No. 11-2787

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NORMAN STOERR,
Defendant-Appellee,

SEVENSON ENVIRONMENTAL SERVICES, INC.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(Honorable Susan D. Wigenton)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES AND RULES

STATEMENT OF JURISDICTION

The district court's jurisdiction rested on 18 U.S.C. § 3231. Title 28 U.S.C. § 1291 gives this Court "jurisdiction of appeals from all final decisions of the district courts of the United States." However, in a criminal case such as this, 18 U.S.C § 3742 provides that only the "defendant . . . [or t]he Government may file a notice of appeal in the district court for review of an otherwise final sentence." Because appellant Sevenson Environmental Services, Inc. is neither the defendant nor the government in this criminal case but yet is appealing defendant-appellee Norman Stoerr's sentence, the government filed a motion to dismiss this appeal on October 11, 2011. After Sevenson responded to that motion, a panel of this Court referred the motion to the merits panel.

STATEMENT OF ISSUES PRESENTED

1. Whether this appeal must be dismissed because as a non-party to this criminal case appellant Sevenson cannot appeal Stoerr's sentence.

2. Whether the district court reasonably denied Sevenson's 18 U.S.C. § 3664(j)(1) restitution request in order to avoid an unwarranted disparity with an earlier sentence imposed on one of defendant-appellee Stoerr's co-conspirators.

STATEMENT OF RELATED CASES

This case has not previously been before this Court.

This appeal is from one (No. 08-CR-521, *United States v. Norman Stoerr*) of several cases brought in the United States District Court for the District of New Jersey that resulted from the United States Department of Justice's investigation into bid-rigging, fraud, and kickback schemes involving the environmental clean-up of two Superfund Sites in New Jersey: Federal Creosote in Manville, and Diamond Alkali in Newark.[1] Appellant Sevenson Environmental Services, Inc. was hired as the prime contractor by the United States Environmental Protection Agency ("EPA") to perform the clean-up at Federal Creosote, and by Tierra Solutions, Inc. ("Tierra"), whom the

[1] A "Superfund Site" is an abandoned area where hazardous waste is located that can possibly affect local ecosystems or people. Presentence Report ("PSR") ¶31.

EPA had designated as the financially responsible party for remediation at Diamond Alkali, to perform the clean-up at that site. Appellant's Brief ("Br.") at 3.

As developed more fully below, the instant appeal involves only kickbacks associated with the Diamond Alkali remediation, and does not involve any crime committed at Federal Creosote. In the district court, non-party Sevenson sought $202,759.04 in reimbursement from defendant-appellee Stoerr for compensation Sevenson had paid to Tierra related to kickbacks received by Sevenson employees, including Stoerr, at the Diamond Alkali site. In the course of his crimes, Stoerr had received approximately $26,000 of those kickbacks.

In addition to the instant case, the government's investigation resulted in the following related prosecutions:[2]

- No. 08-CR-522*, United States v. JMJ Environmental, Inc. and John Drimak, Jr*. JMJ and Drimak pled guilty to conspiring to restrain trade by rigging bids and allocating contracts. Drimak additionally pled guilty to participating in a kickback and fraud conspiracy with

[2] The related cases are discussed in paragraphs 5-28 of the PSR.

Sevenson employees Norman Stoerr and Gordon McDonald at Federal Creosote and Diamond Alkali, and filing false income tax returns. On April 6, 2011, the court sentenced Drimak to 18 months' imprisonment and a $30,000 fine. Additionally, the court ordered both Drimak and JMJ to pay a total of $283,241.61 in restitution: $232,129.22 to Tierra for losses it sustained at Diamond Alkali, and $51,049.39 to the EPA for losses it sustained at Federal Creosote. This liability to pay restitution was imposed jointly and severally on both of them, and the court stated that it might also be imposed jointly and severally on Stoerr and McDonald when they were sentenced for related crimes. As developed more fully below, Sevenson has reimbursed Tierra for $202,759.04 of the $232,129.22 in losses that Tierra suffered through Drimak's fraud and kickback scheme, and it is that $202,759.04 payment that is at issue in this appeal.

