

No. 09-367

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IN THE  
**Supreme Court of the United States**

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BRIAN RUSSELL DOLAN, *Petitioner,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

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On Writ of Certiorari to  
the United States Court of Appeals  
for the Tenth Circuit

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**BRIEF FOR THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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Barbara E. Bergman  
NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE  
LAWYERS  
1117 Stanford, NE  
Albuquerque, NM 87131  
(505) 277-3304

Peter Goldberger  
50 Rittenhouse Place  
Ardmore, PA 19003  
(610) 649-8200

Jonathan L. Marcus  
*Counsel of Record*  
Gregory M. Lipper  
Sarah J. Smith  
Franciska Coleman  
Jesse A. Gurman\*  
COVINGTON & BURLING LLP  
1201 Pennsylvania Ave., NW  
Washington, DC 20004  
(202) 662-6000  
jmarcus@cov.com

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*\*Admitted in California; not admitted in  
the District of Columbia. Supervised by  
principals of the firm.*

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### **Interest Of *Amicus Curiae***

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.<sup>1</sup> Founded in 1958, NACDL has a membership of more than 11,000 and affiliate memberships of almost 40,000. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court’s most significant criminal cases. In many such cases, as in this one, NACDL has sought to ensure that criminal defendants receive proper procedural protections during criminal sentencing.

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<sup>1</sup> Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party’s counsel authored this brief in whole or in part and that no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

### **Summary Of Argument**

The Mandatory Victims Restitution Act (“the Act”), which sets forth procedures governing the award of restitution to victims of federal crimes, provides that “the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.” 18 U.S.C. § 3664(d)(5). In holding that the Act permits an award of restitution even when that determination is made well past “90 days after sentencing,” the Tenth Circuit undermined the Act’s purposes in several respects: the decision deprives defendants of critical procedural protections and also imposes undue burdens on victims and the courts.

First, in assuming that the 90-day limit protected only victims, the Tenth Circuit overlooked the important protections that the 90-day limit affords to criminal defendants. Of greatest importance, the 90-day deadline protects defendants against the loss or erosion of evidence necessary to contest the government’s restitution demand. The loss of evidence is of particular concern in restitution hearings, because many courts have held the government to a modest burden of proof, and because some courts have required defendants to come forward with affirmative evidence—even on questions, such as offsets, in which the evidence is uniquely in the victim’s possession or on issues that go well beyond those contested at trial. Moreover, delays may push restitution hearings until after defendants have been sent to federal prison—often hundreds of miles away from their counsel—leaving them unable to assist in this phase

of their defense. Delays also subject defendants to needless anxiety and uncertainty, which can interfere with their rehabilitation; they also force the defendant to choose between, on the one hand, filing premature appeals before a final sentence, and, on the other hand, delaying their appeals indefinitely as they await a restitution order. And, contrary to the Tenth Circuit, defendants do not benefit financially from delay; courts regularly require defendants to pay prejudgment interest as part of restitution awards.

Second, the Tenth Circuit's decision undermines the other important purposes advanced by the Act's time limits. In eliminating incentives for the government and the court to address restitution promptly, the decision makes it less likely that victims will receive their restitution promptly and when it is of greatest use. Delays in ordering restitution also reduce its deterrent value and burden both federal and state courts with duplicative litigation.

In sum, the Tenth Circuit's interpretation of the Act would undermine congressional purpose and imposes substantial burdens on defendants, victims, and the courts. The decision should be reversed.

## Argument

### **I. The Tenth Circuit’s Interpretation of The Mandatory Victims Restitution Act Would Deprive Criminal Defendants of Important Procedural Protections.**

In holding that Mr. Dolan could be subjected to a restitution order after the 90-day deadline for calculating restitution, the Tenth Circuit asserted that the Act’s “emphasis on the need for speed and finality arises out of concern for victims, not victimizers.” Pet. App. 16a. The Tenth Circuit was also unable to conceive “how a defendant might be prejudiced by an untimely restitution order.” Pet. App. 20a. Yet Congress inevitably recognized that untimely restitution orders can prejudice defendants in multiple ways, and that the 90-day limit provides defendants with important safeguards.

