

10-0520-cr(L),  
10-0615-cr(con)  
USA v. Pescatore

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2010

5 (Submitted: January 3, 2011 Decided: February 23, 2011)

6 Docket Nos. 10-0520-cr(L), -0615-cr

7 \_\_\_\_\_  
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v. -

11 MICHAEL PESCATORE,

12 Defendant-Appellant.  
13 \_\_\_\_\_

14 Before: KEARSE, WINTER, and HALL, Circuit Judges.

15 Appeal from an order of the United States District Court  
16 for the Eastern District of New York, Thomas C. Platt, Judge,  
17 denying defendant's postconviction motion for an order either  
18 compelling the government to use a portion of his forfeited assets  
19 to satisfy his restitution obligations, or vacating so much of the  
20 judgment of conviction as ordered him to pay restitution in excess  
21 of his victims' actual losses.

22 Affirmed, and remanded for further proceedings.

23 LORETTA E. LYNCH, United States Attorney for the  
24 Eastern District of New York, Brooklyn, New  
25 York (Varuni Nelson, Beth P. Schwartz,  
26 Kathleen A. Nandan, Assistant United States  
27 Attorneys, Karen R. Hennigan, Special  
28 Assistant United States Attorney, Brooklyn,  
29 New York, of counsel), for Appellee.

1 JAMES R. PROCCARO, Jr., Port Washington, New  
2 York, for Defendant-Appellant.

3 KEARSE, Circuit Judge:

4 Defendant Michael Pescatore, who was convicted of  
5 operating chop shops in violation of 18 U.S.C. §§ 2322 and 2, and  
6 of extortion offenses in violation of 18 U.S.C. §§ 1951 and 2, and  
7 who, in his plea agreement with the government, agreed to forfeit  
8 \$2.5 million in cash, plus certain real estate, and to pay  
9 restitution in an amount not less than \$3 million, appeals from an  
10 order of the United States District Court for the Eastern  
11 District of New York, Thomas C. Platt, Judge, denying his  
12 postconviction motion for an order either compelling the  
13 government to use a portion of his forfeited assets to relieve him  
14 of his restitution obligations, a process called "restoration,"  
15 18 U.S.C. § 981(e)(6), or vacating as illegal the requirement in  
16 the amended judgment of conviction that he pay \$3 million in  
17 restitution, to the extent that that sum exceeds the total losses  
18 suffered by his identified chop shop victims. On appeal,  
19 Pescatore contends principally (1) that the government should be  
20 compelled to use a portion of the forfeited assets to satisfy his  
21 restitution obligations because no law prohibits such restoration;  
22 (2) that the judgment ordering him to pay \$3 million in  
23 restitution is illegal to the extent that the total amount of  
24 victim losses listed in the pages of the presentence report  
25 ("PSR") that are attached to the amended judgment is less than  
26 \$3 million; and (3) that his obligation should be further reduced

1 because the actual amount of victim losses totals even less than  
2 the amount shown in the PSR. In opposition, the government  
3 argues (1) that the decision whether to grant Pescatore relief in  
4 the form of restoration lay solely within the Attorney General's  
5 discretion, which was not abused; (2) that the amended judgment of  
6 conviction reduced Pescatore's restitution obligation to  
7 \$2,559,611.79 to match the losses identified in the PSR; and (3)  
8 that any contention that the \$2,559,611.79 figure is erroneous is  
9 subject to plain-error analysis and does not meet that standard.

10 For the reasons that follow, we conclude that the district  
11 court did not err in rejecting Pescatore's restoration request;  
12 that the amended judgment did not reduce the \$3 million amount  
13 that Pescatore was ordered to pay in restitution; and that  
14 Pescatore is not entitled to an immediate--if any--order excusing  
15 him from paying that amount. The amount to be paid is limited to  
16 the restitution amounts needed to make Pescatore's victims whole,  
17 plus interest that Pescatore is obligated to pay on the properly  
18 ordered restitution amounts that he has not timely paid, see  
19 18 U.S.C. § 3612(f)(1), plus any penalties to which he may be  
20 subject for unpaid restitution amounts as to which he is or was  
21 delinquent and/or in default, see id. §§ 3612(g), 3572(h)-(i). If  
22 all required payments of restitution, interest, and restitution-  
23 related penalties total less than \$3 million, Pescatore will be  
24 entitled to a refund of the remainder. Accordingly, we affirm the  
25 denial of Pescatore's motion but remand for further proceedings.

1

I. BACKGROUND

2 To the extent relevant to the present case, Pescatore was  
3 first arrested, by law enforcement officers of Suffolk County, New  
4 York, in mid-2003. He and others, including Astra Motor Cars,  
5 Inc. ("Astra"), of which Pescatore was president and 50-percent  
6 owner, were indicted by a New York State grand jury on charges of  
7 fraud and enterprise corruption in violation of New York State  
8 law; Astra was also indicted on state-law charges of money  
9 laundering. In late 2003, the United States commenced an in rem  
10 civil action pursuant to 18 U.S.C. §§ 981(a)(1)(A) and (C) and  
11 21 U.S.C. §§ 881(a)(6) and (7) (the "civil forfeiture action")  
12 against several properties owned in whole or in part, directly or  
13 indirectly, by Pescatore, including one property leased to Astra.  
14 The complaint in that action alleged, inter alia, that Astra had  
15 engaged in illegal trafficking in stolen vehicles and stolen  
16 vehicle parts and had defrauded customers. (See United States v.  
17 322 Richardson Street, No. 2:03-cv-6456-TCP (E.D.N.Y. filed Dec.  
18 24, 2003) ("Forfeiture Complaint" or "complaint") ¶¶ 21-23,  
19 56-93.) It also alleged that Astra sold to a narcotics  
20 trafficking organization specially-ordered vehicles that could  
21 accommodate hidden compartments; that Astra accepted large sums of  
22 cash from that organization; and that Astra's other owner, Sanford  
23 Edmonston, knew that the buyers were drug dealers and that the  
24 cash was proceeds of narcotics trafficking. (See id. ¶¶ 19-20,  
25 94-99.) The complaint sought forfeiture of the defendant

1 properties on the ground that they were derived from proceeds  
2 traceable to "specified unlawful activity" within the meaning of  
3 18 U.S.C. § 1956(c)(7), including the activities alleged in the  
4 complaint. (Forfeiture Complaint ¶¶ 100-62, 173-75.)

5           Pescatore, Astra, and numerous others were indicted by a  
6 federal grand jury in 2004. An 84-count second superseding  
7 indictment (the "Chop Shop Indictment")--alleging, inter alia,  
8 operation of chop shops in violation of 18 U.S.C. § 2322,  
9 alteration or removal of motor vehicle identification numbers in  
10 violation of id. § 511, mail fraud in violation of id. § 1341,  
11 conspiracy to defraud the United States in violation of id. § 371,  
12 and money laundering in violation of id. § 1956--named Pescatore  
13 in most of the counts.

14           In February 2005, Pescatore was also charged, in six  
15 counts of a new federal indictment, with extorting money from a  
16 number of individuals. In February 2006, the extortion case was  
17 tried, and Pescatore was convicted on three of the six counts.

