No. 09-367

IN THE
Supreme Court of the United States

BRIAN RUSSELL DOLAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR PETITIONER

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February 23, 2010

QUESTION PRESENTED

Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

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BRIEF FOR PETITIONER

Petitioner Brian Russell Dolan respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order of the Court of Appeals for the Tenth Circuit granting the petition for rehearing, adding a footnote to the original panel opinion, and denying the petition for rehearing en banc (Pet App. 1a-3a) is unpublished. The opinion of the Court of Appeals for the Tenth Circuit as amended (Pet. App. 4a-26a) is published at 571 F.3d 1022. The district court's opinion (Pet. App. 27a-48a) is unpublished.

JURISDICTION

The order of the court of appeals denying petitioner's petition for rehearing en banc was filed on June 26, 2009. Pet. App. 1a. The petition for a writ of certiorari was filed on September 23, 2009. This Court granted the petition on January 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The full versions of 18 U.S.C. §§ 3663A and 3664 are set out in the Petition Appendix at pages 49a-60a.

With respect to crimes of violence, Section 3663A(a)(1) provides, in pertinent part:

> [W]hen sentencing a defendant . . . , the court shall order, in addition to . . . 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.

Section 3664(d)(5) provides:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT

Petitioner, a Mescalero Apache Indian, was convicted in federal court of assaulting an acquaintance on the reservation. The question presented in this case concerns the power of the district court to sentence petitioner to pay over $100,000 to the federal Indian Health Service for the victim's medical expenses when that restitution order was issued six months after the 90-day

deadline provided in 18 U.S.C. § 3664(d)(5) had expired.

A. Statutory Framework

The Mandatory Victims Restitution Act of 1996 (the MVRA) provides, in pertinent part, that "when sentencing a defendant" convicted of a crime of violence, "the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1).[1] The procedures of 18 U.S.C. § 3664 "apply to all orders of restitution," 18 U.S.C. § 3556, including orders issued pursuant to the MVRA, 18 U.S.C. § 3663A(d).

When a defendant has been convicted, either after trial or upon a guilty plea, the district court sets a sentencing date. *See* Fed. R. Crim. P. 32. As part of the sentencing process, a probation officer must then prepare a presentence report. Fed. R. Crim. P. 32(c)(1). Section 3664 sets out a detailed procedure, including a timeline leading up to the sentencing, for issuing and enforcing restitution orders in criminal sentences. Under the MVRA, restitution is normally ordered "when sentencing" a defendant. 18 U.S.C. § 3663A(a)(1). Accordingly, the Government must, "not later than 60 days prior to the date initially set for sentencing, . . . provide the probation officer with a listing of the amounts subject to restitution." 18 U.S.C. § 3664(d)(1). The

[1] Subsection 3663A(a) requires restitution in cases involving "a defendant convicted of an offense described in subsection (c)." Subsection 3663A(c)(1)(A)(i), the relevant provision in this case, includes any offense that is "a crime of violence as defined in [18 U.S.C. §] 16."

probation officer then uses that information – along with other information obtained from the victims and the defendant, *see* 18 U.S.C. § 3664(d)(2), (d)(3) – to include "in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order." 18 U.S.C. § 3664(a). If there is a dispute over the amount being sought, Section 3664(d)(4) authorizes the court to "require additional documentation or hear testimony" before imposing restitution. The Government bears "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3664(e).

The statute recognizes that there may be cases where the victim's losses "are not ascertainable by the date that is 10 days prior to sentencing." 18 U.S.C. § 3664(d)(5). In these cases, the Government or the probation officer "shall . . . inform the court" of the situation. The court may then proceed with sentencing,[2] but "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Id.*[3]

After a district court has sentenced a defendant – a proceeding that takes place in open court in the presence of defendant and his counsel – the court

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[2] Fed. R. Crim. P. 32(b) would also permit the court to delay sentencing until it has ascertained the necessary information.