- No. 09-CR-141, *United States v. National Industrial Supply and Victor Boski*. National Industrial Supply ("NIS") and Boski pled guilty to participating in a kickback and fraud conspiracy with Stoerr and McDonald involving Federal Creosote and Diamond Alkali. On

April 26, 2011, the court sentenced Boski to a term of probation and a $25,000 fine, and NIS to a $32,000 fine. It further ordered both Boski and NIS jointly and severally to pay a total of $50,000 in restitution: $25,000 to the EPA for Federal Creosote, and $25,000 to Tierra for Diamond Alkali. Boski and NIS paid the restitution to the EPA in full. Prior to Boski's sentencing, Sevenson reimbursed Tierra (but not the EPA) for the $25,000 it lost through Boski's fraud and kickback scheme. Subsequently, Boski offered to recompense Sevenson for its $25,000 payment to Tierra, and Sevenson accepted. A122 n.1; Br. at 9. Thus, Sevenson's payment to Tierra for the Boski losses is not at issue in this appeal.

- No. 08-CR-534, *United States v. Bennett Environmental, Inc*. ("BEI"). BEI pled guilty to conspiring to defraud the EPA at Federal Creosote. On December 15, 2008, the court sentenced BEI to a $1,000,000 fine and to pay the EPA $1,662,000 in restitution.
- No. 08-CR-912, *United States v. Zul Tejpar*. Tejpar pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote. On March 30, 2011, the court sentenced him to a term of probation, a $15,000 fine, and to pay the EPA $300,000 in restitution.

- No. 09-CR-134, *United States v. Christopher Tranchina*. Tranchina pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote. On July 13, 2009, the court sentenced him to 20 months' imprisonment and to pay the EPA $154,597 in restitution.
- No. 09-CR-480, *United States v. Frederick Landgraber*. Landgraber pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote. On October 28, 2009, the court sentenced him to 5 months' imprisonment followed by 5 months' home confinement, a $5,000 fine, and to pay the EPA $35,000 in restitution.
- No. 09-CR-506, *United States v. Robert Griffiths*. Griffiths pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote, conspiring to commit money laundering, and obstruction of justice. On September 12, 2011, the court sentenced him to 50 months' imprisonment, a $15,000 fine, and to pay the EPA $4,644,378.56 in restitution. Griffiths has appealed his sentence to this Court, No. 11-3636.
- No. 09-656, *United States v. Gordon McDonald, John Bennett, and James Haas*. (1) Bennett and McDonald are charged with participating in a kickback and fraud conspiracy and with Major

Fraud Against the United States (18 U.S.C. § 1031(a)) at Federal Creosote. Bennett is a Canadian national residing in Canada; the United States has instituted proceedings to have him extradited. (2) Haas and McDonald were charged with participating in a kickback and fraud conspiracy and with Major Fraud Against the United States at Federal Creosote. Haas pled guilty and, on February 23, 2010, the court sentenced him to 33 months' imprisonment, a $30,000 fine, and to pay the EPA $53,049.57 in restitution. (3) McDonald is further charged with conspiring to commit money laundering, conspiring to restrain trade by agreeing to rig bids and allocate contracts, participating in two separate kickback and fraud conspiracies (one with Drimak and Stoerr, and one with Boski and Stoerr), violating the Anti-Kickback Act, tax fraud, and obstruction of justice. McDonald pled not guilty at his arraignment in September 2009, but subsequently indicated his intention to plead guilty at a hearing scheduled for January 11, 2012. That Change of Plea hearing was adjourned due to a medical condition. McDonald is expected to plead guilty in February 2012.

