

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
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6  
7 August Term, 2008  
8

9 (Argued: May 13, 2009 Decided: August 6, 2009)

10 Docket No. 08-3750-cr  
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14  
15 UNITED STATES OF AMERICA,  
16

17 *Appellee,*  
18

19 -v.-  
20

21 JAMES BATTISTA, ALSO KNOWN AS BABA, ALSO KNOWN AS SHEEP,  
22

23 *Defendant-Appellant.*  
24

25  
26  
27 Before:  
28

29 WALKER, WESLEY, WALLACE,\* *Circuit Judges.*  
30

31 Defendant-Appellant James Battista appeals from a  
32 judgment of the United States District Court for the Eastern  
33 District of New York (Amon, J.), entered on July 24, 2008,  
34 convicting him, after a guilty plea, of conspiracy to  
35 transmit wagering information in violation of 18 U.S.C. §§  
36 371, 1084. We hold that the district court acted within its  
discretion in ordering Battista to pay restitution to the

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\* The Honorable J. Clifford Wallace, United States  
Court of Appeals for the Ninth Circuit, sitting by  
designation.

1 National Basketball Association under the Victim and Witness  
2 Protection Act of 1982, 18 U.S.C. § 3663.  
3  
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6  
7 JACK MCMAHON, Philadelphia, PA, *for Appellant*.  
8

9 JEFFREY GOLDBERG, Assistant United States Attorney  
10 (Jo Ann M. Navickas and Alexander A. Solomon, *on*  
11 *the brief*), *for* Benton J. Campbell, United States  
12 Attorney for the Eastern District of New York,  
13 Brooklyn, NY, *for Appellee*.  
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18 WESLEY, *Circuit Judge*:

19 Defendant-Appellant James Battista appeals from a  
20 judgment of the United States District Court for the Eastern  
21 District of New York (Amon, J.), entered on July 24, 2008,  
22 convicting him, after a guilty plea, of conspiracy to  
23 transmit wagering information in violation of 18 U.S.C. §§  
24 371, 1084. Battista was a co-conspirator, along with Thomas  
25 Martino, in the much-publicized National Basketball  
26 Association ("NBA") gambling scandal involving former  
27 referee Timothy Donaghy. Following guilty pleas by all  
28 three defendants, the NBA, and the United States on its  
29 behalf, sought restitution. The district court determined  
30 that each defendant was required to pay restitution to the  
31 NBA as a victim of their criminal offenses. Only Battista

1 challenges the imposition of restitution on appeal. For the  
2 reasons that follow, we affirm the restitution order of the  
3 district court.

#### 4 **FACTS**

5 Donaghy began his career as an NBA referee in September  
6 1994 and continued in that position for thirteen seasons.  
7 He first began placing bets on NBA games, including games he  
8 officiated, during the 2003-04 season through his friend  
9 Jack Concannon. The conspiracy at issue here, however,  
10 began in December 2006 and continued until April 2007.  
11 Donaghy provided "picks" on NBA games, again including games  
12 he officiated, to co-conspirators Battista and Martino.  
13 Battista agreed to pay Donaghy a fee for each game in which  
14 Donaghy correctly picked the winner. Donaghy provided the  
15 picks to Martino, Martino relayed the information to  
16 Battista, and Battista placed the bets. According to the  
17 government, Donaghy and Martino devised a code for  
18 communicating picks over the telephone using the names of  
19 Martino's two brothers. If Donaghy mentioned Martino's  
20 older brother, the pick would be the home team; if Donaghy  
21 referred to Martino's younger brother, the pick would be the  
22 visiting team. In making his picks, Donaghy relied on,

1 among other things, nonpublic information to which he had  
2 unique access by virtue of his position as an NBA referee.  
3 This information included his knowledge of the officiating  
4 crews for upcoming NBA games, the interactions between  
5 certain referees, players and team personnel, and the  
6 physical condition of players. During the course of the  
7 conspiracy, Martino met with Donaghy in several cities for  
8 the primary purpose of paying Donaghy for his correct  
9 predictions.

10 After the government discovered the gambling scheme,  
11 Donaghy agreed to cooperate with its investigation.  
12 Thereafter, in August 2007, Donaghy pleaded guilty to  
13 conspiracy to commit wire fraud in violation of 18 U.S.C. §  
14 1343 and conspiracy to transmit wagering information in  
15 violation of 18 U.S.C. § 1084. In February 2008, Battista  
16 and Martino were both charged with conspiracy to commit wire  
17 fraud and conspiracy to transmit wagering information.<sup>1</sup> As  
18 pertinent here, the indictment alleged that Martino and  
19 Battista committed the following overt acts in furtherance  
20 of the conspiracy to transmit wagering information:

21 a. On or about December 13, 2006, MARTINO spoke  
22 with the NBA referee [Donaghy] by telephone

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<sup>1</sup> Martino was also charged with two counts of perjury.