[3] Section 3664(d)(5) also provides for amendment of a restitution order if a victim petitions within 60 days of discovering subsequent losses. Such an order "may be granted only upon showing of good cause" for the failure to include such losses in the initial claim of restitution. *Id.*

enters a written judgment pursuant to Fed. R. Crim. P. 32(k), "set[ting] forth," among other things, "the adjudication, and the sentence."

B. Statement of Facts

1. In September 2006, petitioner Brian Russell Dolan and Evan Ray Tissnolthtos, acquaintances who are both members of the Mescalero Apache Indian Tribe, got into a fight on the tribal reservation. Tissnolthtos was seriously injured. He was taken to the hospital and treated at the Government's expense under the Indian Health Service medical program. J.A. 27.

Neither petitioner, because he was intoxicated at the time, nor Tissnolthtos, because of his injuries, remembered the relevant events clearly. *See* J.A. 23, 33. After petitioner's sister contacted the Bureau of Indian Affairs police, they questioned petitioner and subsequently arrested him. Petitioner was charged in the United States District Court for the District of New Mexico with assault resulting in serious bodily injury. J.A. 1; *see* 18 U.S.C. § 1153 (conferring federal jurisdiction over crimes within Indian country); *id.* § 113(a)(6) (governing assaults).

Petitioner pleaded guilty on February 8, 2007. J.A. 2, 19. The plea agreement noted that the sentence petitioner faced could include "restitution as may be ordered by the Court." J.A. 18. The plea minute sheet provided that sentencing would be set "within 75 days" (that is, by April 24, 2007), and ordered that the probation office file a presentence report. J.A. 20.

Petitioner remained in custody. On May 30, 2007, the probation office filed a Presentence Investigation Report (PSR). J.A. 21. The PSR noted the applicability of the MVRA, but stated that because the federal Indian Health Service had not responded to repeated requests for medical expenses borne by the agency, "no information has been received regarding possible restitution payments that may be owed."[4] J.A. 27. The PSR indicated that "[u]pon receipt of said information, it will be forwarded to the Court for consideration." *Id.*

On June 20, 2007, after reviewing the initial PSR and petitioner's sentencing memorandum responding to the PSR, the district court set sentencing for June 28, 2007. J.A. 2. On June 27, 2007, the United States moved to continue the sentencing in order to enable the victim's sister to attend and address the court. J.A. 28. The court granted that motion, J.A. 30, and subsequently scheduled sentencing for July 30, 2007. J.A. 3.

At the July 30 sentencing hearing, the district court sentenced petitioner to 21 months' imprisonment followed by three years' supervised release. J.A. 38. The court, however, recognized that there were questions regarding the scope of potential restitution. *See* J.A. 35. The Government's official victim advocate informed the court that the Government had been unable to contact Tissnolthtos but was aware an outstanding medical bill of $80,000. She then asked whether the court

[4] The PSR also indicated that Tissnolthtos had claimed lost wages, but that the probation officer had not been able to obtain documentation to support that claim. J.A. 26.

"want[ed] to give 90 more days for restitution." *Id.* The court responded: "Well, I think the script anticipates that I'm just leaving the question of restitution open-ended because we don't have a good number at this point." *Id.* Later in the proceedings, the court stated: "Pursuant to the mandatory restitution act, restitution is applicable. However, there is insufficient information on the record at this time regarding possible restitution payments that may be owed; therefore, I'm not going to order restitution at this time, but leave that matter open, pending receipt of additional information." J.A. 39-40.

On August 8, 2007, the district court entered judgment, using the standard Administrative Office form for judgment in a criminal case. J.A. 42. The court left blank the section for setting the amount of restitution. J.A. 48. In the section for scheduling restitution payments, the court provided no schedule, instead noting that "[p]ursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time." J.A. 49.

On October 5, 2007 (67 days after petitioner was sentenced), the probation office prepared an addendum to the PSR indicating that it had received information that the victim's medical expenses totaled $105,559.78.[5] J.A. 52. The addendum also

[5] The parties later agreed that the correct amount was actually $104,649.78. J.A. 54; *see* Pet. App. 47a.

noted that the 90-day time limit set by Section 3664(d)(5) would expire "on October 28, 2007." *Id.*

It is "unclear when the Court received the Second Addendum." Pet. App. 31a. In any event, the Government made no motion or other effort to obtain a restitution order. *Id.* Nor did the court take any action to impose restitution before the 90-day period expired.