18 A. The Plea Agreement and the Judgment of Conviction

19           In March 2006, pursuant to a plea agreement dated March 9,  
20 2006 (the "Plea Agreement" or "Agreement"), Pescatore pleaded  
21 guilty to one count of the Chop Shop Indictment (count 22), which  
22 charged him with owning, operating, maintaining, or controlling a  
23 chop shop, in violation of 18 U.S.C. § 2322. Pescatore admitted  
24 that, in that operation from March 1987 through June 14, 2004, he  
25 "engaged in receiving stolen motor vehicle parts" that were used

1 "to rebuild damaged motor vehicles" (Plea Hearing Transcript,  
2 March 9, 2006 ("Plea Tr."), at 19-20) and hired employees to take  
3 apart, rebuild, and sell such vehicles (id. at 21). The scheme  
4 also involved, inter alia, altering and removing vehicle  
5 identification numbers so that stolen cars could be sold to  
6 unwitting customers. (See id. at 22).

7 The Plea Agreement was designed to settle not only the  
8 Chop Shop Indictment charges but also the civil forfeiture action  
9 and the punishment to be imposed for the three counts on which  
10 Pescatore was convicted in the extortion case. The advisory-  
11 Guidelines-recommended range of imprisonment for his chop shop and  
12 extortion offenses was 188-235 months. In the Agreement, the  
13 government agreed to drop the remaining 50-odd counts alleged  
14 against Pescatore in the Chop Shop Indictment and agreed that an  
15 appropriate total prison term for the chop shop offense and the  
16 extortion offenses would be 132 months. (See Plea Agreement  
17 ¶¶ 4-5, 7.)

18 In addition to agreeing to plead guilty to count 22 of the  
19 Chop Shop Indictment, Pescatore agreed to, inter alia, pay  
20 restitution of "no less than \$3 million":

21 The count [to which Pescatore agreed to plead guilty]  
22 carries the following statutory penalties:

23 . . . .

24 e. Restitution: In an amount to be  
25 determined by the Court, but no less than  
26 \$3 million. The parties agree that restitution  
27 with respect to the defendant's tax liabilities  
28 may be ordered by the Court  
29 (18 U.S.C. §§ 3663 and 3663A).

1 (Plea Agreement ¶ 1.e.). The final sentence of this provision  
2 applied to Pescatore's federal tax liabilities but became moot, as  
3 Pescatore paid that debt prior to being sentenced.

4 In settlement of the civil forfeiture action, Pescatore  
5 agreed to forfeit \$2.5 million in cash, plus real estate (see  
6 id. ¶ 9). With respect to the assets to be forfeited, the United  
7 States Attorney's Office for the Eastern District of New York  
8 ("USAO" or "Office") agreed to recommend that the Department of  
9 Justice ("DOJ" or "Department") grant restoration, relieving  
10 Pescatore of all or part of his restitution obligation:

11 The Office will recommend that any net proceeds  
12 derived from the sale of the Forfeited Assets be made  
13 available to eligible victims, pursuant to 18 U.S.C.  
14 § 981(e), 28 C.F.R. Pt. 9 and Attorney General Order  
15 No. 2088-97 (June 14, 1997), it being understood that  
16 the Office has authority only to recommend and that  
17 the final decision whether to grant such relief rests  
18 with the Department of Justice, which will make its  
19 decision in accordance with applicable law.

20 (Id. ¶ 17.)

21 Pescatore was sentenced some 2½ years after his March 2006  
22 plea of guilty. At the October 24, 2008 sentencing hearing,  
23 Pescatore informed the court that, in the interim, he had timely  
24 turned over many millions of dollars in assets (worth \$9 million,  
25 see Hearing Transcript, January 29, 2010, at 17, 18) in complete  
26 satisfaction of his forfeiture obligations, and he urged the  
27 district court to impose a prison term of no more than 132 months  
28 in accordance with the Plea Agreement.

29 MR. STAMBOULIDIS [Pescatore's then-counsel]:

30 . . . .

1           We had entered an agreement with the government  
2           that's documented in that written plea agreement. We  
3           stand here with the government with little if any  
4           disagreement as to what should happen here today. As  
5           we indicated to the court in the plea agreement, and  
6           at the time of the plea the parties, the government  
7           and Mr. Pescatore, are asking for a concurrent  
8           sentence on both matters.

9           . . . .

10           . . . . We obviously are here to ask for the  
11           court's--to honor and accept the plea, which I  
12           believe you indicated in words or substance that you  
13           have no problem with, but obviously now that you  
14           have the benefit of a presentence report and much  
15           more information than you had then to make up your  
16           mind.

17           (Sentencing Transcript, October 24, 2008 ("Sentencing Tr."),  
18           at 3-4.)

19           The court indicated that it was prepared to sentence  
20           Pescatore to, inter alia, 132 months' imprisonment in accordance  
21           with the Plea Agreement, but it expressed concern that discussion  
22           in the PSR "about 180 months in custody as the agreed upon  
23           amounts" (id. at 11) could prove confusing to the Bureau of  
24           Prisons. Pescatore and the Assistant United States Attorney  
25           ("AUSA") agreed that it would be appropriate that the PSR be  
26           amended to match the Plea Agreement. (See id. at 12-14.) The  
27           record does not indicate that any other objection had been made to  
28           the PSR.

29           With regard to restitution, the government asked the court  
30           to order payment of \$3 million in accordance with the Plea  
31           Agreement, and Pescatore reminded the court that the USAO had  
32           agreed to recommend restoration:

33                           [AUSA] GATZ: . . . .



1 I just ask the court to enter a restitution  
2 amount in the amount of \$3 million as per the plea  
3 agreement, and the government does stand by its  
4 agreement to recommend concurrent sentences on both  
5 of the matters.

6 . . . .

7 MR. STAMBOULIDIS: With respect to Mr. Pescatore  
8 being ordered to pay any more money, . . . .

9 I just want to remind the court this man paid  
10 millions of dollars in forfeiture, agreed-upon  
11 forfeiture, ahead of schedule in many instances, as I  
12 indicated, and we had an understanding and I would  
13 ask the court to keep that in mind when it orders  
14 restitution that the forfeited moneys, the US  
15 Attorney's Office was going to make a recommendation  
16 to whoever the people are in Washington, main  
17 justice or whoever they are called, the people in  
18 Washington consider applying any forfeiture money he  
19 already paid in, including giving over his house and  
20 millions of dollars on top of that, to be applied to  
21 any restitution.

22 THE COURT: If it's within the parameters.

23 I think they would regard it as supplement, any  
24 amount ordered here of the \$3 million forfeiture  
25 [sic], which the government is seeking. I don't  
26 think they have to take it into account what's been  
27 paid heretofore.

28 I may be wrong, Mr. Stamboulidis, but I think  
29 that's right.

30 MR. STAMBOULIDIS: They don't have to, but they  
31 should and, I think, in many cases they do.

32 MS. GATZ: Your Honor, as per the agreement the  
33 government negotiated it and we will stand by it. We  
34 will recommend that the \$3 million restitution be  
35 taken from the prior forfeiture.

36 However, I told Mr. Stamboulidis and the  
37 defendant is aware, we cannot require them to do  
38 that. We make the recommendation and they consider  
39 that.