1 regarding the NBA referee's pick for an NBA game.

2  
3 b. On or about December 14, 2006, BATTISTA and  
4 MARTINO met with the NBA referee in Pennsylvania  
5 and gave a cash payment to the NBA referee.

6  
7 c. On or about December 26, 2006, MARTINO spoke  
8 with the NBA referee by telephone regarding the  
9 NBA referee's pick for an NBA game.

10  
11 d. On or about March 11, 2007, MARTINO met with  
12 the NBA referee in Toronto, Canada, and MARTINO  
13 gave a cash payment to the NBA referee.

14  
15 (Indictment, ¶ 15). A few months later, Martino pleaded  
16 guilty to the wire fraud conspiracy charge and Battista  
17 pleaded guilty to the wagering conspiracy charge. Battista  
18 described his criminal conduct during his plea allocution:

19 [F]rom December of 2006 to March 2007, I was  
20 engaged in the business of sports betting, and I  
21 agreed with Tom Martino and Tim Dona[ghy] to use  
22 the telephone across state lines to obtain  
23 information to assist me in wagering on sporting  
24 events, on NBA basketball games. I received  
25 information from Tom Martino, who received his  
26 information from the NBA referee Tim Dona[ghy].  
27 This agreement was formed during a meeting between  
28 the three of us, in a hotel in December of 2006.  
29 During the course of this agreement from time to  
30 time I directed Mr. Martino to do certain things  
31 such as having meetings with Mr. Dona[ghy].

32  
33 Battista further admitted that he had met with Donaghy in  
34 Pennsylvania for payment.

35 The NBA, and the United States on its behalf, sought  
36 restitution against all three defendants. The NBA requested

1 restitution for (1) Donaghy's compensation for the portions  
2 of the 2003-04, 2004-05, 2005-06, and 2006-07 seasons when  
3 he officiated games in which he had a financial interest;  
4 (2) that portion of the salaries of NBA employees attributed  
5 to reviewing the tapes of the games Donaghy refereed; and  
6 (3) attorneys' fees incurred by the NBA in connection with  
7 assisting the government in its investigation and  
8 prosecution.

9 After a comprehensive and particularized discussion of  
10 each restitution claim asserted by the NBA, the district  
11 court ordered the defendants to pay restitution in the total  
12 amount of \$217,266.94, breaking down the portions owed by  
13 (1) all the defendants jointly and severally, (2) Battista  
14 and Martino jointly and severally, and (3) each defendant  
15 individually. See *United States v. Donaghy*, 570 F. Supp. 2d  
16 411, 436-37 (E.D.N.Y. 2008). As relevant to the issues  
17 Battista raises on appeal, the district court concluded that  
18 the NBA was a "victim" of Battista's crime of conviction -  
19 conspiracy to transmit wagering information - under either  
20 the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18  
21 U.S.C. § 3663A, or the Victim and Witness Protection Act of  
22 1982 ("VWPA"), 18 U.S.C. § 3663. The court determined that

1 Battista's crime was covered by the MVRA, which applies to  
2 "offense[s] committed by fraud or deceit," 18 U.S.C. §  
3 3663A(c)(1)(A)(ii), concluding that "the phrase 'committed  
4 by fraud or deceit' appears to refer to the way in which a  
5 particular offense was carried out rather than its  
6 elements." 570 F. Supp. 2d at 421. In the alternative, the  
7 court concluded that Battista was accountable for  
8 restitution under the VWPA and rejected the argument that  
9 his current unemployment and familial obligations foreclosed  
10 VWPA restitution. *Id.* at 421-23.

11 Battista appeals the district court's restitution  
12 order, arguing that: (1) the NBA was not a "victim" of the  
13 offense to which he pleaded guilty under either the MVRA or  
14 the VWPA; (2) his crime of conviction is not covered under  
15 either restitution statute; (3) attorneys' fees and  
16 investigative costs incurred by the NBA are not recoverable;  
17 and (4) his financial obligations were sufficiently  
18 burdensome to exempt him from paying restitution under the  
19 VWPA. For the following reasons, we reject Battista's  
20 contentions and affirm the district court order.