The district court's next action did not occur until January 28, 2008. Nearly six months after petitioner's sentencing, and 92 days after the period set by Section 3664(d)(5) had run, the district court sua sponte issued a "Notice of Hearing as to Brian Dolan Sentencing (restitution)" for February 4, 2008. J.A. 3-4.

At the February 4 hearing, petitioner immediately raised an objection to the court's ability to order restitution after the expiration of the 90-day period set by Section 3664(d)(5). J.A. 54-55. The court recognized what it described as a possible "jurisdictional" problem, J.A. 56, and asked for additional briefing. J.A. 57.

Although the court initially ordered that the briefing be completed within ten days, J.A. 57, the Government moved for and received an extension. Eventually, the court held oral argument on April 11, 2008. *See* J.A. 58-71. At the hearing, the court noted that it was "pleased" that petitioner had "got[ten] through the service of [his] sentence" and had returned home. J.A. 71. On April 24, 2008—269 days after sentencing—the court determined that it retained authority to order restitution and issued a "Memorandum Opinion and Restitution

Order" requiring petitioner to pay the Indian Health Service $104,649.78 "in nominal periodic payments of $250.00 per month." Pet. App. 27a-48a; *see* J.A. 5.

2. Petitioner timely appealed the April 24, 2008, order to the Tenth Circuit, renewing his claim that the district court lacked the ability, once the 90-day period of Section 3664(d)(5) had expired, to order restitution.[6]

The court of appeals affirmed. It rejected the claim that Section 3664(d)(5)'s 90-day deadline was "jurisdictional" in the sense that "the district court's power to enter any restitution order expired 90 days after [petitioner's] sentencing." Pet. App. 9a (emphasis omitted). Instead, the court of appeals embraced a "better-late-than-never principle," Pet. App. 13a, under which district courts effectively retain permanent authority to impose restitution.

The court of appeals' analysis began by referring to the MVRA's directive that "*[n]otwithstanding any other provision of law*, when sentencing a defendant convicted of [an offense covered by the Act], the court *shall* order . . . restitution." Pet. App. 9a (quoting 18 U.S.C. § 3663A(a)(1) (emphasis and alterations by the court)). It reasoned that the obligation to order restitution thus "overr[ode] conflicting provisions of any other section" of the Act, including the time limits of Section 3664(d)(5). Pet. App. 10a (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)). It also relied on the title of Section 3664 –

[6] Petitioner also challenged the restitution payment schedule ordered by the district court, but he does not renew that issue before this Court.

"*Procedure* for issuance and enforcement of order of restitution." Pet. App. 11a (quoting 18 U.S.C. § 3664 (emphasis by the court)). It thought that the use of the word "procedure" indicated that Section 3664(d)(5) was not a jurisdictional statute. Pet. App. 11a.

Second, with respect to canons of statutory construction, the court of appeals pointed to a principle against "readily infer[ring] congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." Pet. App. 12a (quoting *Barnhart v. Peabody Coal*, 537 U.S. 149, 160 (2003)). Although Section 3664(d)(5) required restitution to be ordered within 90 days of sentencing, it had "no other language purporting to deny district courts the authority to enter late restitution orders." Pet. App. 13a.

Third, the court of appeals asserted that the MVRA's legislative history reinforced its conclusion. The Senate Committee Report accompanying the Act, it declared, "makes plain that its emphasis on the need for speed and finality arises out of concern for victims, not victimizers." Pet. App. 16a. Quoting its prior decision in *United States v. Dando*, 287 F.3d 1007, 1010 n.4 (10th Cir.), *cert. denied*, 537 U.S. 917 (2002), the court declared that "Congress intended the 90 day limitation period to protect victims against the dissipation of defendants' assets and not to protect defendants from a drawn-out sentencing process or to establish finality." Pet. App. 17a.

