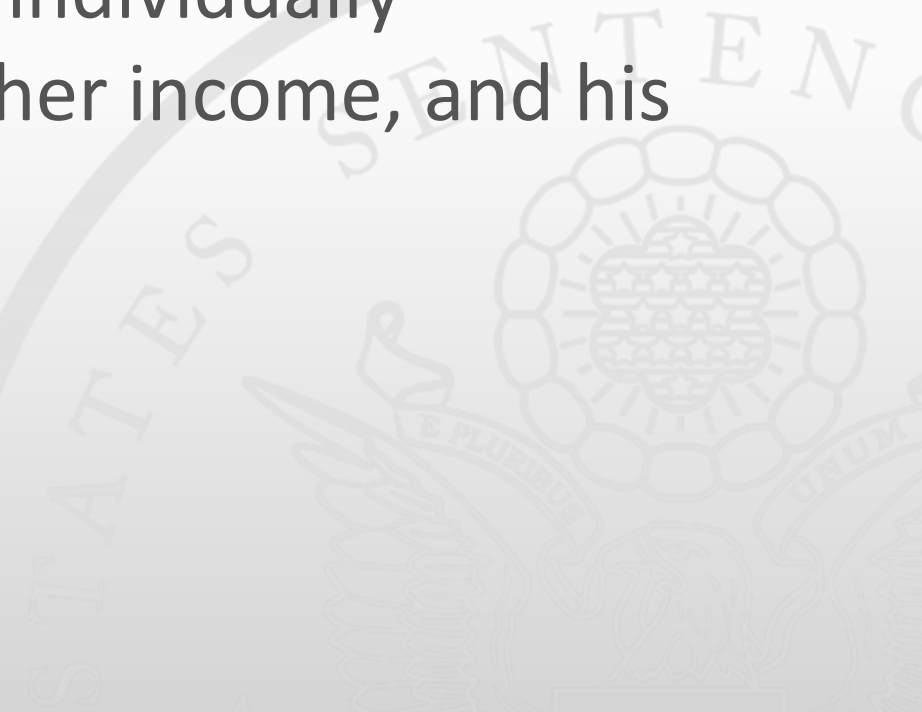
Partial payments at specified interval

In-kind payments

Combination specified intervals and in-kind payments

Payment Schedule

Court must consider certain factors regarding an individual defendant, including the defendant's financial resources, his other assets (including whether jointly or individually controlled), his projected earnings and other income, and his financial obligations.



Multiple Defendants

18 U.S.C. § 3664(h)

Where multiple defendants have contributed to the loss of a victim, the court may make each defendant liable for payment of the full restitution, or may apportion liability among defendant to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

U.S. v. Moran Calderon, 780 F.3d 50 (1st Cir. 2015)

Other Issues



What if Victim doesn't Want Restitution?

Under the MVRA, a victim's decision not to participate in the sentencing process does not relieve the defendant from having to pay restitution.

U.S. v. Johnson, 378 F.3d 230 (2d Cir. 2004)