In addition, appellant Sevenson has instituted two civil actions to secure its own recovery from Stoerr and McDonald: (1) a state action against defendant-appellee Stoerr in the New York State Supreme Court, County of Niagara, *Sevenson Environmental Services, Inc. v. Norman Stoerr* (No. 08-134442) (Br. at 11); and (2) a federal action in the United States District Court for the District of New Jersey against Stoerr, McDonald, their subcontractor co-conspirators, and others, *Sevenson Environmental Services, Inc. v. McDonald, et al.* (No. 08-CV-1386). Br. at 4.

STATEMENT OF THE CASE

On July 23, 2008, pursuant to a Fed. R. Crim. P. 11(c)(1)(B) plea agreement (A40), defendant-appellee Stoerr pled guilty to a three-count Information that charged him with conspiring to rig bids and allocate contracts (15 U.S.C. § 1), conspiring to violate the Anti-kickback Act and commit mail fraud (18 U.S.C. § 371), and aiding and assisting in the preparation of a false and fraudulent income tax return (26 U.S.C. § 7206(2)), all with respect to the environmental cleanup of the Federal Creosote and Diamond Alkali sites. A24; *see supra* note 1. Sentencing

was held on May 23, 2011. In connection with that sentencing, appellant Sevenson sought restitution both as a victim of Stoerr's charged offenses and, pursuant to 18 U.S.C. § 3664(j)(1), as a partial payer of compensation to Tierra, the victim of Stoerr's charged offenses at Diamond Alkali. A53, 125. On May 23, 2011, the court sentenced Stoerr to a 5-year term of probation that included 8 months' home confinement, a $25,000 fine, and to pay a total of $391,228.18 in restitution: $134,098.96 to the EPA for Federal Creosote, and $257,129.22 to Tierra for Diamond Alkali. A1.

The district court entered a final amended judgment on June 6, 2011. A9. Sevenson filed a motion for reconsideration of its 18 U.S.C. § 3664(j)(1) claim on June 14, 2011 (A157), which the court denied on June 21, 2011. A172. On June 22, 2011, the district court entered an Order of Satisfaction of Restitution that reduced the amount of restitution payable to Tierra from $257,129.22 to $29,370.18. A173. Sevenson filed its notice of appeal on June 28, 2011. A17. The United States subsequently filed its above mentioned motion to dismiss the appeal. *See supra* p. 1.

STATEMENT OF THE FACTS

I. Background

Remediation for the Diamond Alkali site began in 1983, and for Federal Creosote in 1999. The Army Corps of Engineers ("COE"), on behalf of the EPA, oversaw the process at Federal Creosote, while the EPA designated Tierra Solutions as the financially responsible entity for remediation at Diamond Alkali. Both the COE and Tierra hired appellant Sevenson to be their prime contractor. Sevenson, in turn, hired subcontractors that provided the actual goods and services necessary for the clean-up efforts. The subcontractors invoiced Sevenson for the goods and services provided, and Sevenson passed those charges on to the EPA at Federal Creosote and Tierra at Diamond Alkali. The EPA and Tierra reimbursed Sevenson for the invoiced charges plus a fixed fee, typically 4½– 6½ percent of invoiced charges at Federal Creosote, and 20 percent at Diamond Alkali. A26, 31, 53 & n.1, 74-77; PSR ¶32.[3]

[3] By pleading guilty to the Information, Stoerr admitted the discrete facts alleged in the information that constitute his crimes. *See United States v. Broce*, 488 U.S. 563, 570 (1989).

Sevenson's employees, Stoerr and his supervisor Gordon McDonald, administered the subcontracts at both Superfund Sites. A25, 27, 29-30, 73-74. As early as Fall of 2000, Stoerr and McDonald began engaging in a multi-year kickback and fraud scheme at both sites in which subcontractors such as Drimak would pay kickbacks to Stoerr and McDonald in return for favorable treatment in the award of subcontracts. A29, 34-35. Each subcontractor engaged in its own conspiracy with McDonald and Stoerr. Thus, none of the subcontractors were co-conspirators with each other.