40 (Sentencing Tr. 14-16.) The government asked the court to order  
41 that the \$3 million in restitution "be paid in full by the close

1 of the year 2009" (id. at 21), a delay of some 14 months in light  
2 of the restoration recommendation to be made by the USAO to the  
3 DOJ. Pescatore asked that the due date for payment be delayed  
4 for at least three years rather than 14 months, so that he could  
5 receive credit for restitution payments that would be made by  
6 codefendants in the interim. (See id. at 21-24.) The government  
7 opposed that request, stating that Pescatore's victims had been  
8 "calling . . . for the past five years asking for their  
9 restitution." (Id. at 23.) The court granted the government's  
10 request and ordered that the restitution be paid on or before  
11 December 31, 2009. (See id. at 23-24.)

12 A judgment was entered sentencing Pescatore in accordance  
13 with the Plea Agreement. It ordered, inter alia, that  
14 "\$3,000,000.00" in "restitution should be paid in full by the  
15 close of the year 2009." Judgment dated November 1, 2008,  
16 at 4, 5. The restitution order did not state, or otherwise  
17 incorporate, the names of the victims to whom restitution was to  
18 be made or the amount of loss sustained by each victim.

19 In January 2009, the government asked the court to correct  
20 the judgment pursuant to Fed. R. Crim. P. 36,

21 in order to expressly incorporate the Pre-Sentence  
22 Report ("PSR") dated February 21, 2008, at pages  
23 23-46 and 58-60, which identifies the victims and the  
24 actual losses incurred by each victim as a result of  
25 said schemes. The reason for this is, in order for  
26 the Asset Forfeiture and Money Laundering Section of  
27 the Department of Justice to process the restoration  
28 request submitted by this office pursuant to the  
29 applicable regulations, the judgment must  
30 specifically identify the victims. In that it was  
31 the parties' and the Court's intention that the  
32 victims identified in the PSR be included in the

1 judgment, the government respectfully submits that  
2 the failure to do so was a clerical error which may  
3 be corrected at any time.

4 (Letter from AUSA Kathleen Nandan to Judge Platt dated January 28,  
5 2009 ("Government's January 2009 Letter"), at 1-2.) On January  
6 30, 2009, the district court, noting the absence of any objection,  
7 granted the government's request by endorsement. (The judgment  
8 with PSR pages appended is hereinafter referred to as the  
9 "Judgment" or "amended Judgment"; the appended PSR pages are  
10 hereinafter referred to as the "Loss Chart" or "PSR Loss Chart".)

11 B. Pescatore's Motion To Compel Restoration or To Vacate and  
12 Modify the Restitution Requirement

13 In April 2009, AUSA Nandan notified Pescatore that the DOJ  
14 had denied the restoration request. Pescatore was subsequently  
15 informed that Nandan could not disclose the reason for the denial  
16 because the Department considered the details of its response to  
17 the USAO to be privileged.

18 In late October and early November 2009, Pescatore,  
19 represented by new counsel citing Santobello v. New York, 404 U.S.  
20 257 (1971), moved in the district court for an order compelling  
21 restoration as "specific performance" of ¶ 17 of the Plea  
22 Agreement, and, alternatively, sought a writ of coram nobis  
23 declaring ¶ 1.e. of the Agreement unenforceable as a matter of  
24 public policy to the extent that \$3 million exceeds the total  
25 losses of Pescatore's chop shop victims ("restoration/restitution  
26 motion"). In support of restoration, Pescatore pointed out that  
27 the Plea Agreement stated that the DOJ would make its decision in

1 accordance with applicable law, and he argued that it should be  
2 compelled to apply a portion of his forfeited assets to satisfy  
3 his restitution obligation because no law forbade it to do so.  
4 The government responded that there had been no breach of the Plea  
5 Agreement by the government. The AUSA stated that the USAO had  
6 fulfilled its promise to recommend restoration (see Motion  
7 Hearing Transcript, January 29, 2010 ("Motion Tr."), at 18 ("We  
8 made a recommendation to the Department of Justice"; "we made the  
9 recommendation, we made the request")); that "[t]he request was  
10 denied because the defendant actually does have assets" (id.);  
11 and that DOJ's decision to deny restoration "is not reviewable in  
12 a court of law" (id.).

13 In support of his request for modification of the  
14 restitution order, Pescatore pointed out that the purpose of  
15 restitution is not punishment, but compensation of victims, and  
16 that the losses listed in the PSR Loss Chart attached to the  
17 Judgment totaled less than \$3 million. He also argued that in  
18 reality the total amount of victims' losses was even less than the  
19 total indicated by the Loss Chart. He asked that the Plea  
20 Agreement be voided and that the restitution amount be  
21 recalculated to reflect the actual losses suffered by his victims.

22 The government, in opposition to Pescatore's request for a  
23 reduction of his restitution obligation, stated, inter alia, that

24 [t]he Court's order of mandatory restitution in the  
25 amount of \$3 million is consistent with the Mandatory  
26 Victim[s] Restitution Act . . . and is the **minimum**  
27 **amount** agreed to in the plea agreement . . . . The  
28 plea agreement states that restitution shall be "in  
29 an amount to be determined by the Court, but no less

1 than \$3 million." . . . . The Court properly  
2 considered the loss sustained by each victim as a  
3 result of the defendant's offenses, and properly  
4 incorporated the analysis set forth by the  
5 Pre-sentence Report.

6 The defendant pled guilty, and was sentenced  
7 pursuant to an agreement with the government wherein  
8 restitution of at least \$3 million was agreed upon.  
9 The defendant was represented by counsel at  
10 sentencing who provided argument relative to  
11 restitution. The Court properly considered all  
12 relevant matters and ordered restitution in the  
13 lowest agreed upon amount.

14 (Letter from Special AUSA Karen R. Hennigan to Judge Platt dated  
15 December 30, 2009 ("Government's December 2009 Letter"), at 2-3  
16 (emphasis in original).)

17 At the January 29, 2010 hearing on Pescatore's motion,  
18 the colloquy with respect to restitution included the following:

19 MR. FROCCARO [Pescatore's new attorney]:  
20 . . . .

21 Your Honor, and this is in no way, shape, or  
22 form a reflection on your Honor, but in the parties'  
23 plea agreement there was an agreement that he would  
24 pay no less than \$3 million in restitution.

25 When he was sentenced, there was no probation  
26 list attached identifying the victims and the amounts  
27 of the losses.

28 . . . .

29 . . . . You went in accordance with the  
30 agreement, judge, with the understanding that there  
31 would be in actuality at least \$3 million in losses.

32 THE COURT: What?

33 MR. FROCCARO: That there would be at least  
34 \$3 million in actual losses to the victims.

35 THE COURT: Was that raised at the sentencing  
36 time?

1 MR. FROCCARO: You know, Judge, the lawyers  
2 didn't raise it. And I cited in my papers to your  
3 Honor that it is plain error that the lawyers--

4 THE COURT: Whoa! Did anybody say to the court  
5 at the date of sentence that the \$3 million figure  
6 which was mentioned, I guess I ordered it[] be paid  
7 by December 31, that that was in error?

8 MR. FROCCARO: They didn't. And that was their  
9 mistake, Judge. And that constitutes plain error  
10 under Second Circuit case law.

11 (Motion Tr. 4-5.)