1 must order restitution where "an identifiable victim or  
2 victims has suffered a . . . pecuniary loss." *Id.* §  
3 3663A(c)(1)(B). In contrast to the MVRA, however,  
4 restitution under the VWPA is discretionary. The VWPA  
5 provides that "[t]he court, when sentencing a defendant  
6 convicted of [any] offense under this title . . ., may order  
7 . . . that the defendant make restitution to any victim of  
8 such offense." 18 U.S.C. § 3663(a)(1)(A) (emphasis added).  
9 The VWPA requires sentencing courts to consider the amount  
10 of the loss sustained by the victim as a result of the  
11 offense, the defendant's financial resources, the financial  
12 needs and earning ability of the defendant and the  
13 defendant's dependents, and other factors the court deems  
14 appropriate. See *id.* § 3663(a)(1)(B)(i)(I-II); *United*  
15 *States v. Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001). While  
16 the district court must review these statutory factors,  
17 detailed factual findings for each factor are not required.  
18 See *United States v. Stevens*, 211 F.3d 1, 6 (2d Cir. 2000).  
19 Aside from the aforementioned differences, "the provisions  
20 of the VWPA and the MVRA are nearly identical in authorizing  
21 an award of restitution." *United States v. Serawop*, 505  
22 F.3d 1112, 1118 (10th Cir. 2007) (internal quotation marks

1 and alteration omitted).

2 In this case, the district court determined that  
3 Battista's offense of conviction - conspiracy to transmit  
4 wagering information - was covered under the MVRA, reasoning  
5 that "the phrase 'committed by fraud or deceit' appears to  
6 refer to the way in which a particular offense was carried  
7 out rather than its elements." 570 F. Supp. 2d at 421.  
8 Although Battista's criminal offense (unlike the other co-  
9 conspirators' offenses of conviction, i.e., wire fraud) does  
10 not contain "fraud or deceit" as one of its elements, the  
11 government argues that the crime nevertheless falls within  
12 the scope of the MVRA because it was executed in a  
13 fraudulent manner. Specifically, the government contends  
14 that the conduct underlying the wagering conviction was  
15 Battista's dealings with Donaghy and Martino as part of a  
16 scheme to defraud the NBA of Donaghy's honest services by  
17 using NBA insider information to place wagers on NBA games.  
18 The district court generally agreed, observing that "the  
19 success of Battista's wagering was dependent on Donaghy's  
20 fraudulent conduct." *Id.* In support of its position, the  
21 government points to statements made by Battista during his  
22 plea allocution and the factual allegations set forth in the

1 indictment, asserting that they demonstrate that Battista's  
2 transmittal of wagering information was intertwined with the  
3 fraudulent gambling scheme. Battista's co-conspirators,  
4 Donaghy and Martino, never disputed before the district  
5 court the applicability of the MVRA to the offense for which  
6 they pleaded guilty - conspiracy to commit wire fraud -  
7 because that offense must, by definition, be committed by  
8 fraud or deceit.

9 We need not decide whether the district court properly  
10 ordered Battista to pay restitution under the MVRA - which  
11 would require us to answer the open question of whether the  
12 language "committed by fraud or deceit" in Section  
13 3663A(c)(1)(A)(ii) refers to the elements of an offense or  
14 the manner in which the defendant commits the offense -  
15 because we hold that restitution was properly imposed  
16 pursuant to the VWPA.<sup>3</sup> *Cf. United States v.*  
17 *Murillo-Bejerano (In re Rendon Galvis)*, 564 F.3d 170, 175  
18 (2d Cir. 2009) (declining to decide whether the term "crime  
19 victim" under the Crime Victims' Rights Act, 18 U.S.C. §

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<sup>3</sup> The MVRA and VWPA do not overlap. Rather, the MVRA makes restitution mandatory for the crimes it covers, and the VWPA enables discretionary restitution for non-MVRA crimes. See 18 U.S.C. § 3663(a)(1)(A) (excluding from the VWPA "offense[s] described in section 3663A(c)").

1 3771, should be defined according to the elements of the  
2 crime or offense of conviction). Before turning to the  
3 district court's analysis of the statutory factors set forth  
4 in the VWPA, however, we must first determine whether the  
5 NBA is a "victim" of Battista's offense of conviction under  
6 the VWPA.

7 **II. Is the NBA a "Victim"?**

8 The VWPA defines "victim" as

9 a person directly and proximately harmed as a  
10 result of the commission of an offense for which  
11 restitution may be ordered including, in the case  
12 of an offense that involves as an element a  
13 scheme, conspiracy, or pattern of criminal  
14 activity, any person directly harmed by the  
15 defendant's criminal conduct in the course of the  
16 scheme, conspiracy, or pattern.