Stoerr formed a shell company for use in concealing kickback payments to him. A30. Stoerr received kickbacks in the form of cash, payments to his shell company, tools and a cruise. The amounts of the kickbacks were included in the co-conspirators' invoices to Sevenson, which Sevenson in turn billed to the EPA and Tierra. A34-37. Between April 2002 and Spring 2004, Stoerr received at least $77,132 in kickbacks related to both Superfund sites. A156; PSR ¶38.

In addition to McDonald, Stoerr's known co-conspirators at the Diamond Alkali site included Boski and his company NIS, and Drimak and his company JMJ. A73-75; PSR ¶¶39, 44. Ultimately, the court

concluded that Stoerr's and McDonald's kickback and fraud schemes at Diamond Alkali cost Tierra $257,129.22 in losses. Of those losses, $25,000 was attributable to Stoerr's scheme with McDonald, Boski and NIS, and $232,129.22 was attributable to Stoerr's scheme with McDonald, Drimak and JMJ. A15. Of the $232,129.22 in Drimak kickbacks, Stoerr received approximately $26,000 and McDonald the rest. PSR ¶48.

II. Sevenson's Request For Restitution

In connection with Stoerr's May 23, 2011, sentencing, Sevenson sought relief in letters filed with the court on April 26, 2011 (A53), and May 20, 2011. A125. Sevenson claimed that upon learning of Stoerr's and McDonald's wrongdoing at Diamond Alkali, it completely reimbursed Tierra for the $25,000 in losses caused by their kickback and fraud scheme with Boski and NIS, and reimbursed Tierra $202,759.04 for losses caused by their kickback and fraud scheme with Drimak and JMJ.[4] A53-54, 114-18. Sevenson asked the court,

[4] As noted above, the court found that the Drimak scheme caused Tierra $232,129.22 in losses, but that amount did not include the 20 percent mark-up that Sevenson charged and Tierra paid. Additionally,

pursuant to 18 U.S.C. § 3664(j)(1), to grant it non-party payer status and reimburse it for its $202,759.04 payment to Tierra.[5] Because Boski and Sevenson had already settled their dispute over restitution civilly, *see supra* p. 5, Sevenson did not seek reimbursement of the $25,000 it had paid Tierra for Stoerr's scheme with Boski.[6]

In its letters to the court, Sevenson further noted that "[u]pon learning about the kickback scheme" it had "commenced a civil action [in 2008] against [Stoerr] (and others) in this Court (Camden Vicinage)

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although the EPA has suffered nearly $5 million in losses at Federal Creosote, *see supra* pp. 3-7, Sevenson has not reimbursed EPA for any of those losses.

[5] Title 18 U.S.C. § 3664(j)(1) provides: "If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation."

[6] Sevenson also claimed to be a victim of Stoerr's crimes and sought restitution in its own right. The court, however, found that Sevenson was not a victim, and Sevenson has not appealed that finding. *See* Br. at 3 & n.1.

(Civ. No. 08-1386)."[7] A53. It also acknowledged that the court had previously sentenced Boski and Drimak for their related crimes at the Diamond Alkali site. *Id*. Among other things, the court had already sentenced Drimak and JMJ to pay $232,129.22 in restitution to Tierra. In its judgment in *Drimak*, the court noted that the $232,129.22 "represent[s] the total amount[] due [Tierra] for . . . these losses," and that Stoerr and McDonald, who had yet to be sentenced, "may be subject to restitution orders to [Tierra] for these same losses." No. 08-522 (D.N.J. Apr. 12, 2011), ECF No. 20 at 8. Sevenson never requested any relief in *Drimak*.