12 Froccaro argued that the victims' losses totaled "at  
13 least \$1.2 million less than what your Honor ordered" (id. at 5);  
14 and although saying that he was unable to state a "definite  
15 figure" (id. at 6), he said, "Judge, this loss is on the PSR for  
16 1.8" (id. at 18); "Judge, I took a calculator out, I added up the  
17 loss amount in the PSR, and it added up to 1.8" (id. at 22; but  
18 see id. at 21 ("I never agreed to the \$1.8 million, your  
19 Honor.")). Froccaro acknowledged that Pescatore had not appealed  
20 to challenge the \$3 million amount. (See id. at 6.)

21 The government, represented at the hearing by AUSAs  
22 Hennigan and Gatz, appeared to take divergent positions on whether  
23 the \$3 million amount was proper. Hennigan pointed out that  
24 "there is a plea agreement wherein the defendant got the benefit  
25 of a bargain, got the benefit of an agreement that required him to  
26 pay \$3 million as of the 31st of December 2009, which was passed"  
27 (id. at 9); but she also stated that, from the numbers in "the  
28 presentence report that was incorporated into the sentence" (id.  
29 at 10), she calculated the victims' losses "to be about  
30 \$2.7 million" (id. at 11); and she said that "[i]n the event that

1 there is ever some overpayment, the government would certainly  
2 consider that" (id. at 9).

3 AUSA Gatz took the position that Pescatore should be bound  
4 by the Judgment, based on his express agreement to pay restitution  
5 of not less than \$3 million:

6 Your Honor, I just want to remind the court that  
7 the defendant agreed to pay \$3 million, in the plea  
8 agreement. He said before the court I will pay  
9 \$3 million and no less in restitution. And your  
10 Honor ordered that. And we are done with the J&C.  
11 It was filed probably almost a year ago.

12 So this satellite litigation is improper,  
13 frankly, as a whole because the defendant agreed to  
14 the \$3 million in the plea agreement.

15 (Motion Tr. 14.)

16 The court ultimately rejected all of Pescatore's  
17 arguments. Having requested in vain that Pescatore provide  
18 "specifics" (id. at 8) and "proof" (id. at 12) as to the  
19 contention that his victims' losses totaled no more than  
20 \$1.8 million, the court found that that contention was not  
21 substantiated, "not on the representations you made here today,  
22 which [are] solely an effort to get more time" (id. at 22).  
23 Further noting that, of the amount he did not dispute, Pescatore  
24 "ha[d]n't even produced a dollar in good faith" (id. at 28), the  
25 court stated that Pescatore should at least pay the undisputed  
26 amount immediately (see id. at 27 ("Pay what you say you owe.");  
27 id. at 22 ("Pay them the 1.8").) And although noting that  
28 compliance with the Judgment was already nearly 30 days overdue,  
29 the court gave Pescatore a new 30-day period within which to pay  
30 the \$3 million ordered in the Judgment; the court denied

1 Pescatore's request for a longer period and stated that after 30  
2 days the government should begin to levy on Pescatore's property.  
3 (See id. at 20-24.)

4 MS. HENNIGAN: Your Honor, are you ordering that  
5 the defendant pay the \$3 million within the next 30  
6 days? . . . .

7 THE COURT: 3 million bucks.

8 . . . .

9 . . . . Wasn't my order for \$3 million?

10 MS. HENNIGAN: Yes.

11 MS. GATZ: Yes.

12 THE COURT: That is the judgment.

13 MS. HENNIGAN: Yes.

14 MS. GATZ: Yes.

15 THE COURT: Enforce it.

16 (Motion Tr. 21-22.)

17 MS. GATZ: Your Honor, at this point you are not  
18 setting aside the J&C, which requires the defendant  
19 to pay the \$3 million. You are not setting aside the  
20 J&C, the judgment and conviction, which requires the  
21 defendant to pay the \$3 million. You are not  
22 setting that aside at this point.

23 THE COURT: No.

24 (Id. at 24-25.)

25 MS. HENNIGAN: . . . [Y]our Honor, for  
26 clarification. Your Honor is suggesting that  
27 [Pescatore] pay what he does not dispute, but you are  
28 holding him accountable for the \$3 million.

29 THE COURT: Yes, I am.

30 (Id. at 27.)



1           This appeal followed. The new 30-day period granted by  
2 the district court ended on March 1, 2010. On March 3, Pescatore  
3 moved in this Court for a stay of his restitution obligation.  
4 That motion was denied on March 5.

5   II. DISCUSSION

6           On appeal, Pescatore pursues his contentions (1) that  
7 restoration, to relieve him of his restitution obligation, was  
8 required because no law prohibited the DOJ from granting him that  
9 relief; and (2) that, as the purpose of restitution is  
10 compensation, the Judgment ordering him to pay \$3 million in  
11 restitution is illegal to the extent that that amount (a) exceeds  
12 the total of his victims' losses as shown by the PSR Loss Chart  
13 and (b) exceeds an actual--albeit unspecified--loss total that he  
14 alleges is lower than that shown by the PSR. For the reasons that  
15 follow, we find no merit in the restoration contention. With  
16 respect to restitution, Pescatore is of course correct that its  
17 purpose is to compensate victims; however, as Pescatore did not  
18 timely challenge the Judgment and, without obtaining a stay,  
19 failed to comply with the Judgment, we conclude that he is not  
20 entitled to immediate relief from the order to pay \$3 million, as  
21 it is not clear that that sum will exceed the total of (a) the  
22 losses suffered by his chop shop victims, (b) the statutory  
23 interest to which his victims are entitled because of his delay in  
24 making payment, and (c) the statutory penalties that may be

1 applicable on account of that delay. Further proceedings in the  
2 district court will be required, after Pescatore has paid  
3 \$3 million, to determine whether he is entitled to any refund.

4 A. Restoration

5 Civil forfeiture actions such as that commenced by the  
6 government against Pescatore in 2003 and settled pursuant to the  
7 Plea Agreement are governed by 18 U.S.C. § 981. That section  
8 "subject[s] to forfeiture to the United States" property that was  
9 involved in, inter alia, various offenses under Title 18,  
10 including money laundering in violation of § 1956 and altering or  
11 removing motor vehicle identification numbers in violation of  
12 § 511. 18 U.S.C. §§ 981(a)(1)(A) and (F)(i). To the extent  
13 pertinent to the present appeal, § 981(e) provides that

14 [n]otwithstanding any other provision of the law,  
15 . . . the Attorney General . . . is authorized to  
16 retain property forfeited pursuant to this section,  
17 or to transfer such property on such terms and  
18 conditions as he may determine--

19 . . . .

20 (6) as restoration to any victim of the  
21 offense giving rise to the forfeiture . . . .

22 18 U.S.C. § 981(e)(6) (emphases added). Thus, the Attorney  
23 General is allowed to choose between restoration and retention.  
24 Pescatore has not called to our attention, and we are not aware  
25 of, any provision in this or any other section that requires the  
26 Attorney General to choose either option over the other. The  
27 authorization either "to retain . . . or to transfer," with no

1 accompanying statutory constraints, makes the decision between the  
2 two choices a matter of discretion.

