

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: August 24, 2004

Decided: September 3, 2004)

5 Docket No. 03-1615

6 UNITED STATES OF AMERICA,

7 *Appellee,*

8 v.

9 EMAEYEK EKANEM,

10 *Defendant-Appellant.*

11 Before: CABRANES, STRAUB, and WESLEY, *Circuit Judges.*

12 Appeal from a judgment of conviction and sentence entered on October 10, 2003, in
13 the United States District Court for the Southern District of New York (Leonard B. Sand,
14 *Judge*). We consider here, as a matter of first impression in this Circuit, defendant's
15 contention that the District Court lacked authority to order restitution to the United States
16 under the Mandatory Victims Restitution Act of 1996.

17 Affirmed.

18 YUANCHUNG LEE, The Legal Aid Society, New York,
19 NY, *for Defendant-Appellant.*
20

1 GLEN G. MCGORTY, Assistant United States Attorney
2 (Jonathan S. Abernethy, Celeste L. Koeleveld,
3 Assistant United States Attorneys, *of counsel*;
4 David N. Kelley, United States Attorney for the
5 Southern District of New York, *on the brief*),
6 United States Attorney’s Office for the Southern
7 District of New York, New York, NY, *for*
8 *Appellee*.

9 JOSÉ A. CABRANES, *Circuit Judge*:

10 Defendant Emaeyek Ekanem appeals from a judgment of conviction and sentence
11 entered on October 10, 2003, in the United States District Court for the Southern District of
12 New York (Leonard B. Sand, *Judge*). We consider here only defendant’s contention that the
13 District Court lacked authority to order restitution to the United States Department of
14 Agriculture (“the Government”) under the Mandatory Victims Restitution Act of 1996, 18
15 U.S.C. § 3663A (“MVRA”), and we hold, as a matter of first impression in this Circuit, that
16 the Government fits within the meaning of “victim” under the MVRA. Accordingly, we
17 affirm the order of restitution. In a summary order filed contemporaneously with this
18 opinion, we address all other issues raised in this appeal.

19 **BACKGROUND**¹

20 During the time period relevant to the indictment, defendant was the executive
21 director of Hope International, Inc. (“Hope”), a not-for-profit organization that ran various
22 programs in the Bronx and in Africa. One of Hope’s programs was to act as a sponsoring
23 organization for private child care providers seeking reimbursement from the United States

¹ We outline only those facts necessary to address the restitution issue.

1 Department of Agriculture’s Child and Adult Care Food Program (“CACFP”) for meals the
2 providers served to the children in their care. As a sponsoring organization, Hope, on a
3 monthly basis, collected the child care providers’ receipts, forwarded the receipts and other
4 paperwork to CACFP, received funds from CACFP, and then issued reimbursement checks
5 to the providers. [Blue Br. at 4-7; Red Br. at 2-4]

6 By superseding indictment filed in February 2003, defendant was charged with one
7 count of embezzlement of CACFP funds, in violation of 18 U.S.C. § 641,² and one count of
8 intentional misapplication of the same federal funds, in violation of 18 U.S.C. § 666.³ [A11-

1 ² 18 U.S.C. § 641 provides, in relevant part:
2

3 Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without
4 authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United
5 States or of any department or agency thereof, or any property made or being made under contract for
6 the United States or any department or agency thereof; or
7

8 Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to
9 have been embezzled, stolen, purloined or converted--

10 Shall be fined under this title or imprisoned not more than ten years, or both
11

1 ³ 18 U.S.C. § 666 provides, in relevant part:
2

3 (a) Whoever, if the circumstance described in subsection (b) of this section exists--
4

5 (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any
6 agency thereof--
7

8 (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly
9 converts to the use of any person other than the rightful owner or intentionally
10 misapplies, property that--
11

12 (i) is valued at \$5,000 or more, and
13

14 (ii) is owned by, or is under the care, custody, or control of such organization,
15 government, or agency; or
16

17 (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to
18 accept, anything of value from any person, intending to be influenced or rewarded in

12] In March 2003, defendant pleaded guilty, without a plea agreement, to both counts, and he admitted to the District Court that the amount of federal funds he misused was \$85,000.