Thus, even if delay was "caused by the government or district court, rather than by the

defendant," the court of appeals held that "the passing of § 3664(d)(5)'s deadline does not toll the death knell of the district court's subject matter jurisdiction" to order restitution. Pet. App. 18a.

The court of appeals recognized that "some of [its] sister circuits" had "held out the possibility" of providing a remedy to defendants who had been prejudiced by a violation of Section 3664(d)(5) but found itself "unsure whether Congress has authorized us to excuse a defendant from the obligation to pay restitution for offenses covered by the MVRA under *any* circumstances." Pet. App. 20a (emphasis added).

3. Petitioner moved for rehearing and rehearing en banc. The panel granted the petition for rehearing "for the limited purpose" of adding a footnote to its original opinion to address petitioner's claim that its opinion conflicted with an earlier Tenth Circuit case, *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005). Pet. App. 1a. The petition for rehearing en banc was denied. Pet. App. 3a.

4. Petitioner sought review from this Court. On January 8, 2010, this Court granted the petition for writ of certiorari. 130 S. Ct. ___ (2010).

SUMMARY OF ARGUMENT

I. The Mandatory Victims Restitution Act authorizes district courts to impose restitution as part of a criminal sentence "when sentencing" a defendant, 18 U.S.C. § 3663A(a)(1), and, if necessary, for a period "not to exceed 90 days after sentencing,"

id. § 3664(d)(5). The MVRA does not give district courts free-ranging power to impose restitution indefinitely. In this case, the district court tried to impose restitution 269 days after sentencing petitioner. The district court erred in entering a restitution order outside the statutory time period.

Section 3664(d)(5) lays out timing rules governing "the initial claim for restitutionary relief" in a criminal sentencing. Like other claims-processing rules that contain mandatory language and set a definite end to judicial proceedings, Section 3664(d)(5)'s time limit cannot be disregarded by a district court when – as here – it has been properly invoked by a defendant.

That Section 3664(d)(5)'s 90-day provision is a deadline, rather than an aspirational admonition, is reinforced by the 60-day discovery and good-cause requirement that appears in the next sentence. The 60-day requirement, which addresses the availability of "an amended restitution order," would be either superfluous or perverse if the 90-day deadline set no limit on a district court's power. And the 90-day rule's status as a definite time limit is further emphasized by contrasting its mandatory language with the expressly permissive language used in other parts of Section 3664 that, for example, impose no time limits on a district court's power to "adjust" a defendant's payment schedule in light of "any material change in the defendant's economic circumstances," *id.* § 3664(k) – whenever that change might occur – or that temper responsibilities of the Government, the probation office, or the court by

requiring compliance only "to the extent practicable," *id.* §§ 3664(a), 3664(d)(1), 3664(d)(4).

The fact that restitution is part of a defendant's criminal sentence provides additional support for the plain language interpretation of Section 3664(d)(5)'s deadline as a limit on district courts' power to order restitution. Federal law contemplates that all aspects of a defendant's punishment, including restitution, will be imposed in a single sentence (and, indeed, that the court will consider how the forms of punishment interact with one another in setting the various terms). Shortly after that sentence is imposed, a court is expected to enter a final judgment that serves to define the contours and timing of any subsequent appellate proceedings.

Because a final judgment in a criminal case must resolve all aspects of a defendant's sentence, restitution under the MVRA must be determined – either by the court or by operation of law – before judgment can become final. Section 3664(d)(5) performs a critical function by setting an outer limit on how long a court has for "final determination" of a defendant's sentence: the district court has 90 days from the time of initial sentencing to complete the sentence and set in motion any subsequent appeal, as well as important aspects of the correctional process. By contrast, under the Tenth Circuit's approach, the judgment in a criminal case cannot become final unless and until the district court orders restitution – whenever that might be. The indefinite delay of a defendant's right to appeal his conviction and other aspects of his sentence countenanced by this approach poses a serious due

process problem. Trying to cure that constitutional difficulty would produce either piecemeal litigation or jurisdictional difficulties that could delay restitution even further. By contrast, compliance with Section 3664(d)(5)'s 90-day deadline poses no practical difficulties and ensures an efficient and constitutionally adequate sentencing process.