3 Nor does anything in the Plea Agreement, which we  
4 interpret in accordance with traditional principles of contract  
5 law, see generally United States v. Brumer, 528 F.3d 157, 158 (2d  
6 Cir. 2008), purport to place any constraints on the Attorney  
7 General's exercise of that discretion. Paragraph 17 of the  
8 Agreement obligated the USAO to "recommend" that the DOJ grant  
9 Pescatore relief in the form of restoration, and Pescatore has  
10 provided no reason to discredit the government's representation to  
11 the district court that the Office made the promised  
12 recommendation. The Agreement further stated expressly that the  
13 USAO "ha[d] authority only to recommend and that the final  
14 decision whether to grant such relief rest[ed] with the  
15 Department" (Plea Agreement ¶ 17), and Pescatore concedes that  
16 this called on the DOJ to "exercise its discretion" (Pescatore  
17 brief on appeal at 12). The promise that the Department would  
18 "make its decision in accordance with applicable law" (Plea  
19 Agreement ¶ 17) is not, as Pescatore would have it (see, e.g.,  
20 Pescatore brief on appeal at 4, 9, 10, 12, 14, ), the equivalent  
21 of a promise to grant restoration so long as it is not prohibited.  
22 The unambiguous statement that the Department, upon receiving the  
23 recommendation, would make its decision "in accordance with  
24 applicable law" plainly means that the Department would do  
25 anything the law requires and nothing the law prohibits. The Plea

1 Agreement contains no promise that the DOJ would exercise its  
2 discretion to grant Pescatore relief that was not required.

3 To the extent that the government suggests here, as it  
4 argued in the district court, that the decision of the DOJ to deny  
5 restoration "is not reviewable in a court of law" (Motion Tr. 18),  
6 we need not address that issue, given that the government has  
7 explained the basis for the DOJ's decision, and the record cannot  
8 support a conclusion that that basis evinced any abuse of  
9 discretion. Forfeiture and restitution are separate remedies with  
10 different purposes, and the DOJ Manual dealing with forfeitures  
11 and with compensation for crime victims indicates that discretion  
12 may be exercised to transfer forfeited assets to victims "where  
13 . . . other property is not available to satisfy the order of  
14 restitution" (Appendix to Government brief on appeal (United  
15 States Department of Justice, Asset Forfeiture Policy Manual 164  
16 (2010))). At the hearing on Pescatore's restoration/restitution  
17 motion, the government explained that Pescatore's restoration  
18 "request was denied because the defendant actually does have  
19 assets" (Motion Tr. 18; see also Government brief on appeal at  
20 16), and Pescatore in no way suggested that he lacked the  
21 wherewithal to satisfy his restitution obligations (see Motion  
22 Tr. 16 (Mr. Froccaro: "I have never said he doesn't have  
23 assets").) Accordingly, the criteria for restoration set out in  
24 the DOJ Manual were not met.

25 In sum, we see nothing in the statutory provisions, DOJ's  
26 normal operating procedures, or the Plea Agreement that required

1 the Department to use the forfeited assets to relieve Pescatore of  
2 his restitution obligations, and the record shows no failure on  
3 the part of the government to consider his request in good faith.  
4 The district court properly denied Pescatore's motion to compel  
5 the government to grant restoration.

6 B. Restitution

7           The Mandatory Victims Restitution Act ("MVRA"), codified  
8 largely at 18 U.S.C. §§ 3663A and 3664, provides, in part, that in  
9 sentencing a defendant convicted of a felony "offense against  
10 property under" Title 18, "including any offense committed by  
11 fraud or deceit," the court "shall order, in addition to . . . any  
12 other penalty authorized by law, that the defendant make  
13 restitution to the victim of the offense." 18 U.S.C.  
14 §§ 3663A(a)(1) and (c)(1)(A)(ii). "In each order of restitution,  
15 the court shall order restitution to each victim in the full  
16 amount of each victim's losses as determined by the court and  
17 without consideration of the economic circumstances of the  
18 defendant." Id. § 3664(f)(1)(A).

19           The purpose of restitution is to compensate victims for  
20 their losses. See, e.g., Hughey v. United States, 495 U.S. 411,  
21 416 (1990), superseded by statute, Crime Control Act of 1990, Pub.  
22 L. No. 101-647 § 2509, 104 Stat. 4789, 4863 (codified at 18 U.S.C.  
23 § 3663(a)(3)); United States v. Boccaqna, 450 F.3d 107, 115 (2d  
24 Cir. 2006) ("Boccaqna"); United States v. Reifler, 446 F.3d 65,

1 137 (2d Cir. 2006) ("Reifler"); United States v. Nucci, 364 F.3d  
2 419, 423-24 (2d Cir. 2004) ("Nucci").

3 In determining the appropriate measure of value  
4 for property relevant to restitution, a district  
5 court must consider that the purpose of restitution  
6 is essentially compensatory: to restore a victim, to  
7 the extent money can do so, to the position he  
8 occupied before sustaining injury. See Hughey v.  
9 United States, 495 U.S. 411, 416, 110 S.Ct. 1979, 109  
10 L.Ed.2d 408 (1990) (observing that the "meaning of  
11 'restitution' is restoring someone to a position he  
12 occupied before a particular event"); United States  
13 v. Coriaty, 300 F.3d 244, 253 (2d Cir.2002) (holding  
14 that "statutory focus" of the MVRA is "upon making  
15 victims whole"). Because the MVRA mandates that  
16 restitution be ordered to crime victims for the  
17 "full amount" of losses caused by a defendant's  
18 criminal conduct, see 18 U.S.C. § 3664(f)(1)(A);  
19 United States v. Reifler, 446 F.3d at 134 . . . , it  
20 can fairly be said that the "primary and overarching"  
21 purpose of the MVRA "is to make victims of crime  
22 whole, to fully compensate these victims for their  
23 losses and to restore these victims to their original  
24 state of well-being." United States v. Simmonds, 235  
25 F.3d [826, 831 (3d Cir. 2000)].

26 Boccagna, 450 F.3d at 115. Section 3663A does not authorize the  
27 court to order restitution to victims in excess of their losses.  
28 See, e.g., Reifler, 446 F.3d at 122-35; Boccagna, 450 F.3d at 109;  
29 Nucci, 364 F.3d at 423-24. And as "'[f]ederal courts have no  
30 inherent power to order restitution'" but only "'[s]uch authority  
31 [as is] conferred by Congress' through statute," United States v.  
32 Gottesman, 122 F.3d 150, 151 (2d Cir. 1997) (quoting United States  
33 v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991) (emphasis ours)), the  
34 court has no authority under the MVRA to adopt or enforce an  
35 agreement calling for restitution in excess of that authorized by  
36 statute.

1           The chop shop offense of which Pescatore was convicted was  
2 plainly an offense "against property" and was "committed by fraud  
3 or deceit" within the meaning of 18 U.S.C. § 3663A(c)(1)(A)(ii).  
4 His operations involved, inter alia, receiving stolen car parts  
5 and using those parts to rebuild damaged motor vehicles, and  
6 transferring stolen cars to other individuals for replacement of  
7 the vehicle identification numbers with false numbers so that the  
8 cars could be sold to unwitting customers. (See Plea Tr. 19-22.)  
9 Thus, the MVRA was applicable and required the district court to  
10 order that Pescatore pay restitution to each identified victim of  
11 his offense in the full amount of the victim's losses. The court  
12 was not authorized to require restitution in excess of those  
13 losses.