#### *A. Delayed restitution determinations increase the risk that defendants will lose access to necessary evidence.*

In asserting that the 90-day limitation serves to protect victims only, the Tenth Circuit overlooked its importance in ensuring that a defendant has access to evidence necessary to contest a restitution demand. As part of the criminal sentence, 18 U.S.C. § 3556, an award of restitution is both a “sanction,” *id.* § 3551(b), and a “penalty,” *id.* § 3663A(a)(1). The legislative history reflects the Act’s concern with protecting defendants’ constitutional “right not to be sentenced on the basis of inva-

lid premises or inaccurate information.” S. Rep. No. 104-179 (1995), at 18.

But with the Act “streamlining the process” for issuing orders of restitution, *id.*, the need to prevent the erosion of evidence due to delay is all the more important to protect defendants’ right to due process. Here, the 90-day limitation acts as a mandatory claim-processing rule, which, like a statute of limitations, “typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.” *Stogner v. California*, 539 U.S. 607, 615–16 (2003). In refusing to enforce the Act’s 90-day limitation, the Tenth Circuit overlooked this important protection.

1. Defendants’ access to evidence is critical in the context of restitution. Congress and courts have not required the government to prove the entitlement to and amount of restitution beyond a reasonable doubt. 18 U.S.C. § 3664(e); *United States v. Dupes*, 513 F.3d 338, 345 (2d Cir. 2008) (“[T]here is no constitutional requirement that the facts needed for the district court’s fashioning of a restitution order be found by a jury beyond a reasonable doubt.”) (quotation omitted); *United States v. Miller*, 419 F.3d 791, 792 (8th Cir. 2005) (“The government has the burden of proving the amount of restitution by a preponderance of the evidence.”).

The defendant’s need for access to evidence is especially great because the defendant often lacks the opportunity to confront the government’s evidence directly through cross-examination. *See, e.g., United*

*States v. Smith*, 528 F.3d 423, 425 (5th Cir. 2008) (“We reject Smith’s argument that the Government was required to present live testimony or a sworn affidavit from the victim at the sentencing hearing regarding the total amount of loss.”). The Federal Rules of Evidence do not apply to sentencing hearings, including restitution hearings. Fed. R. Evid. 1101(d)(3). The Act encourages victims to submit affidavits in support of restitution claims, but does not require them to do so as a condition of receiving restitution. 18 U.S.C. § 3664(d)(2). The more time that passes, and the more evidence that disappears, the harder it becomes for defendants to overcome these hurdles.

Loss of evidence over time is especially harmful when courts impose on defendants an affirmative burden to present evidence. Some courts have held that, if the Presentence Report (PSR) presents sufficient indicia of reliability, “[t]he defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue.” *Smith*, 528 F.3d at 425 (quotations omitted); *see also United States v. Prochner*, 417 F.3d 54, 65–66 (1st Cir. 2005) (“A PSR generally bears sufficient indicia of reliability to permit the district court to rely on it at sentencing. . . . The defendant may object to facts in the PSR, but if [his] objections to the PSR are merely rhetorical and unsupported by countervailing proof, the district court is entitled to rely on the facts in the PSR.”) (citation and quotations omitted). Other courts have held that defendants bear the burden of establishing offsets to restitution amounts, under § 3664(j)(2), based on other sources of compen-

sation already received by victims. *See United States v. Crawford*, 169 F.3d 590, 593 & n.2 (9th Cir. 1999) (upholding restitution order in which “the district court placed the burden [of establishing offsets] on the defendant”); *United States v. Sheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998) (“[J]ustice requires that the burden of establishing any offset to a restitution order should fall on the defendant.”) (quotations omitted). And because information about offsets will often be uniquely within the victim’s control, the defendant cannot control whether and to what extent that information is preserved over time.