Treating Section 3664(d)(5) as a mandatory deadline thus best serves the broad purposes of the MVRA. In providing a streamlined process for obtaining restitution at sentencing or shortly thereafter, Congress did not create stand-alone, drawn-out satellite litigation. Protracted restitution proceedings would serve the interests of neither courts, nor defendants, nor victims. Among other things, Section 3664(d)(5)'s time limits protect the defendant's constitutional right not to be sentenced on the basis of inaccurate information. And treating the 90-day limit as a real deadline also serves victims better than the Tenth Circuit's lackadaisical "better-late-than-never" approach, which removes an important statutory incentive for prosecutors and courts to address restitution claims promptly.

The language, structure, and purposes of the MVRA all point in the same direction: Section 3664(d)(5) imposes a 90-day limit on when a court can impose restitution as part of a criminal sentence. But if any ambiguity were to remain, this Court's decision in *Hughey v. United States*, 495 U.S. 411 (1990), which construed the availability of restitution under the predecessor to the MVRA, shows that the rule of lenity requires treating Section 3664(d)(5) as a limit on the district court's power.

II. The district court's error in sentencing petitioner to pay restitution outside of the time provided by Section 3664(d)(5) requires reversal. As an initial matter, the district court was not entitled to cancel out its earlier (and by then unreviewable) error of not ordering restitution within 90 days of sentencing by committing a second error – issuing a restitution order, months later, that was not authorized by Section 3664(d)(5). Nor in light of the MVRA's command that any "order of restitution under this section shall be issued and enforced in accordance with section 3664," *id.* § 3663A(d), was the court of appeals permitted to ignore petitioner's properly preserved objection to the imposition of a restitution order that violated Section 3664(d)(5).

The district court's entry of an untimely restitution order cannot be treated as harmless. First, the order in fact prejudiced petitioner. A defendant has the right not to be sentenced except as authorized by statute. *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812). By definition, an illegal sentence violates a defendant's "substantial rights." Fed. R. Crim. P. 52(a).

The outcome in this case was an illegal sentence, entered after the time provided by statute. Petitioner was sentenced to pay nearly $105,000 at a time when the district court had no authority to order him to pay any restitution. The fact that there was a time, by then long gone, when the sentence would have been legal is irrelevant.

More fundamentally, harmless-error analysis is inappropriate in cases involving statutory time limits properly invoked by defendants in criminal cases.

Convictions obtained by prosecutions commenced after the statute of limitations has run, for example, are not subject to harmless-error review; reviewing courts do not ask whether the Government would have obtained a conviction had it pursued the defendant more diligently. So, too, violations of the Speedy Trial Act require reversal per se. The same rule should obtain here. If Congress had intended to permit courts of appeals to consider the timeliness of district courts' decisions to order defendants to pay restitution on a case-by-case basis, it would have written the MVRA quite differently. Giving full effect to Congress's language forbids appellate courts from abandoning a statutory limitations period in favor of a common-law laches approach, especially in a criminal case.

ARGUMENT

I. THE DISTRICT COURT ERRED IN IMPOSING A RESTITUTION ORDER OUTSIDE OF THE STATUTORY TIME LIMIT AUTHORIZED BY SECTION 3664.

There is no federal common law of crimes or criminal sentencing. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). "[T]he guarantee of the process provided by the law of the land assures prior legislative authorization for whatever punishment is imposed." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 799 (1994) (Scalia, J., dissenting) (citation omitted). Federal courts have no inherent power to order restitution – a criminal punishment unknown at common law, *see*

A. Campbell, *Law of Sentencing* § 3:3 (3rd ed. 2004) – absent statutory authorization.[7]

The district court's power to order restitution in this case was both provided and constrained by the provisions of the MVRA. *See* 18 U.S.C. § 3556 (providing that "court[s], in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A" and that "[t]he procedures under section 3664 shall apply to all orders of restitution under this section"); *id.* § 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."). Once the district court sentences the defendant, the MVRA tethers the