14           Pescatore does not dispute the applicability of the MVRA;  
15 his contention is that the Plea Agreement and the Judgment are  
16 illegal because they require him to pay restitution in excess of  
17 his victims' losses. The government, for its part, does not  
18 contend on this appeal that it was permissible for the court to  
19 order restitution in excess of the victims' losses. Instead, its  
20 brief on appeal suggests that the amended Judgment against  
21 Pescatore in fact reduced the restitution order to \$2,559,611.79:

22           [a]lthough Pescatore challenges the \$ 3 million  
23 figure to which he agreed, the fact is that the  
24 judgment was amended to incorporate the portion of  
25 the PSR identifying the victims of Pescatore's crimes  
26 and their actual losses, which total  
27 \$ 2,559,611.79. . . .

28           . . . .

1           . . . . The judgment against him already has been  
2 amended to incorporate the victim and loss  
3 information from the PSR, making his restitution  
4 obligation no more than the actual losses suffered by  
5 his victims of his crimes.

6 (Government's brief on appeal at 18, 20 (emphasis added).)

7           We disagree with the government's characterization of the  
8 Judgment. However, given the posture of the case, we also  
9 disagree with Pescatore's contention that he should immediately be  
10 relieved of the requirement that he pay \$3 million in connection  
11 with his restitution obligations.

12           1. The Amount Ordered in the Judgment

13           Despite the government's contention on appeal that the  
14 amended Judgment requires Pescatore to pay no more in restitution  
15 than \$2,559,611.79, nothing in the record--pertinent parts of  
16 which are quoted in Part I.B. above--supports that contention. To  
17 begin with, the record does not include any document ordering  
18 Pescatore to pay any amount other than \$3,000,000 or any order or  
19 opinion stating that the \$3 million amount originally ordered has  
20 been reduced. Further, the government's letter to the district  
21 court, requesting that the original judgment be "corrected," did  
22 not ask the court to change the restitution ordered to a sum other  
23 than \$3 million; it asked only that the court amend the judgment  
24 by attaching the PSR pages that identified the victims and  
25 itemized their losses--and it stated that the reason for the  
26 request was that the DOJ required that the judgment specifically  
27 identify the victims in order "to process the restoration



1 request." (Government's January 2009 Letter at 1.). Nothing in  
2 that letter stated that \$3 million was the wrong amount. Nor was  
3 a lesser total amount immediately apparent from the proffered PSR  
4 pages. While the Loss Chart detailed the losses suffered by each  
5 of 80 victims, it did not state a total. From the government's  
6 submission, the district court might easily have inferred that the  
7 Loss Chart supported the entire already-ordered \$3 million.  
8 Indeed, the Government's January 2009 Letter described the  
9 requested amendment as a "clerical" correction (*id.* at 2), hardly  
10 a term that is applicable to an undiscussed reduction of a  
11 liability by nearly half a million dollars. In sum, neither the  
12 letter nor the attached PSR pages alerted the court that the  
13 Judgment as thus augmented might be viewed as reducing Pescatore's  
14 restitution obligation from \$3 million to \$2,559,611.79.

15       Moreover, such a view was nowhere evident in the  
16 government's opposition to Pescatore's November 2009 request to  
17 have the ordered \$3 million reduced to match the amount of his  
18 victims' losses. The government's preargument letter to the  
19 district court stated, *inter alia*, that "[t]he Court's order of  
20 mandatory restitution in the amount of \$3 million is consistent  
21 with the Mandatory Victim[s] Restitution Act." (Government's  
22 December 2009 Letter at 2.) The letter contained no reference to  
23 \$2,559,611.79. Nor at oral argument was there any mention of that  
24 number. AUSA Hennigan stated that based on the PSR pages  
25 incorporated in the Judgment, she calculated the victims' losses  
26 "to be about \$2.7 million" (Motion Tr. 11); but that statement

1   apparently was not meant to suggest that any less than \$3 million  
2   was ordered in the Judgment, for she had referred to the  
3   possibility that there might be an "overpayment" (id. at 9), and  
4   when the court asked whether the Judgment ordered payment of  
5   \$3 million, Hennigan answered affirmatively (id. at 21). AUSA  
6   Gatz echoed that affirmative answer (see id.); and she argued  
7   unequivocally that Pescatore had "agreed to pay \$3 million" in  
8   restitution "and no less," that the court had "ordered" that  
9   amount in the "J&C," and that Pescatore's attempt to have that  
10  amount reduced was "improper" (id. at 14).

11           Finally, as revealed by the colloquy described in Part  
12  I.B. above, the district court itself plainly did not believe it  
13  had amended the judgment to reduce the restitution amount below  
14  \$3 million. (See, e.g., id. at 21 (The Court: "Wasn't my order  
15  for \$3 million? . . . . That is the judgment.").)

16           The record thus in no way supports the government's new  
17  contention that, because the judgment was amended to append the  
18  PSR Loss Chart listing Pescatore's victims and their losses, that  
19  "clerical" step reduced Pescatore's restitution obligation to  
20  \$2,559,611.79. The Judgment orders Pescatore to pay restitution  
21  of \$3 million.

22           The government's present acknowledgement that, as revealed  
23  by the pertinent PSR pages, "[a]ll the losses sustained by the  
24  victims of crimes in which Pescatore was involved add up to  
25  \$2,559,611.79" (Government brief on appeal at 17 (footnote  
26  omitted)) means that those losses total some \$440,000 less than

1 the Judgment orders Pescatore to pay. Pescatore contends that the  
2 discrepancy is even greater, arguing that the actual losses listed  
3 in the PSR Loss Chart total "at least \$1 million less" than  
4 \$3 million. (Pescatore brief on appeal at 8 (emphasis in  
5 original).) We address these two discrepancies--the first  
6 actual, the second alleged--in reverse order.

7 2. Pescatore's Challenge to the Accuracy of the PSR's  
8 \$2,559,611.79 Loss Total

9 As indicated above, 18 U.S.C. § 3664(f)(1)(A) required  
10 that the amount of each victim's loss be determined by the  
11 district court and included in the restitution order. Although  
12 the original judgment entered in November 2008 did not comply with  
13 this requirement, the amended Judgment appended the PSR Loss Chart  
14 that identified 80 chop shop victims in whose losses Pescatore was  
15 involved; those pages showed the precise amount of each victim's  
16 loss. Although the Loss Chart did not state an overall total of  
17 those items, the total is \$2,559,611.79. Pescatore contends that  
18 the actual total amount of his victims' losses is less.

19 Pescatore had received the February 21, 2008 PSR well in  
20 advance of his sentencing hearing on October 24, 2008. The record  
21 does not indicate that in connection with sentencing he made any  
22 objection whatever to the PSR's specification of victims or  
23 losses, or to the total loss figure--\$2,559,611.79--that was in  
24 fact stated elsewhere in the PSR. Further, in January 2009, when  
25 the government asked the court to amend the original judgment by  
26 appending specific pages of the PSR, Pescatore made no objection:

1 He did not suggest that any individual or entity identified in  
2 those pages was not a victim in whose loss he was involved; he did  
3 not suggest that any loss amount shown on those pages was  
4 incorrect; he did not suggest that the loss amounts listed  
5 totaled less than \$2,559,611.79. And when the amended Judgment  
6 was entered, Pescatore did not appeal.