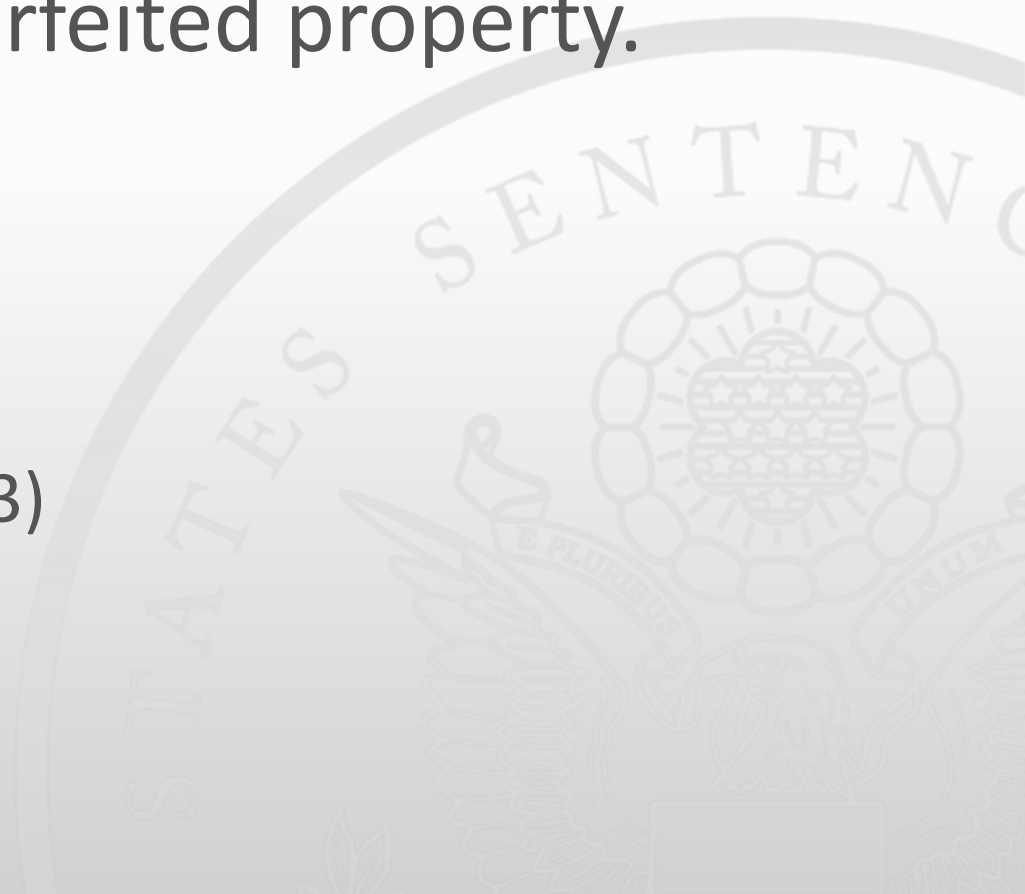
Forfeiture

A defendant is not entitled to have the restitution award offset by the value of any forfeited property.

U.S. v. Arnold, 878 F.3d 940 (10th Cir. 2017)

U.S. v. Carter, 742 F.3d 440 (9th Cir. 2014)

U.S. v. Adetiloye, 716 F.3d 1030 (8th Cir. 2013)



Third-Party Issues

18 USC 3664(j) permits a court to order restitution to paid third-parties who as insurers or otherwise have assumed some or all of the victim's losses, although in such cases the victim must be fully compensated first.

Amount might be reduced by any amounts that the victim later receives from related federal or state civil litigation.

Foreign Conduct

The district court erred in including foreign victims of the defendant's fraud scheme, who had no nexus to the defendant's criminal conduct in the United States, in its restitution calculation under 18 U.S.C. § 3663A (the "Mandatory Victims Restitution Act").

U.S. v. Elbaz, 52 F.4th 593 (4th Cir. 2022)

"Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country."

U.S. v. Baston, 818 F.3d 651 (11th Cir. 2015)

Timing of Restitution Order

Typically, 90-day deadline (18 U.S.C. § 3664(d)(5)) but there is an exception if court makes clear prior to the 90 days that it is still considering restitution.

U.S. v. Dolan, 130 S. Ct 2533 (2010)



Victim Table – §2B1.1(b)(2)

+2

10 or more victims; mass-marketing; or resulted in substantial financial hardship to **1 or more victims**.

+4

Resulted in substantial financial hardship to **5 or more victims**.

+6

Resulted in substantial financial hardship to **25 or more victims**.



**Substantial
Financial
Hardship
Factors**

Insolvency or bankruptcy

Substantial loss of a retirement, education, or other savings

Substantial changes to living arrangements


Substantial changes to employment

Substantial harm to credit

The defendant stole rent checks from 5 defendants with the amounts ranging from \$400-800.

Can the court find that there was substantial financial hardship even though the amounts are relatively low?

A. No

 B. Yes



United States v. Castaneda-Pozo

877 F.3d 1249 (11th Cir. 2017)

“Although each victim’s pecuniary loss may not seem great, Castaneda–Pozo’s actions made his victims insecure in life’s basic necessities—housing, electricity, water, and food. Certainly, that insecurity is sufficient to raise a substantial hardship.”



United States v. Aderinoye

33 F.4th 751 (5th Cir. 2022)

“A loss qualifies as “substantial financial hardship” if it significantly impacts the victim’s resources.”



Substantial Financial Hardship Cases

U.S. v. Iwuawanyu, 69 F.4th 17 (1st Cir. 2023)

U.S. v. Skouteris, 51 F.4th 658 (6th Cir. 2022)

U.S. v. Kitts, 27 F.4th 777 (1st Cir. 2022)

U.S. v. Minhas, 850 F.3d 873 (7th Cir. 2017)

U.S. v. Kuljko, 1 F.4th 87 (1st Cir. 2021)

U.S. v. George, 949 F.3d 1181 (9th Cir. 2020)

U.S. v. Aderinoye, 33 F.4th 751 (5th Cir. 2022)

U.S. v. Poulson, 949 F.3d 1181 (9th Cir. 2020)

U.S. v. Alfaro, 30 F.4th 514 (5th Cir. 2022)

U.S. v. McClafin, 939 F.3d 1113 (10th Cir. 2019)