The Probation Office addressed Sevenson's restitution requests in an "Addendum To The Presentence Report."[8] Probation concluded that Tierra was Stoerr's victim, "not Sevenson Environmental Solutions." PSR at 42. It further concluded that it was "not in a position to

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[7] Sevenson knew of the government's investigation no later than September 2006, when it was served with a grand jury subpoena. A122 n.2

[8] With the district court's permission, the Government has provided Sevenson with the Addendum, which consists of pages 41-43 of the PSR. Citations to that Addendum in this brief are to those PSR pages.

determine whether or not Sevenson Environmental Solutions was an actual 'participant' in the offense and therefore not eligible to receive monetary compensation in return for their payment to the actual victim, Tierra Solutions."[9] *Id*. at 42-43. Finally, Probation noted that Sevenson had filed its federal civil suit, *see supra* p. 8, and explained that "[t]he allegations in th[e] civil suit are directly related to the offense conduct outlined in this report." PSR at 43. Probation then reminded the court that it had ordered other Diamond Alkali co-conspirators to pay restitution and noted the court's prior concern with maintaining "uniformity":

> The Court must rule on this issue at sentencing. Furthermore, should the Court rule that Sevenson Environmental Services is not eligible to be named as the recipient of the restitution in favor of their pending civil matter, the probation officer would note that while a restitution obligation to Tierra Solutions is no longer necessary in light of Sevenson's repayment to the victim, the Court can, and has most recently in the Boski sentence,

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[9] As noted above, Sevensons's fees from Tierra were at least twenty percent of its subcontractors' charges, which were inflated by the amount of the kickbacks to Stoerr and McDonald. Thus, Sevenson's fees from Tierra were likely larger than they would have been, absent its employees' criminal schemes. However, Sevenson's fees were not included in the restitution to Tierra ordered by the court. The government has not charged Sevenson with a crime, nor did it allege below whether Sevenson was a participant in Stoerr's crimes.

> ordered restitution to the victim in the amounts noted above for purposes of uniformity among all co-conspirators in this case. Following sentencing, the government then has the ability to submit an order to the Court, as it was ordered to do in Boski's sentence, confirming that restitution to Tierra Solutions has been satisfied.

Id.[10] (emphasis added).

At Stoerr's sentencing hearing, the court noted its desire "to avoid unwarranted sentencing disparities because there are a number of individuals in this case."[11] A200; s*ee* 18 U.S.C. § 3553(a)(6) (among the factors a court "shall consider" at sentencing is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). It also noted that "it appears to be essentially conceded that Tierra Solutions is and

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[10] In responding to Sevenson's § 3664(j)(1) request, the government had also suggested that, under the totality of the circumstances, Sevenson's request could be better addressed in the civil suits it had instituted. A113, 123.

[11] At the sentencing hearing, Judge Wigenton explained that "I have sentenced obviously a number of other individuals that have been involved in this prosecution." A175. In fact, not long before Stoerr's sentencing, Judge Wigenton had sentenced John Drimak and Victor Boski, Stoerr's co-conspirators in the Diamond Alkali schemes, as well as Zul Tejpar. Judge Greenaway had previously sentenced Christopher Tranchina, Frederick Landgraber, and James Haas. *See supra* pp. 2-7; A205-06.

was the victim as it relates to the offense that was conducted and involved in by Mr. Stoerr."[12] A201.

In denying Sevenson's restitution requests, the court concluded that it was not "appropriate to impose a restitution obligation in the criminal aspect as it relates to Sevenson." In addition, while not the basis for its denial, the court further noted that Sevenson was not without a remedy because of its pending civil suits against Stoerr. A201-02. The court therefore ordered Stoerr to pay the same $232,129.22 in restitution to Tierra that it had ordered in *Drimak*, and made that obligation joint and several with Drimak and JMJ.[13] A205-06.

Stoerr, however, has been unemployed and unable to obtain employment since pleading guilty in 2008, and also "had to exhaust his retirement, his 401k to meet his expenses." A182. Thus, finding that Stoerr did "not have the financial ability to pay . . . this restitution in

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[12] At the sentencing hearing, when the court stated to Sevenson's counsel that "Tierra Solutions is actually the victim, which is why I'm assuming you paid them," counsel responded: "Tierra, as well as the EPA," A191.