17  
18 18 U.S.C. § 3663(a)(2); accord *id.* § 3663A(a)(2).<sup>4</sup> Although  
19 the definition of victim is certainly broad, in determining  
20 whether one qualifies as a victim, a sentencing court can  
21 only consider the offense or offenses for which the  
22 defendant was convicted. See *Hughey v. United States*, 495  
23 U.S. 411, 413 (1990); *United States v. Metal Lathers Local*

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<sup>4</sup> The Crime Victims' Rights Act, 18 U.S.C. § 3771, contains a similar definition. That statute defines the term "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e).

1     *46 Pension Fund (In re Local # 46 Metallic Lathers Union)*,  
2     568 F.3d 81, 86 (2d Cir. 2009). Thus, restitution may be  
3     ordered “only for the loss caused by the specific conduct  
4     that is the basis of the offense of conviction.” *Hughey*,  
5     495 U.S. at 413. “[T]he loss caused by the conduct  
6     underlying the offense of conviction establishes the outer  
7     limits of a restitution order.” *Id.* at 420.

8             On the facts presented in this case, we conclude that  
9     the NBA was “directly and proximately harmed” by Battista  
10    committing the crime of conspiracy to transmit wagering  
11    information. 18 U.S.C. § 3663(a)(2). As the district court  
12    explained, “[o]ne of the key features of this conspiracy was  
13    that Donaghy was able to gain a wagering advantage for  
14    Battista by using confidential information belonging to the  
15    NBA in the course of providing him with ‘picks’ on games he  
16    refereed.” 570 F. Supp. 2d at 420. Although Battista did  
17    not defraud the NBA directly, we conclude that the district  
18    court properly characterized the NBA as a “victim” under the  
19    VWPA because the NBA was harmed by the conduct committed  
20    during the course of the conspiracy to transmit wagering  
21    information, e.g., Battista’s use of nonpublic information  
22    solely belonging to the NBA (conveyed to him by the co-

1 conspirators) to place illegal wagers on its games.  
2 Moreover, we must look at Battista's "offense" of  
3 conspiracy, in which his criminal conduct encompasses not  
4 just his own acts but also those of his co-conspirators.  
5 See *United States v. Boyd*, 222 F.3d 47, 50-51 (2d Cir. 2000)  
6 (per curiam). By this standard, Battista's crime plainly  
7 harmed the NBA.

8 **III. The District Court's VWPA Analysis**

9 We find no error in the district court's analysis of  
10 the statutory factors set forth in the VWPA. Nor did the  
11 district court abuse its discretion in rejecting Battista's  
12 argument that VWPA restitution was improper because he is  
13 financially unable to make payments due to his current  
14 unemployment and that he has five minor children. We have  
15 previously indicated that "[a] defendant's limited financial  
16 resources at the time restitution is imposed is not  
17 dispositive of whether restitution is proper, particularly  
18 where the defendant has a reasonable potential for future  
19 earnings." *Ben Zvi*, 242 F.3d at 100 (citation omitted); see  
20 also *United States v. Mortimer*, 52 F.3d 429, 436 (2d Cir.  
21 1995) ("Even an indigent defendant may be subject to the  
22 duty to pay restitution when and if funds are eventually

1 acquired.").

2 Here, the district court found that Battista possessed  
3 assets totaling \$676,300. 570 F. Supp. 2d at 422. The  
4 court further noted that Battista's sole liability was the  
5 \$120,000 balance on his mortgage. *Id.* The court found the  
6 following additional facts about Battista's financial  
7 status:

8 His household's monthly income is \$1,800, which is  
9 the sum of his wife's salary and assistance from  
10 other family. His household's monthly expenses  
11 total \$4,830, resulting in a monthly negative cash  
12 flow of \$3,030. Currently, Battista stays home  
13 with his three children while his wife works. His  
14 wife has indicated that Battista has expressed  
15 interest in opening a catering business, and his  
16 presentence report reflects that he has previous  
17 experience in the restaurant business.