General Rule

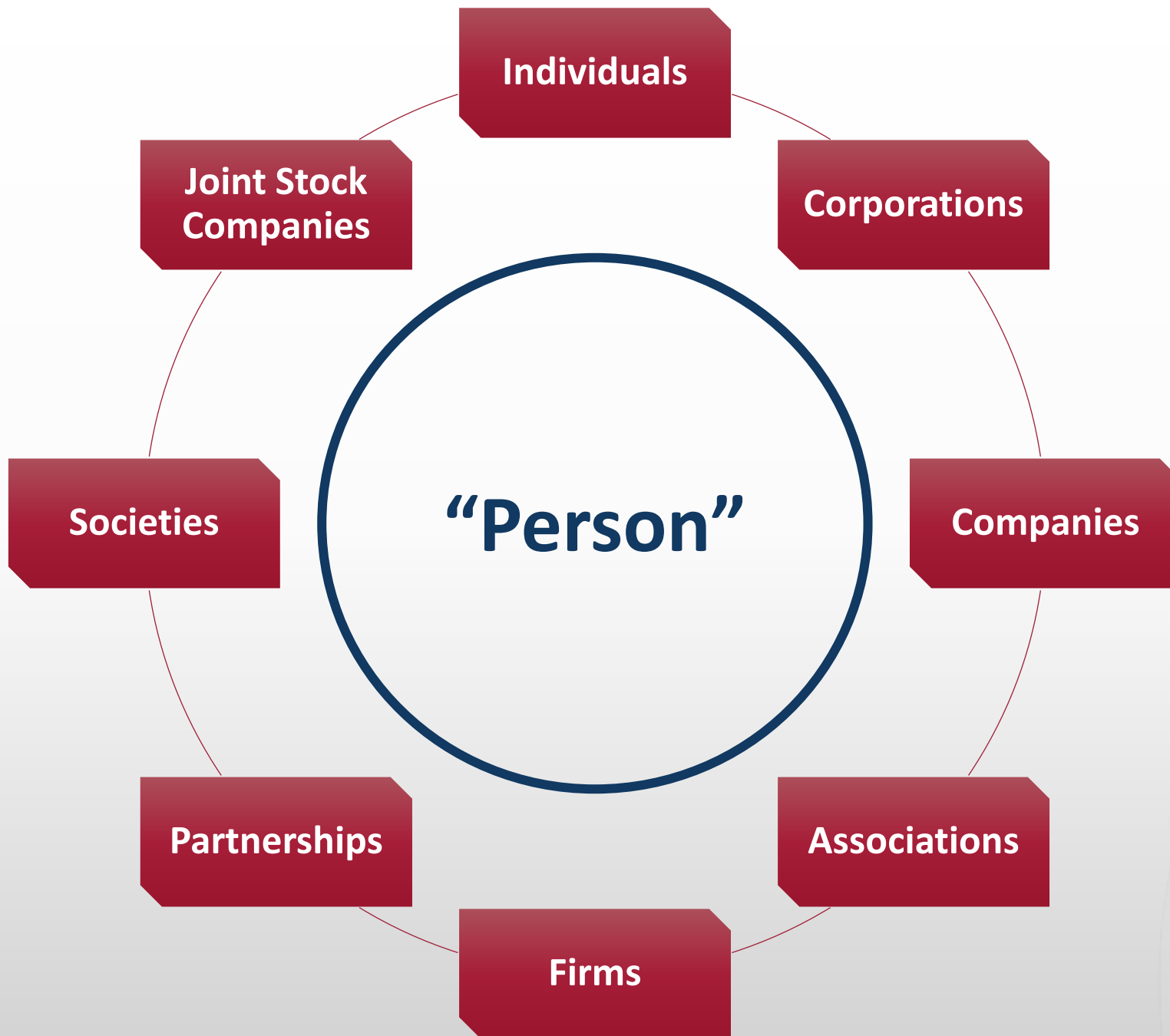
§2B1.1, App. Note 1

Victim:

Any person who sustained any part of the **actual loss** determined under subsection (b)(1);

-or-

any individual who sustained bodily injury as a result of the offense.



Who is a Person?
§2B1.1, App. Note 1

Both Account Holders

U.S. v Ryan, 806 F.3d 691 (2d Cir. 2015)

U.S. v Harris, 718 F.3d 698 (7th Cir. 2013)



Victims in Identity Theft Cases

Includes any individual whose “**means of identification**” was used **unlawfully or without authority**.



United States v. Ramirez

979 F.3d 276 (5th Cir. 2020)

Can include a **Medicare beneficiary** whose information was used in a fraudulent claim.



Key Restitution Concepts

Goal of restitution is to restore the victim.

Although similar, the determination of loss under the guidelines is different than restitution.

Guideline loss is defined as greater of actual or intended loss. Restitution is based only the actual loss caused by the offense.

Key Restitution Concepts

Generally, court cannot rely on relevant conduct to determine loss. Exception for scheme, conspiracy, or pattern.

Offense of conviction determines who is entitled to restitution.

Plea agreements can expand restitution – both in amount and who the victim is under statute.

Learning Outcomes

Now you should be able to

Determine when restitution can be ordered.

Define key characteristics of a “victim” across a variety of scenarios.

Determine what is compensable for restitution

Determine restitution in select offense types.

Analyze the increase for substantial financial hardship



Questions?



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