7 Pescatore's contention that his victims' losses total  
8 less than \$2,559,611.79 was not advanced until he made his  
9 restoration/restitution motion, some nine months after the  
10 amended Judgment was filed. Given the lack of any timely  
11 objection to the correctness of the PSR Loss Chart's listing of  
12 Pescatore's individual victims, showing losses that total  
13 \$2,559,611.79, Pescatore's contention that the Judgment is  
14 inaccurate because the appended PSR Loss Chart is inaccurate is  
15 reviewable only for plain error. See Fed. R. Crim. P. 52(b);  
16 United States v. Catoggio, 326 F.3d 323, 326 (2d Cir. 2003);  
17 United States v. Coriaty, 300 F.3d 244, 252 (2d Cir. 2002); United  
18 States v. Kinlock, 174 F.3d 297, 299 (2d Cir. 1999).

19 Under the standard set by the Supreme Court for the  
20 application of Rule 52(b), before an appellate court is allowed to  
21 correct an error that was not timely raised in the district court  
22 four conditions must be met. "[T]here must be (1) 'error,' (2)  
23 that is 'plain,' and (3) that 'affect[s] substantial rights'"; and  
24 "[i]f all three" of those "conditions are met, an appellate court  
25 may then exercise its discretion to notice a forfeited error, but  
26 only if (4) the error 'seriously affect[s] the fairness,

1 integrity, or public reputation of judicial proceedings.'"   
2 Johnson v. United States, 520 U.S. 461, 467 (1997) (quoting   
3 United States v. Olano, 507 U.S. 725, 732 (1993)) (other internal   
4 quotation marks omitted).

5           Pescatore's contention that the actual losses suffered by   
6 his chop shop victims are less than the \$2,559,611.79 detailed in   
7 the PSR Loss Chart that was made part of the Judgment does not   
8 meet even the first threshold condition of the plain-error test.   
9 His restoration/restitution motion asserted that "the aggregate   
10 amount of loss or restitution to the victims identified in the PSR   
11 is more than \$1 million lower than Mr. Pescatore was ordered by   
12 the Court to pay" (Memorandum of Law in Support of Defendant   
13 Michael Pescatore's Santobello Motions at 7 (emphasis in   
14 original)), but it proffered no facts to support that assertion.   
15 The motion did not challenge the PSR's identification of any   
16 particular victim; and it did not challenge the amount of any   
17 specific PSR-itemized loss. Rather, it claimed that that lower   
18 amount was revealed by "[s]imple arithmetic" (id. at 7 n.5). Yet   
19 the motion did not proffer a precise amount by which Pescatore   
20 contended the PSR was in error. Nor was a precise figure--or any   
21 evidence--proffered at oral argument of the motion, despite the   
22 court's request for "proof" (Motion Tr. 12). Although Froccaro,   
23 Pescatore's attorney, stated that he used his calculator to   
24 determine that "the loss amount in the PSR . . . added up to 1.8"   
25 (id. at 22), Froccaro also said, "I never agreed to the \$1.8

1 million," (id. at 21), and said he could not give the court a  
2 "definite figure" (id. at 6).

3           The district court thus ruled--properly--that it could not  
4 uphold Pescatore's challenge to the accuracy of the PSR based on  
5 his vague and conclusory assertions (see, e.g., Motion Tr. 22  
6 ("not on the representations you made here today")).

7           Our own mathematical review confirms that the relevant  
8 victims' losses listed in the Loss Chart appended to the Judgment  
9 total \$2,559,611.79. Although Pescatore's brief on appeal  
10 provides somewhat more enlightenment than was proffered to the  
11 district court as to the nature of his claim of arithmetic error,  
12 that claim improperly disregards the fact that in many instances  
13 his offense with respect to a particular vehicle caused losses to  
14 more than one victim. Given Pescatore's failure to proffer any  
15 evidence to show that the PSR Loss Chart is inaccurate, we cannot  
16 conclude that the amended Judgment's incorporation of the PSR's  
17 listing of losses totaling \$2,559,611.79 is error, much less  
18 "plain" error.

19           3. Pescatore's Challenge to the \$3 Million Requirement

20           Pescatore's contention that the Judgment is in error to  
21 the extent that it orders him to pay more than \$2,559,611.79 is  
22 also subject to plain-error review and is far more problematic.  
23 In the original judgment entered in November 2008, the order that  
24 Pescatore pay restitution in the amount of \$3 million did not  
25 include or incorporate any identification of Pescatore's victims

1 or determination of each victim's loss. Hence that judgment's  
2 order that Pescatore pay restitution did not comply with the MVRA.  
3 Pescatore did not appeal to complain of that defect.

4 More importantly, when the government asked the district  
5 court to amend the original judgment by appending the PSR Loss  
6 Chart itemizing Pescatore's victims and their losses, which  
7 would apparently bring the Judgment into compliance with  
8 § 3664(f)(1)(A), Pescatore did not ask the district court to also  
9 amend the original \$3 million figure so that the restitution  
10 ordered would not exceed the \$2,559,611.79 in losses listed in the  
11 Loss Chart. Nor, after the amended Judgment was filed in January  
12 2009, did Pescatore appeal to complain that the Judgment required  
13 him to pay more in restitution than the \$2,559,611.79 the  
14 government had proven in losses. Rather, he waited until October  
15 2009 to complain of the Judgment, i.e., six months after being  
16 notified that the DOJ would not relieve him of his restitution  
17 obligation, and nine months after the Judgment was filed.  
18 Accordingly, Pescatore's present challenge to the Judgment's order  
19 that he pay \$3 million in restitution cannot be sustained unless  
20 he meets the plain-error test, described in Part II.B.2. above.  
21 We conclude that he meets the first three elements of that test,  
22 but not the fourth.

23 Given the government's concession on this appeal that it  
24 proved losses totaling only \$2,559,611.79, the amended Judgment's  
25 retention of the order that Pescatore pay \$3 million in  
26 restitution was error. And in light of the authorities cited

1 above, that error is plain. Further, there can be no doubt that,  
2 at least at the time the Judgment was amended and itemized only  
3 \$2,559,611.79 in losses, the error affected Pescatore's  
4 substantial rights, for it required him to pay some \$440,000 more  
5 than the MVRA authorized. But these are just the threshold  
6 conditions that, if met, permit us to "exercise [our] discretion  
7 to notice a forfeited error . . . only if [] the error seriously  
8 affect[s] the fairness, integrity, or public reputation of  
9 judicial proceedings." Johnson, 520 U.S. at 467 (internal  
10 quotation marks omitted) (emphasis added). In the present case,  
11 if Pescatore had proceeded to make timely payment of  
12 \$2,559,611.79, we would, in the interest of justice, recognize  
13 that his restitution obligation was satisfied; or if he had timely  
14 paid the ordered \$3 million, we would conclude that justice  
15 entitled him to a refund.

16 In fact, however, Pescatore, without obtaining a stay of  
17 the Judgment, simply flouted it. He moved on December 22, 2009--  
18 and renewed his motion on December 31, 2009--for a stay of the  
19 Judgment's requirement that he pay on or before December 31, 2009;  
20 but the court did not grant a stay. Pescatore nonetheless made  
21 no payment at or before that first deadline.

22 At the January 29, 2010 argument on Pescatore's request to  
23 reduce the restitution obligation, the court--despite repeatedly  
24 noting that Pescatore "ha[d]n't complied with the order of this  
25 court" (Motion Tr. 24), was nearly "30 days overdue" (id. at 20,  
26 23; see, e.g., id. at 24, 25), and "ha[d]n't even produced a



1 dollar in good faith" (id. at 28)--granted Pescatore a new 30-day  
2 period in which to make a restitutionary payment (see id. at 20).  
3 That 30-day period ended on March 1, 2010, and nothing in the  
4 record suggests that Pescatore made any payment by that date.