[13] The court also ordered Stoerr to pay the EPA $134,098.96 in restitution for the Federal Creosote site. A204-05. As noted above, *see supra* note 4, Sevenson has not reimbursed EPA for any of its losses.

full," the court permitted him to pay the restitution in "monthly payments in the amount of $250.00." A206. Subsequently, the court ordered Stoerr's restitution amount to Tierra reduced by the $202,759.04 Tierra had been paid by Sevenson.[14] A172; *cf.* 18 U.S.C. § 3664(j)(2) (requiring restitution order to be reduced by amount victim recovers for the same loss from other sources).

SUMMARY OF ARGUMENT

1. The Court should dismiss Sevenson's appeal. The rule that only parties to a lawsuit may appeal an adverse final judgment is well settled. This rule applies with even greater force when an appeal attempts to disturb a criminal defendant's final judgment and sentence, as Sevenson attempts to do here. Simply put, "there is no precedent — nor any compelling justification — for allowing a non-party, post-judgment appeal that would reopen [Stoerr's] sentence and affect [his] rights." *United States v. Hunter*, 548 F.3d 1308, 1315 (10th Cir. 2008). This Court's decision in *United States v. Kones*, 77 F.3d 66 (3d Cir.

[14] The court similarly reduced Drimak's restitution obligation to Tierra by the same amount of $202,759.04. No. 08-CR-522 (D.N.J. June 20, 2011), ECF No. 22.

1996), is not to the contrary nor does it bind this panel. In *Kones*, neither the parties nor the Court ever raised or discussed whether the non-party had standing to appeal defendant Kones' sentence, which renders the Court's decision non-precedential.

2. The court did not abuse its discretion when it rejected Sevenson's 18 U.S.C. § 3664(j)(1) restitution request. Although Drimak had paid the $232,192.22 in kickbacks that constitute Tierra's losses from his kickback and fraud scheme, Sevenson eschewed any relief in Drimak's sentencing. Under these circumstances, granting Sevenson's restitution request would have made Stoerr solely responsible for nearly all of Drimak's kickbacks when, in fact, Stoerr, who is still obligated to pay Tierra $29,370.18 in restitution, received only approximately $26,000 of Drimak's kickbacks. Therefore, given the unique circumstances of this case, the court did not abuse its discretion when it denied Sevenson's request and, instead, made Stoerr's obligation to pay restitution consistent with Drimak's.

ARGUMENT

I. THE COURT MUST DISMISS THIS APPEAL BECAUSE, AS A NON-PARTY TO THE CRIMINAL CASE, SEVENSON CANNOT APPEAL DEFENDANT-APPELLEE STOERR'S FINAL JUDGMENT AND SENTENCE

In its Motion To Dismiss ("Motion") filed October 11, 2011, and its Reply To Sevenson's Response ("Reply") filed November 16, 2011, the government explained why Sevenson, as a non-party to this criminal prosecution, cannot appeal defendant-appellee Stoerr's final judgment and sentence. That Motion has been referred to the merits panel. Since the government's jurisdictional argument is fully explained in its Motion and Reply, which we incorporate by reference, we will only briefly summarize that argument below.

The rule "that only parties to a lawsuit . . . may appeal an adverse judgment" is "well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curium). And there is no statute, rule, or case law that permits non-party Sevenson to intervene in this criminal case and thereby assume party status.[15]

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[15] *See* Motion at 6-7, explaining that the Federal Rules of Criminal Procedure contain no provision for third-party intervention.

As the First Circuit recently explained, "[n]otwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding." *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010). Accordingly, "the baseline rule is that crime victims, as non-parties, may not appeal a defendant's criminal sentence."[16] *Id.* For exactly that same reason, third-party payers to actual crime victims, such as Sevenson, cannot appeal a defendant's sentence. *See* Motion at 7 & n.9. Rather, 18 U.S.C. § 3742 provides jurisdiction over sentencing appeals only when brought by the government or a criminal defendant. *See* 18 U.S.C. § 3742(a)-(b). "Had Congress intended to allow victims [or third-party payers] to directly appeal, it seems likely it would have provided them that right under [18 U.S.C.] § 3771(d)(4),"[17] *United States v. Monzel*, 641 F.3d 528, 542 (D.C. Cir. 2011).