Moreover, in calculating offsets and addressing other restitution questions, courts have often required defendants to provide extremely specific evidence, which can erode over time. Courts have required defendants to litigate a wide range of nuanced issues, including complex questions of securities valuation and even whether recovered assets were, in fact, part of the stolen sum. *See United States v. Gordon*, 393 F.3d 1044, 1052 (9th Cir. 2004) (considering victim’s “lost opportunity to sell the Terayon shares at a higher price in determining the amount of the loss caused by Defendant’s embezzlement of the shares” (quotations omitted)); *United States v. Taylor*, 128 F.3d 1105, 1111 (7th Cir. 1997) (“[The defendants] contend that because they stole only approximately \$133,000 and because the police recovered more than \$40,000, the total \$100,000 restitution order is too high. What the defendants fail to recognize, however, is that the money recovered has not been returned to the bank, nor even proven to be part of the proceeds of the robbery.”).

Whatever the merits of these decisions, they underscore that defendants have a significant need for evidence to contest broad restitution requests. Without time limits on restitution awards, the potential for lost evidence over time—and the corresponding prejudice to defendants—would be substantial.

2. The harms from the passage of time, including the potential for lost evidence, occur even when the defendant has diligently and vigorously prepared for trial. Notwithstanding the Court’s holding in *Hughey v. United States*, 495 U.S. 411 (1990), courts frequently issue “orders of restitution that are much harsher than a defendant could have reasonably predicted from the indictment, the evidence presented at trial, or the defendant’s admission of guilt during the plea colloquy.” Melanie D. Wilson, *In Booker’s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 Ind. L. Rev. 379, 380 (2006).

For instance, in conspiracy and ‘scheme’ cases, defendants “are sometimes ordered to make restitution to ‘victims’ who were omitted from the indictment and never mentioned during the defendant’s change of plea hearing and, occasionally, to persons identified for the first time weeks after the defendant’s conviction.” Wilson, *supra*, at 387. Under §§ 3663(a)(2) and 3663A(a)(2), “[s]o long as the indictment details a broad scheme encompassing transactions beyond those alleged in the counts of conviction, the district court may order restitution to victims who suffered from defendant’s criminal activity beyond what was described with particularity in

the indictment.” *United States v. Liner*, 435 F.3d 920, 926 (8th Cir. 2006) (citations omitted).<sup>2</sup>

In addition, and although the Act refers to those who are “directly and proximately harmed,” 18 U.S.C. § 3663A(a)(2), restitution hearings have sometimes placed at issue losses that are indirect or contingent. *See, e.g., United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006) (“Because future income is income that is lost to the victim as a direct result of the crime, the plain language of the statute leads to the conclusion that lost future income can be included in a restitution order.”). This type of analysis is complicated and fact intensive, and the risks to the defendant of evidentiary loss over time are significant—especially since courts have sometimes upheld awards supported by a mere “reasonable inference.” *See, e.g., United States v. Schuster*, 467 F.3d 614, 617 (7th Cir. 2006) (upholding restitution award—based on theory that defendant’s misuse of computer equipment led victim to switch service providers and lose productivity—because the “evidence was sufficient to *raise the reasonable inference* that Schuster had caused the inexplicable problems”) (emphasis added).

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<sup>2</sup> *See, also e.g., United States v. Dickerson*, 370 F.3d 1330, 1342 (11th Cir. 2004) (“[W]here a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses . . . [that] were caused by conduct outside of the statute of limitations.”); *United States v. Boyd*, 222 F.3d 47, 50–51 (2d Cir. 2000) (Act “confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts”) (citations omitted)..

\* \* \*

In sum, with a streamlined process, and with some courts willing to uphold broad restitution awards based on modest government showings, the need for defendants to retain access to evidence is critical. By permitting restitution awards outside the 90-day limit, the Tenth Circuit’s approach creates a substantial risk that evidence will be unavailable to defendants, leaving them unable to contest untimely restitution demands.