5 After his March 1, 2010 deadline had passed, Pescatore  
6 asked this Court to grant him a stay. That motion was promptly  
7 denied on March 5. No party has informed us that Pescatore has  
8 made any payment yet.

9 We note also that following this Court's denial of a stay,  
10 Pescatore made no effort whatever to expedite this appeal; instead  
11 he missed several filing deadlines, two of which resulted in  
12 dismissals (followed eventually by reinstatements) of the appeal.  
13 As a consequence of the lack of any urgency on Pescatore's part,  
14 this appeal was not submitted for decision until January 2011,  
15 nearly a year after the denial of his request to modify the  
16 restitution order, and more than 10 months after the expiration of  
17 the new 30-day period granted him at the January 2010 hearing--  
18 when he was already in noncompliance--to make payment in full.

19 Although the fact that the government had shown losses  
20 totaling only \$2,559,611.79 means that the Judgment's order for  
21 restitution in the amount of \$3 million was in error, it is  
22 fundamental law that that error did not give Pescatore the right  
23 simply to ignore the court's order. It is a

24 basic proposition that all orders and judgments of  
25 courts must be complied with promptly. If a person  
26 to whom a court directs an order believes that order  
27 is incorrect the remedy is to appeal, but, absent a  
28 stay, he must comply promptly with the order pending  
29 appeal.

1 Maness v. Meyers, 419 U.S. 449, 458 (1975) (emphasis added).

2 [A]n order issued by a court with jurisdiction over  
3 the subject matter and person must be obeyed by the  
4 parties until it is reversed by orderly and proper  
5 proceedings. This is true without regard even for  
6 the constitutionality of the Act under which the  
7 order is issued.

8 United States v. United Mine Workers of America, 330 U.S. 258, 293  
9 (1947) (footnote omitted); see, e.g., Howat v. Kansas, 258 U.S.  
10 181, 190 (1922) ("until [the] decision" of a court of competent  
11 jurisdiction "is reversed for error by orderly review, either by  
12 itself or by a higher court, its orders based on its decision are  
13 to be respected"); SEC v. Charles Plohn & Co., 433 F.2d 376, 379  
14 (2d Cir. 1970) ("It is axiomatic that a court order must be  
15 obeyed, even assuming its invalidity, until it is properly set  
16 aside." (internal quotation marks omitted)).

17 In light of Pescatore's election to disregard these  
18 principles and disobey the Judgment, although we agree that he  
19 cannot be compelled to pay more than \$2,559,611.79 as pure  
20 restitution, we cannot conclude that he has met the final prong of  
21 the plain-error test so as to require that he be given immediate  
22 relief from the \$3 million figure, for a defendant's unexcused  
23 failure to comply with a restitution order has monetary (as well  
24 as other potential) consequences. See, e.g., 18 U.S.C. §§ 3572  
25 (penalties), 3612 (penalties and interest); 3613 (civil  
26 enforcement), 3613A (inter alia, modification of supervised  
27 release terms; contempt of court), 3614 (resentencing).

28 The consequences most relevant to this appeal are the  
29 accrual of interest and penalties with respect to restitution

1 payments not made when due. If a restitution payment of more than  
2 \$2,500 is not made as ordered by the court, "[i]n general[, t]he  
3 defendant shall pay interest," 18 U.S.C. § 3612(f)(1). In  
4 addition, a "payment of restitution is delinquent if a payment is  
5 more than 30 days late," and is "in default if a payment is  
6 delinquent for more than 90 days." 18 U.S.C. §§ 3572(h) and (i).

7 The penalties for delinquency and default are substantial:

8           If a fine or restitution becomes delinquent, the  
9           defendant shall pay, as a penalty, an amount equal to  
10          10 percent of the principal amount that is  
11          delinquent. If a fine or restitution becomes in  
12          default, the defendant shall pay, as a penalty, an  
13          additional amount equal to 15 percent of the  
14          principal amount that is in default.

15 18 U.S.C. § 3612(g) (emphases added); see also id. § 3612(i)  
16 ("Payments relating to fines and restitution shall be applied in  
17 the following order: (1) to principal; (2) to costs; (3) to  
18 interest; and (4) to penalties."). These penalties for default  
19 and delinquency are not paid to the defendant's victims, but  
20 rather become assets of the United States Treasury. See  
21 Administrative Office of the United States Courts, Guide to  
22 Judiciary Policy vol. 13, § 810.50.10(a)(2) (Aug. 3, 2010)  
23 ("Interest assessed on restitution is paid to the victim. Any  
24 penalty assessed on restitution is deposited into Miscellaneous  
25 Fines, Penalties, and Forfeitures Fund . . .").

26           Assuming that Pescatore has made no restitutionary  
27 payments during the pendency of this appeal, he has accumulated  
28 obligations of interest on the \$2,559,611.79, as well as penalties  
29 that are sizeable. Thus, it is not clear that \$3 million will

1 exceed the sum of his victims's losses, the statutory interest to  
2 which the victims are entitled because of his delay in making  
3 payment, and the statutory penalties that may be applicable on  
4 account of that delay. In all the circumstances, although we  
5 agree that Pescatore cannot be compelled to pay more than  
6 \$2,559,611.79 as pure restitution, we cannot conclude that he has  
7 met the final prong of the plain-error test in any way that  
8 requires that he be given immediate relief from the requirement  
9 that he pay \$3 million.

10 We note that Pescatore acknowledged in his plea allocution  
11 that his chop shop operation began in 1987 and ended in mid-2004.  
12 Thus, his victims have been without compensation for their losses  
13 for the better part of a decade, or longer. We conclude that, in  
14 light of the choices made by Pescatore throughout this case,  
15 including:

16 ■ his initial agreement to pay no less than  
17 \$3 million in restitution,

18 ■ his failure to timely object to or appeal from the  
19 amended Judgment to challenge its retention of the  
20 \$3 million restitution obligation despite the  
21 amendment identifying victims whose losses totaled  
22 only \$2,559,611.79,

23 ■ his failure to challenge the accuracy of the PSR  
24 Loss Chart before sentencing, at sentencing, or upon  
25 the government's request that the Loss Chart be made  
26 part of the Judgment,

27 ■ his unsubstantiated challenges to the accuracy of  
28 the Loss Chart, made in conclusory fashion, more  
29 than a year late, and without even an offer of proof,

30 ■ his tortoise-like pace in pursuing relief, both in  
31 the district court and on this appeal, to achieve  
32 delays that he had requested and been denied,



1 restitution, interest, and restitution-related penalties does not  
2 exhaust the \$3 million, the amount to be refunded to Pescatore.

3           The order of the district court (a) denying an order  
4 compelling restoration, and (b) denying immediate relief from the  
5 \$3 million restitution order is affirmed. Pescatore is to make  
6 payment of \$3 million within 60 days of the issuance of the  
7 mandate herein; interest on any unpaid portion of \$2,559,611.79  
8 shall not cease to accrue during that period. The matter is  
9 remanded to the district court for proceedings not inconsistent  
10 with this opinion.

11           The mandate shall issue forthwith.