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[16] The courts of appeals are unanimous on this point. *See* Motion at 7; Reply at 3-6 (explaining how, in criminal cases, no statute confers appellate rights over a defendant's sentence on non-parties).

[17] Title 18 U.S.C. § 3771(d)(4), part of the Crime Victims' Rights Act, reserved to the United States alone the right to appeal a district court's denial of a crime victim's request for restitution. *See* Motion at 9-10.

Neither this Court's decision in *United States v. Kones*, 77 F.3d 66 (3d Cir. 1996), nor the Sixth Circuit's decision in *United States v. Perry*, 360 F.3d 519 (6th Cir. 2004), alters this established law. *Kones* is nothing more than a non-precedential "drive-by jurisdictional ruling," *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 265-66 (3d Cir. 2009), because neither the parties nor the Court ever raised or discussed whether the non-party had standing to appeal defendant Kones' sentence. *See* Motion at 11-12; Reply at 2-3.

Perry, and several other non-party appellate cases, *see* Reply at 6, did not involve an attempt to disturb a defendant's final judgment and sentence; thus granting the appellant relief would not have altered the defendant's sentence. *See* Motion at 12; Reply at 6-7. As the Tenth Circuit explained when it distinguished *Perry*, "there is no precedent—nor any compelling justification—for allowing a non-party, post-judgment appeal that would reopen a defendant's sentence and affect the defendant's rights."[18] *Hunter*, 548 F.3d at 1315.

[18] As explained in Reply at 7, Sevenson is unquestionably attempting to alter Stoerr's sentence.

In short, no court of appeals has ever held that a non-party such as Sevenson may appeal a criminal defendant's sentence. For the above reasons, and those stated in the government's Motion and Reply, this Court should join its sister circuits and dismiss non-party Sevenson's appeal of defendant-appellee Stoerr's final judgment and sentence.

II. THE DISTRICT COURT REASONABLY AVOIDED UNWARRENTED DISPARITY WITH DRIMAK'S ORDER OF RESTITUTION

A. Standard Of Review

This court "review[s] de novo whether restitution is permitted by law and the amount of the award for abuse of discretion." *United States v. Bryant*, 655 F.3d 232, 253 (3d Cir. 2011).

B. The Court Did Not Abuse Its Discretion When It Denied Sevenson's Restitution Request

Title 18 U.S.C. § 3553(a)(6) directs that sentencing courts "shall consider" the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." This directive applies both before and after *United States v. Booker*, 543 U.S. 220 (2005). *United States v. Friedman*, 658 F.3d 342,

359-60 (3d Cir. 2011). And failure to properly consider sentencing disparity can amount to reversible procedural error. *Id.* at 363.

Sevenson paid Tierra $202,759.04 as compensation for losses caused by Drimak's kickback and fraud scheme with Stoerr and McDonald. Br. at 5. Yet Sevenson sought no relief in Drimak's case. The court therefore ordered Drimak to pay Tierra $232,192.22 in restitution for the losses his kickbacks caused. No. 08-CR-522 (D.N.J. Apr. 12, 2011), ECF No. 20 at 8. The court later reduced that amount by the $202,759.04 that Tierra received from Sevenson. *Id.* ECF No. 22. Thus, Drimak now owes Tierra $29,370.18. *Id.* And due to Sevenson's failure to seek relief in Drimak's case, Sevenson's only remedy against Drimak is its civil action. *See supra* p. 9.

When Stoerr was scheduled to be sentenced a few weeks later,[19] however, Sevenson asked the court to order Stoerr to reimburse its $202,759.04 payment to Tierra. But the court was well aware of its earlier sentences in *Drimak* and *Boski* in which Sevenson eschewed any possible relief in those criminal cases in favor of its civil remedies.