*B. Untimely restitution determinations prevent defendants from meaningfully assisting in their defense.*

A prompt determination of restitution is critical to enabling the defendant to assist counsel in litigating these claims. Because those convicted of federal crimes often serve their prison sentences far from the site of their trial, excessive delays impede communication between attorneys and clients and interfere with clients’ ability to assist in their defenses.

Once defendants are sentenced to federal prison, they may be moved far away from the jurisdiction in which they have been tried and in which their counsel practice—making communication between attorneys and clients far more difficult. Under 18 U.S.C. § 3621(b), the “[t]he decision whether to designate a facility as a place of federal detention is plainly and unmistakably within the discretion [of the Bureau of Prisons].” *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 76 (2d Cir. 2005) (quotations omitted). As a result, federal “facilities tend to be far

away from home,” and federal inmates can “be transferred to a facility on the other side of the country.” Christine Tartaro & David Lester, *Suicide and Self-Harm in Prisons and Jails* 3 (2008). Those convicted of federal crimes often serve their sentences hundreds of miles from the site of their trial. *See, e.g.*, Michael Hinkelman, *Kentucky Prison Far From Home for Fumo, In More Ways Than One*, Phil. Daily News, Sept. 1, 2009, at 6 (defendant tried in Philadelphia but serving sentence “more than 500 miles southwest of Philadelphia, in the northeast corner of Kentucky”); Val Walton, *Aliceville Is To Be New Home for State’s First Federal Female Prison*, Birmingham News, Sept. 22, 2008, at 1A (“Currently, women convicted of federal crimes in Alabama are sent out of state, with the closest women’s prisons in Tallahassee and Marianna, Fla.”).

The Court has long recognized the importance of a criminal defendant’s ability “to consult with counsel, and to assist in preparing his defense.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Yet “representing clients confined in distant prisons presents frustrating logistic and legal difficulties.” *Imprisoned Citizens Union v. Shapp*, 473 F. Supp. 1017, 1028 (E.D. Pa. 1979). These difficulties are far more likely to arise when restitution determinations are delayed until long after the primary sentencing hearing.

*C. Untimely restitution determinations subject defendants to gratuitous anxiety and uncertainty and stifle economic transactions.*

When the time for an award of restitution is open-ended, the defendant is subject to gratuitous

uncertainty. For individual defendants—many of whom are indigent—this delay can impose increased anxiety about an additional financial consequence of undetermined size. For organizational defendants, the uncertainty about a large financial award can stifle commerce.

1. For individual defendants, the absence of a time limit for imposing restitution awards needlessly prolongs the criminal process and the anxiety that accompanies it. Courts have recognized the importance of protecting criminal defendants from gratuitous uncertainty and anxiety. *See, e.g., United States v. Ewell*, 383 U.S. 116, 120 (1966) (speedy trial right “is an important safeguard . . . to minimize anxiety and concern accompanying public accusation”). Yet even after a conviction and a prison sentence, another variable looms large—even for defendants who have pleaded guilty to bring the proceedings to a prompt conclusion.

The imposition of gratuitous personal distress not only affects defendants’ well being, but also can interfere with their rehabilitation. An “[i]mpaired emotional state, including elevated levels of . . . anxiety, may significantly affect the ability of ex-prisoners to successfully reintegrate into the general community.” Alison J. Shinkfield & Joe Graffam, *The Relationship Between Emotional State and Success in Community Reintegration for Ex-Prisoners*, Int’l J. Offender Therapy & Comp. Criminology, Mar. 3, 2009, at 1, 2, *available at* <http://ijo.sagepub.com/cgi/rapidpdf/0306624X09331443v1>.