18  
19 *Id.* Battista does not challenge any of these factual  
20 findings on appeal, nor have we identified any basis for  
21 questioning them. In our view, the district court acted  
22 well within its discretion in determining that Battista has  
23 a "reasonable potential for future income" and that he  
24 "should have sufficient resources to contribute to the  
25 payment of restitution to the NBA." *Id.*

26 We further note that, in addition to the enumerated  
27 factors identified in Section 3663(a)(1)(B)(i), sentencing  
28 courts may also consider "such other factors as the court

1 deems appropriate." 18 U.S.C. § 3663(a)(1)(B)(i)(II). The  
2 district court took note of its desire to accord equal  
3 treatment to similarly situated defendants. See 570 F.  
4 Supp. 2d at 422-23. Under the circumstances presented in  
5 this case, two co-conspirators pled guilty to a crime  
6 clearly subject to mandatory restitution, and another co-  
7 conspirator (Battista), equally blameworthy in the eyes of  
8 the district court, pled guilty to a crime involving the  
9 same underlying criminal conduct that is not as obviously  
10 subject to mandatory restitution but plainly subject to  
11 discretionary restitution in the alternative. In our view,  
12 it was entirely proper for the district court - which  
13 concluded that the VWPA applied to Battista in the  
14 alternative - to recognize equal treatment as a factor  
15 supporting the imposition of restitution under that statute.

#### 16 **IV. Attorneys' Fees**

17 Lastly, Battista argues that attorneys' fees incurred  
18 by the NBA are not recoverable under either restitution  
19 statute.<sup>5</sup> Along with permitting restitution for, among

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<sup>5</sup>Battista does not specifically challenge the other categories of restitution that the district court applied to him: (1) the amount of compensation paid to Donaghy for the games he refereed during the 2006-07 season in which he provided picks to Battista and Martino (\$67,343.92), see 570



1 other things, property loss and healthcare expenses, the  
2 VWPA allows a victim to recover "lost income and necessary  
3 child care, transportation, and *other expenses* related to  
4 participation in the investigation or prosecution of the  
5 offense or attendance at proceedings related to the  
6 offense." 18 U.S.C. § 3663(b)(4) (emphasis added); accord 18  
7 U.S.C. § 3663A(b)(4).

8 We recently addressed the scope of the term "other  
9 expenses" under the MVRA, 18 U.S.C. § 3663A(b)(4), in *United*  
10 *States v. Amato*, 540 F.3d 153, 159-63 (2d Cir. 2008), where  
11 we affirmed a restitution order in the amount of \$12.8  
12 million to the corporate victim of mail and wire fraud. In  
13 *Amato*, we held that "'other expenses' incurred during the  
14 victim's participation in the investigation or prosecution  
15 of the offense or attendance at proceedings related to the  
16 offense may include attorney fees and accounting costs."  
17 *Id.* at 159. We rejected the defendants' contention that the  
18 term "other expenses" excluded attorneys' fees and

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F. Supp. 2d at 424-30 (apportioned jointly and severally across all defendants); and (2) the amount representing the time NBA employees spent reviewing tapes of games that Donaghy refereed at the government's request (\$9,930.02), also apportioned jointly and severally among all three defendants, see 570 F. Supp. 2d at 436-37.

1 accounting costs as a matter of law, noting that “[o]ur  
2 conclusion follows from the plain language of the statute.”  
3 *Id.* at 160. We observed that the language in Section  
4 3663A(b)(4) of the MVRA “gives the district courts broad  
5 authority to determine which of the victim’s expenses may be  
6 appropriately included in a restitution order.” *Id.* We  
7 further elaborated on the statutory requirements, stating  
8 that:

9 The statute requires that the included expenses be  
10 “necessary,” and that they be “incurred during  
11 participation in the investigation or prosecution  
12 of the offense or attendance at proceedings  
13 related to the offense.” 18 U.S.C. § 3663A(b)(4).  
14 It also requires . . . that these expenses be  
15 incurred by a “victim” within the meaning of 18  
16 U.S.C. § 3663A(a)(2) and that they not require  
17 unduly complicated determinations of fact, see 18  
18 U.S.C. § 3663A(c)(3). The statute does not  
19 otherwise limit the type of expenses that may be  
20 included.