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[19] Drimak was sentenced on April 6, 2011, and at that time Stoerr's sentencing was scheduled for May 2, 2011. *See* A53.

A189-90. Indeed, Probation and the government had suggested that the court might leave Sevenson to its civil remedy and maintain "uniformity among all co-conspirators in this case." PSR at 43; A113, 122-23, 194-96.

Sevenson incorrectly claims that "[b]ecause Tierra had already received compensation for its losses from Sevenson," the district court's order of restitution "resulted in a recovery [by Tierra] greater than its losses." Br. at 13; *accord id*. at 11. In fact, the restitution statute forbids a sentencing court from ordering restitution to a victim other than "in the full amount of each victim's losses as determined by the court." 18 U.S.C. § 3664(f)(1)(A). The statute further provides that "[i]n no case shall the fact that a victim *has received* or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution." *Id*. § 3664(f)(1)(B) (emphasis added). Thus, the court rightly ordered restitution to Tierra in the full amount of its losses, and then subsequently ordered that amount satisfied to the extent of Sevenson's compensation to Tierra. *See United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000).

Moreover, 18 U.S.C. § 3664(j)(1) allows payment to third-party payers of compensation only *after* "all restitution of victims required by the order be paid to the victims." Currently, Stoerr is required to pay restitution of $29,370.18 to Tierra, and $134,098.96 to the EPA. A7, 173. And because Stoerr is essentially broke, the court has permitted him to pay that restitution at only $250 per month. A206. At that rate, if none of Stoerr's joint and severally liable co-conspirators compensated Tierra, it would take Stoerr 654 months (assuming he can make the payments), or 54½ years, to fulfill his restitution obligations to the victims, Tierra and the EPA. Thus, even if the court had granted Sevenson's § 3664(j)(1) request, it is possible that the currently 56-year-old Stoerr would not begin to pay Sevenson until he is 100 years old.

Thus, while under normal circumstances Sevenson might have been entitled to restitution under 18 U.S.C. § 3664(j)(1), under the unique circumstances of this case it was not unreasonable for the court to deny Sevenson's request. *See, e.g.*, *United States v. Parker*, 462 F.3d 273, 278 (3d Cir. 2006) ("Where appropriate to the circumstances of a given case, a sentencing court may reasonably consider sentencing disparity of co-defendants in its application of [the 18 U.S.C. § 3553(a)] factors."). In

fact, granting the request would have resulted in Drimak, who paid the kickbacks to Stoerr and McDonald and was therefore jointly and severally liable with them, receiving the benefit of Sevenson's $202,759.04 payment to Tierra, while making Stoerr solely responsible for reimbursing Sevenson for that amount. That result would have been strange at best given the uncontested finding in the PSR that Stoerr, who currently owes Tierra $29,370.18 in restitution for the Drimak scheme (A173), received a total of "approximately $26,132" in kickbacks from that scheme.[20] PSR ¶48. If, however, Sevenson had successfully sought third-party payor status in Drimak and then in Stoerr, Drimak and Stoerr would have been jointly and severally liable for any restitution Sevenson received.

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[20] Sevenson's claim that the court's order of satisfaction allows Stoerr "to retain the benefit of his crimes" (Br. at 15, 21), is therefore at odds with the findings in the PSR. Moreover, McDonald, who is currently under indictment for related charges, *see supra* pp. 6-7, accepted approximately $206,000 in kickbacks from the Drimak scheme. Thus, Sevenson may be able to obtain full compensation for its $202,759.04 payment to Tierra in that case.

Accordingly, the sentence imposed on Stoerr was reasonable and the court did not abuse its discretion in refusing to grant any relief to Sevenson.

CONCLUSION

For the above stated reasons and those stated in the Motion To Dismiss, the Court should dismiss Sevenson's appeal. Alternatively, the judgment and sentence of the district court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,263 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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January 31, 2012 /s/ John P. Fonte

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CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on January 31, 2012, I electronically filed the foregoing brief for appellee the United States of America with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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