[A23] As part of his sentence, the Court ordered defendant to make restitution to the Government in that amount pursuant to the MVRA, to compensate the Government for the misapplied funds. [A368]

DISCUSSION

On appeal, defendant argues that the District Court lacked authority under the MVRA to order restitution to the Government, on the basis that the Government is not a “victim” within the meaning of the MVRA. Defendant contends that the MVRA’s definition of “victim”—as “a *person* directly and proximately harmed,” 18 U.S.C. § 3663A(a)(2) (emphasis added)—is controlled by the definition of “person” contained in the Dictionary Act, 1 U.S.C. § 1,⁴ which generally excludes governmental entities, *see United States v. United Mine Workers*,

connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

⁴ The relevant portion of the “Dictionary Act” provides:

In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals

1 U.S.C. § 1.

1 330 U.S. 258, 275 (1947).

2 We review *de novo* the District Court’s interpretation of the MVRA to include the
3 Government as a victim, *see, e.g., Perry v. Dowling*, 95 F.3d 231, 235 (2d Cir. 1996) (*de novo*
4 review for issues of statutory interpretation), which is a question of first impression for this
5 Court.

6 The MVRA provides for mandatory restitution to the victims of certain identified
7 offenses, including, as relevant here, offenses against property. *See* 18 U.S.C. § 3663A(a)(1),
8 (c)(1)(A)(ii).⁵ The MVRA defines “victim” as “a person directly and proximately harmed as a
9 result of the commission of an offense for which restitution may be ordered.” *Id.*
10 § 3663A(a)(2). As the Government concedes, this definition does not explicitly identify the
11 Government as a possible victim.

12 But the meaning of “victim” under the MVRA, contrary to defendant’s position, is not
13 controlled by the default definition of “person” in the Dictionary Act—which excludes the
14 Government—because that definition does not apply if “the context [of a particular statute]
15 indicates otherwise,” 1 U.S.C. § 1; *see also Rowland v. California Men’s Colony*, 506 U.S. 194,

⁵ 18 U.S.C. § 3663A, entitled “Mandatory restitution to victims of certain crimes,” provides in relevant part:

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.

• • • •

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense . . . (A) that is . . . (ii) an offense against property under this title, . . . including any offense committed by fraud or deceit . . .

1 199-200 (1993) (defining “context” as used in the Dictionary Act to mean “the text of the Act
2 of Congress surrounding the word at issue, or the texts of other related congressional Acts”
3 and also recognizing that the “very reference to contextual ‘indication’ bespeaks something
4 more than an express contrary definition”). For the reasons stated below, we conclude that
5 the context of the MVRA indicates otherwise, so that the term “victim” as used in that statute
6 is not limited by the default definition of “person” in the Dictionary Act but instead includes
7 the Government.

8 We first note that the enforcement provisions of the MVRA, contained in 18 U.S.C.
9 § 3664, recognize the Government as a possible victim. Section 3664(i) states: “In any case in
10 which the United States is a victim, the court shall ensure that all other victims receive full
11 restitution before the United States receives any restitution.” 18 U.S.C. § 3664(i). Although
12 § 3664 applies to all cases in which restitution is ordered—not only those cases in which the
13 MVRA requires restitution—nothing indicates that Congress intended two different meanings
14 when it used the same word in §§ 3663A and 3664(i)—related provisions adopted at the same
15 time and codified in serial sections in the United States Code. *See* MVRA, Pub. L. No. 104-
16 132, Title II, Subtitle A, §§ 204, 206, 110 Stat. 1227, 1227-29, 1235 (1996) (codified at 18 U.S.C.
17 §§ 3363A, 3664 (1996)); *cf. Bailey v. United States*, 516 U.S. 137, 145-46 (1995) (relying on the
18 presumption against congressional use of superfluous words to conclude that “Congress used
19 two terms because it intended each term to have a particular, nonsuperfluous meaning”).
20 Moreover, to read the term “victim” as used in the MVRA to not include the Government, we
21 would have to conclude, contrary to a well-established canon of statutory construction, that
22 § 3664(i)’s reference to the United States as a victim—a provision otherwise having

1 meaning—is nevertheless meaningless with respect to restitution enforced by § 3664 but
2 required by the MVRA. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S.
3 237, 249-50 (1985) (noting “the elementary canon of construction that a statute should be
4 interpreted so as not to render one part inoperative” (internal citation and quotation marks
5 omitted)).