Delays also leave defendants uncertain about the proper time to appeal their conviction and sentence. As explained in Petitioner’s brief (pp. 29–33), a judgment in a criminal case is not final until the district court has resolved all issues affecting a defendant’s sentence. If a court has sentenced a defendant to prison but has not resolved the government’s restitution request, a defendant is faced with an unenviable choice: either appeal a judgment which appears to be non-final (thus invoking federal appellate jurisdiction prematurely and depriving the district court of jurisdiction until the appeal is resolved), or delay his appeal until the court has issued a restitution order—even if that delay lasts months or years and lasts longer than the defendant’s prison sentence. The defendant avoids this unfairness and uncertainty only if the Act’s 90-day deadline is enforced.

**2.** For organizational defendants, uncertainty over restitution awards can stifle economic transactions, harming both the entities themselves as well as third parties who contract with them. When convicted of a crime, entities such as corporations may be subject to restitution orders. *See, e.g., United States v. Segal*, 495 F.3d 826, 836 (7th Cir. 2007) (reviewing restitution order against insurance brokerage corporation). Statutory limits on the assertion of claims serve “promptly to resolve disputes in order that commercial and other activities can continue unencumbered by the threat of litigation.” *Elkins v. Derby*, 525 P.2d 81, 86 n.4 (Cal. 1974). “Unasserted potential claims may prevent or hinder prospective defendants from engaging in business transactions,

such as financings or mergers, until the risk of liability has been resolved. Such uncertainty also may limit a potential defendant's ability to allocate resources most efficiently.” Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 466 (1997). These concerns apply equally to lingering claims for restitution, and they will be exacerbated as the federal government increasingly targets organizational defendants such as corporations. See Exec. Order No. 13519, 74 Fed. Reg. 60121 (Nov. 19, 2009) (creating Financial Fraud Enforcement Task Force); Zachary A. Goldfarb, *Task Force to Take Up Financial Fraud Cases*, Wash. Post, Nov. 18, 2009, at A15.

3. Contrary to the Tenth Circuit’s suggestion, delays do not inure to the benefit of defendants on the theory that “it is usually better to pay a dollar tomorrow than to pay one today.” Pet. App. 21a. Some courts have ruled that restitution should include prejudgment interest; when restitution awards are delayed, prejudgment interest accumulates. See, e.g., *United States v. Molak*, 276 F.3d 45, 51 (1st Cir. 2002) (restitution statute “affords no latitude for excluding . . . interest, or costs from the required computation”); *Gov’t of Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994) (prejudgment interest “is an aspect of the victim’s actual loss which must be accounted for in the calculation of restitution in order to effect full compensation”). Because delays can be accounted for by prejudgment interest, and because they create uncertainty and inhibit appeals, defendants do not benefit from them.

## II. The Tenth Circuit's Interpretation of the Act Would Burden Both Victims and the Courts.

The Tenth Circuit's decision undermines other purposes of the Act as well. In permitting open-ended delays in the awarding of restitution, the Tenth Circuit's approach encourages delay, to the detriment of both victims and the courts.

A. Noncompliance with the 90-day limit undermines Congress's goal of providing victims with "closure." 141 Cong. Rec. S19278 (1995) (statement of Sen. Hatch). Congress has mandated, in the Crime Victims Rights Act, that victims receive an award of restitution "free from unreasonable delay." 18 U.S.C. § 3771(a)(7). Enforcement of the Act's 90-day limit promotes this goal; untimely restitution determinations decrease the likelihood that victims will be compensated when their need is greatest. *See, e.g., State v. Moen*, 919 P.2d 69, 74 (Wash. 1996) ("It is also in the victim's best interest to have restitution set in a timely fashion under [law] when evidence of loss is fresh and the victim's need often at its greatest."). And just as delays in restitution awards encumber the assets of organizational defendants, such delays also prevent organizational victims from deploying their assets most efficiently. *See, e.g., United States v. Farkas*, 935 F.2d 962, 967–68 (8th Cir. 1991) (restitution sought by bank); *United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988) (restitution sought by insurance company).