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[7] *See, e.g.*, *United States v. Gilberg*, 75 F.3d 15, 22 (1st Cir. 1996) ("A federal court has no inherent authority to order restitution in a criminal case; it may do so only as expressly provided by statute."); *United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998) ("It is well-established that a federal court may not order restitution except when authorized by statute."); *United States v. Akande*, 200 F.3d 136, 138 (3d Cir. 1999) ("We begin with the firmly established principle that federal courts may not order restitution in the absence of statutory authorization."); *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005) ("A federal court cannot order restitution except when authorized by statute." (quotation marks omitted)), *cert. denied* 547 U.S. 1050 (2006); *United States v. Wells*, 177 F.3d 603, 608 (7th Cir. 1999) ("In fashioning a restitution order, a district court is therefore circumscribed by the substantive and procedural limitations outlined [in the governing statute]." (quotation marks omitted)); *United States v. Lomow*, 266 F.3d 1013, 1021 (9th Cir. 2001) ("[T]he district court does not have the inherent authority to order restitution."); *United States v. Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005) ("Federal courts possess no inherent authority to order restitution, and may only do so as explicitly empowered by statute." (quotation marks omitted)).

court's authority to impose restitution to that date. In the usual case, the district court will impose restitution "when sentencing" the defendant. 18 U.S.C. § 3663A(a)(1). But if it does not, the mandatory-claims processing rule in section 3664(d)(5) requires that the Government obtain any restitution order during a period "not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). Because the district court entered an untimely restitution order over petitioner's timely objection, that order is invalid.

A. The Plain Language Of Section 3664 Provides District Courts With The Authority To Order Restitution Only When Sentencing Defendants Or Within 90 Days Thereafter.

In cases involving statutory interpretation, this Court "look[s] first to the language of the statute itself." *Hughey v. United States*, 495 U.S. 411, 415 (1990) (applying this principle when interpreting a criminal restitution statute). In this case, the unambiguous language of the MVRA states that district courts have the power to enter orders of restitution only when sentencing a defendant or within 90 days after imposing sentence.

1. The MVRA unambiguously requires that an order of restitution be made when sentencing the defendant and provides a statutory deadline on the court's authority to order restitution. Section 3663A(a)(1) states that a court shall order restitution "*when sentencing* a defendant" convicted of specified

offenses. 18 U.S.C. § 3663A(a)(1) (emphasis added).[8] It does not authorize district courts to impose restitution orders at a time of their choosing.

Section 3664 sets out the "[p]rocedure for issuance and enforcement" of the restitutionary portion of a defendant's punishment, including a timeline based on the date a defendant is to be sentenced. Section 3664(d)(1) requires the Government to provide the probation officer with information related to the restitution determination "not later than 60 days prior to the date initially set for sentencing." Section 3664(a) requires the probation officer to provide that material to the court, along with other "information sufficient for the court to exercise its discretion in fashioning a restitution order." This is usually included as part of the presentence report, which is generally provided to the Government and the defendant "at least 35 days before sentencing." *See* Fed. R. Crim. P. 32(e)(2).

Section 3664 contemplates that the district court will impose restitution as part of the sentence itself. Courts are required to consider the amount of restitution in determining whether to impose probation or incarceration, and if the latter, the appropriate period of incarceration, *see* 18 U.S.C.

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[8] The Tenth Circuit construed the phrase "[n]otwithstanding any other provision of law" at the beginning of Section 3663A(a)(1) to somehow override all of the requirements in Section 3664, including the 90-day time limit in section 3664(d)(5). Pet. App. 10a. That construction makes no sense because it renders Section 3663A(d), which requires compliance with Section 3664, meaningless.

§ 3553(a)(7), and in setting the amount of any fine, *see* 18 U.S.C. § 3572(a)(4). Both of these determinations (imprisonment and fine) must be made at the time of sentencing, and not later. Indeed, AO 245B, the standard form provided by the Administrative Office of the U.S. Courts for Judgment in a Criminal Case, contains four pages devoted to specifying the amount, recipients, and schedule for restitution. *See* http://www.uscourts.gov/forms/ao245B.pdf.