6 Another reason to reject defendant’s claim is this Court’s interpretation of the term
7 “victim” under the Victim and Witness Protection Act, 18 U.S.C. § 3663 (“VWPA”), to
8 include governmental entities. *See United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991)
9 (holding that restitution under the VWPA to the Internal Revenue Service and the State of
10 New York was proper). Our decision in *Helmsley* is relevant because the MVRA was enacted
11 as a supplement to, and amendment of, the VWPA, and, since 1996—when the MVRA was
12 enacted and the VWPA amended—the two statutes have used the same definition of “victim.”
13 *See* Pub. L. No. 104-132, Title II, Subtitle A, §§ 204, 205, 110 Stat. at 1228, 1230. Although
14 *Helmsley* concerned an earlier version of the VWPA, which did not define the term “victim,”
15 *see* 18 U.S.C. § 3663(a) (1988), “[c]ourts [have] always considered the Government a ‘victim’
16 under the VWPA and we can presume that Congress was aware of this interpretation when it
17 enacted the 1996 amendments [under the MVRA],” *United States v. Martin*, 128 F.3d 1188,
18 1192 (7th Cir. 1997); *id.* at 1191 (collecting cases); *see also United States v. Lincoln*, 277 F.3d
19 1112, 1114 (9th Cir. 2002) (“Presumably, when Congress changed the [VWPA’s] definition of
20 ‘victim’ in 1996, it was aware of case law interpreting the [earlier] version of the VWPA to
21 include the United States.”).

22 Finally, interpretation of the term “victim” under the MVRA to include the

1 Government, as in the VWPA, is consistent with the intent and purpose of the MVRA to
2 expand, rather than limit, the restitution remedy. *See* S. Rep. No. 104-179, at 12 (1995),
3 *reprinted in* 1996 U.S.C.C.A.N. 924 (stating that “[the MVRA] is needed to ensure that the
4 loss to crime victims is recognized, and that they receive the restitution that they are due. It is
5 also necessary to ensure that the offender realizes the damage caused by the offense and pays
6 the debt owed to the victim as well as to society.”); *id.* at 13 (noting that, since Congress first
7 enacted a general victim restitution statute in 1982, “much progress remains to be made in the
8 area of victim restitution”); *see also Martin*, 128 F.3d at 1190 (observing that restitution in
9 federal criminal law bears “not a history marked by steady congressional erosion, but rather
10 by constant expansion of the restitution remedy”). Various provisions of the MVRA
11 demonstrate this expansive purpose. *See, e.g.*, 18 U.S.C. § 3663A(a)(1) (providing that, for
12 applicable offenses, “the court *shall* order . . . that the defendant make restitution to the victim
13 of the offense” (emphasis added)); *id.* § 3664(f)(1)(A) (“In each order of restitution, the court
14 shall order restitution to each victim in the *full amount* of each victim’s losses” (emphasis
15 added)); *see also United States v. Johnson*, 378 F.3d 230, 244-45 (2d Cir. 2004) (relying on the
16 “mandatory nature” of the MVRA to hold that district courts “must . . . impose orders of
17 restitution on defendants convicted of crimes identified in the MVRA even if their victims
18 decline restitution”). In view of the purpose of the MVRA and the interpretation of the
19 VWPA’s definition of “victim,” we agree with the Government that it is “inconceivable
20 that . . . Congress somehow meant to exclude the Government as a potential victim under the
21 MVRA when it adopted the definition of ‘victim’ contained in the VWPA,” *Gov’t Br.* at 47.

22 Accordingly, we reject defendant’s claim that he should not be ordered to pay

1 restitution to the Government, and we hold that the Government fits within the meaning of
2 “victim” under the MVRA.

3 CONCLUSION

4 For the reasons stated above, as well as the reasons stated in the accompanying
5 summary order, the judgment of the District Court is affirmed.

6 The mandate in this case will be held pending the Supreme Court’s decision in *United*
7 *States v. Booker*, No. 04-104, 2004 WL 1713654 (U.S. cert. granted Aug. 2, 2004) (mem.), and
8 *United States v. Fanfan*, No. 04-105, 2004 WL 1713655 (U.S. cert. granted Aug. 2, 2004) (mem.).
9 Should any party believe there is a special need for the District Court to exercise jurisdiction
10 prior to the Supreme Court’s decision, it may file a motion seeking issuance of the mandate in
11 whole or in part. Although any petition for rehearing should be filed in the normal course
12 pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not reconsider
13 those portions of its opinion that address the defendant’s sentence until after the Supreme
14 Court’s decision in *Booker* and *Fanfan*. In that regard, the parties will have until 14 days
15 following the Supreme Court’s decision to file supplemental petitions for rehearing in light of
16 *Booker* and *Fanfan*.