21  
22 *Id.*<sup>6</sup>

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<sup>6</sup> Among other arguments raised by the *Amato* defendants that we rejected was one asserting that attorneys’ fees and accounting costs could not be considered “other expenses” because they were merely indirect or consequential damages. *Id.* at 162. We declined to follow several decisions from our sister circuits holding that attorneys’ fees could not be included in restitution orders. See *United States v. Radziszewski*, 474 F.3d 480, 487 n.3 (7th Cir. 2007); *Gov’t of Virgin Islands v. Davis*, 43 F.3d 41, 46 (3d Cir. 1994); *United States v. Mullins*, 971 F.2d 1138, 1146-47 (4th Cir. 1992); *United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990). The latter three cases were decided under 18

1           We conclude that the holding in *Amato* - concededly  
2 decided in the MVRA context - applies to the almost verbatim  
3 statutory language in the VWPA.<sup>7</sup> Accordingly, the district  
4 court did not err in awarding the NBA attorneys' fees  
5 incurred as a result of the assistance it provided to the  
6 government in its investigation and prosecution of  
7 Battista's criminal offense. The rationale that we provided  
8 in support of our conclusion that attorneys' fees were  
9 recoverable as "other expenses" under the MVRA applies with  
10 equal force to the VWPA. See *Amato*, 540 F.3d at 159-162.  
11 Moreover, when "two sections share the same purpose, the  
12 parallel provisions can, as a matter of general statutory  
13 construction, be interpreted to be *in pari materia*." *United*

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U.S.C. § 3663(b)(1), prior to the enactment of the provision  
at issue in this case, 18 U.S.C. § 3663(b)(4). See *Amato*,  
540 F.3d at 161; see also *id.* at 159 (noting that Congress  
added 18 U.S.C. § 3663(b)(4) in 1994). Moreover, to the  
extent that the Seventh Circuit in *Radziszewski* reached a  
contrary result while interpreting the parallel subsection  
under the MVRA, 18 U.S.C. § 3663A(b)(4), we expressly  
declined to follow that holding. See *id.* at 161.

<sup>7</sup> Instead of using the phrase "other expenses *related*  
to participation," 18 U.S.C. § 3663(b)(4) (emphasis added),  
the MVRA states "other expenses *incurred during*  
participation in the investigation or prosecution of the  
offense or attendance at proceedings related to the  
offense." 18 U.S.C. § 3663A(b)(4) (emphasis added). In all  
other respects, the statutory provisions are identical.

1 *States v. Carr*, 880 F.2d 1550, 1553 (2d Cir. 1989). Indeed,  
2 we have often interpreted the MVRA and VWPA in concert.  
3 *See, e.g., United States v. Ekanem*, 383 F.3d 40, 43-44 (2d  
4 Cir. 2004).

5 Here, the NBA incurred substantial attorneys' fees as a  
6 direct result of Battista's criminal acts. The district  
7 court meticulously parsed out the fees and costs submitted  
8 by the NBA in determining which expenses were associated  
9 with each defendant and whether they were incurred while  
10 assisting the government in ascertaining the extent of the  
11 criminal conspiracy and in preparing for Battista's criminal  
12 proceedings. Notably, the district court rejected  
13 restitution for attorneys' fees not directly related to the  
14 assistance the NBA provided to the government in its  
15 investigation and prosecution of the criminal offenses  
16 committed by the defendants. The court agreed with the  
17 defendants that attorneys' fees associated with counseling  
18 the NBA on its public response to Donaghy's guilty plea were  
19 not recoverable as an "investigation cost" pursuant to 18  
20 U.S.C. §§ 3663(b)(4), 3663A(b)(4). *See* 570 F. Supp. 2d at  
21 432. Indeed, this gambling scandal undoubtedly damaged the  
22 reputation of the NBA and had the potential to impugn the

1 integrity of other referees in the league.<sup>8</sup> Moreover, the  
2 conspiracy has called into question the legitimacy of the  
3 outcomes of the many games Donaghy refereed. Nevertheless,  
4 in contrast to the attorneys' fees discussed above and  
5 authorized by the district court, such damages, while  
6 certainly significant, were not associated with assisting  
7 the government in the investigation and prosecution of the  
8 defendants' criminal offenses, and thus, are not compensable  
9 under 18 U.S.C. § 3663(b)(4).

10 **CONCLUSION**

11 Accordingly, for the reasons set forth above, the  
12 judgment of the district court is hereby AFFIRMED.

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<sup>8</sup> Donaghy's attorney alleged widespread game manipulation and criminal activity amongst NBA referees. See Howard Beck, *Donaghy Cites Broad Misconduct in N.B.A.*, N.Y. Times, June 11, 2008, available at <http://www.nytimes.com/2008/06/11/sports/basketball/11refs.html>. In addition, a referee friend of Donaghy was accused of wrongdoing in the media. See Howard Beck, *N.B.A. Referee Speaks as Gambling Cloud Passes*, N.Y. Times, Nov. 4, 2008, at B14, available at <http://www.nytimes.com/2008/11/05/sports/basketball/05referee.html>.