B. Delayed restitution also diminishes its deterrent value. Restitution "forces the defendant to con-

front, in concrete terms, the harm his actions have caused”; “the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.” *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986). Numerous courts have recognized that restitution is partly rooted in deterrence. See *United States v. Twitty*, 107 F.3d 1482, 1493 n.12 (11th Cir. 1997) (restitution is a “criminal penalty meant to have a strong deterrent and rehabilitative effect”) (quotations omitted); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) (“The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some offenders less likely to be imposed than restitution.”).

As a deterrent, however, restitution becomes less effective over time. Economists recognize that “[b]ecause potential criminals tend to discount the future at higher rates than [the rest of] society, punishing crimes long after they are committed will be inefficient.” Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. Legal Stud. 99, 99 (2002). Thus, timely adjudication of restitution demands benefits victims, past and future.

C. Delayed restitution increases the likelihood of duplicative civil litigation. An award of “restitution may eliminate a crime victim’s need to bring a separate civil action against a criminal offender in many cases.” Don Rogers, *The Crime Victim’s Constitutional Right to Restitution in Texas Criminal Proceedings*, 46-FEB Hous. Law. 18, 23 (2009). When

victims do not receive restitution promptly, they may resort to civil litigation. *See, e.g., Corporacion Insular de Seguros v. Reyes-Munoz*, 849 F. Supp. 126, 130 (D.P.R. 1994) (lawsuit to recover losses caused by defendants, who pleaded guilty to federal criminal charges); *Doe v. Doe*, 551 S.E. 2d 257, 257–59 (S.C. 2001) (victims of sexual abuse brought civil suit against convicted parent). The greater the delay in ordering restitution, the greater the need for duplicative civil lawsuits—which burden victims, defendants, and the courts.

**D.** Delayed restitution could also generate piecemeal appeals. Serious constitutional concerns would arise if a defendant were required to postpone his entire appeal due to indefinite delays arising from the restitution component of the sentence. *See* Pet’r Br. at 30. As a result, the only way to ensure that a defendant had a timely appeal would be to permit a defendant to appeal twice: once to challenge the conviction and prison sentence, and a second time to challenge the restitution award. *Cf. Cherry v. State*, 15 So. 3d 774, 775 (Fla. Dist. Ct. App. 2009) (“This court has previously affirmed Mr. Cherry’s judgment and sentence for misdemeanor possession of marijuana . . . . In this appeal, Mr. Cherry challenges only the restitution order that was entered after his judgment and sentence.”). Even if, contrary to existing law, *see* Pet’r Br. 29, an appeal of an incomplete sentence could somehow be permitted, the district court might be divested of jurisdiction during its pendency, producing even more delay in the resolution of restitution claims. And if a disputed issue

then arose about the ultimate award of restitution, another appeal would result.

This type of duplication would undermine congressional intent “to streamline the administration of restitution within the criminal justice system.” *United States v. Edwards*, 162 F.3d 87, 91 (3d Cir. 1998). Only by reversing the Tenth Circuit, and enforcing the 90-day limitation, can the Court avoid burdening the appellate courts while still protecting a defendant’s right to appellate review that is meaningful and timely.

### Conclusion

The Tenth Circuit’s judgment should be reversed.

Barbara E. Bergman  
NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE  
LAWYERS  
1117 Stanford, NE  
Albuquerque, NM 87131  
(505) 277-3304

Peter Goldberger  
50 Rittenhouse Place  
Ardmore, PA 19003  
(610) 649-8200

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Respectfully submitted,

Jonathan L. Marcus  
*Counsel of Record*  
Gregory M. Lipper  
Sarah J. Smith  
Franciska Coleman  
Jesse A. Gurman\*  
COVINGTON & BURLING LLP  
1201 Pennsylvania Ave, NW  
Washington, D.C. 20004  
(202) 662-6000  
jmarcus@cov.com

*\*Admitted in California; not  
admitted in the District of  
Columbia. Supervised by princi-  
pals of the firm.*