Although the Government normally obtains a restitution order at the sentencing, Section 3664(d)(5) provides a sharply delimited extension. If the Government or the probation office concludes that "the victim's losses are not ascertainable by the date that is 10 days prior to sentencing," it must notify the court that it needs more time. The court, in turn, "shall set a date for final determination of the victim's losses, *not to exceed* 90 days after sentencing." 18 U.S.C. § 3664(d)(5) (emphasis added). This 90-day limit sets an outer boundary on the entry of restitution. The court lacks discretion to set a later date as part of the sentencing process. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (use of the word "shall" "normally creates an obligation impervious to judicial discretion").

2. The plain text reading of the 90-day deadline as a limit on district courts' sentencing power is reinforced by the good-cause amendment provision in the very next sentence of Section 3664(d)(5):

> If the victim subsequently discovers further losses, the victim shall have 60

> days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

The words "amended" and "subsequently" by definition assume a preexisting restitution order.[9] If courts retained unlimited power to order restitution at any time, as the court of appeals mistakenly held, then the good-cause amendment provision would be unnecessary. The court of appeals' reading thus flouts one of the "most basic interpretive canons that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (internal quotations omitted); *see also Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1892 (2009) (courts "should not interpret a statute in a manner that makes some of its language superfluous").

Indeed, under the court of appeals' reading of the 90-day period as merely aspirational, the good-cause amendment provision – if it retains any significance at all – becomes perverse. The more dilatory the victim, the greater his opportunity for restitution. A victim who cooperates promptly with the probation

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[9] Similarly, the language of Section 3664(k), which gives courts the power to "adjust" the restitution schedule upon a change in the defendant's economic circumstances, also presupposes the existence of a previously imposed restitution order that can be adjusted.

office, and whose restitution is set either at sentencing or within the 90-day period, will be able to obtain additional restitution only if he can show good cause. By contrast, a victim whose nonfeasance makes it impossible for the court to comply with the 90-day deadline could be awarded full restitution via an initial restitution order imposed at any time. In this case, for example, had the Government sought restitution at the time of sentencing for the $80,000 medical bill of which it was then aware, *see* J.A. 35, the Government would have been able to seek the additional $25,000 in restitution it ultimately requested only by meeting two conditions. First, it would have had to file a motion for that amount no later than December 1, 2007, having learned of the additional claim no later than October 3. *See* J.A. 52. Second, in that motion it would have been required to have made a "showing of good cause for the failure to include such losses in the initial claim for restitutionary relief." 18 U.S.C. § 3664(d)(5). By contrast, the Government's dilatory pursuit of reimbursement here somehow enabled it to receive the full $105,000 while flouting both the 60-day and good cause requirements.

Moreover, if courts cannot amend a restitution order to increase a defendant's obligations absent "good cause" for delay, it makes no sense to permit courts to delay entry of any order at all without good cause, as the district court forthrightly indicated it did here. *See* J.A. 56 (noting in February 2008 that it had had the relevant information "back in October [2007]," and was "not sure why we're just getting together today"); Pet. App. 18a (stating that the question before the court was "what to do about

delay caused by the Government or district court, rather than by the defendant"). In *Carlisle v. United States*, 517 U.S. 416 (1996), this Court rejected an analogous construction of Fed. R. Crim. P. 29(c). In *Carlisle*, the district court entered a judgment of acquittal sua sponte even though the defendant had not timely filed his motion for acquittal notwithstanding the verdict. This Court rejected that outcome, finding it "would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger." *Carlisle*, 517 U.S. at 423; *see also United States v. Smith*, 331 U.S. 469, 474 (1947) ("[I]t would be a strange rule which deprived a judge of power to do what was asked when the request was made by the person most concerned, and yet allowed him to act without petition."). Here, it would be equally strange if victims were not allowed to recover additional losses without complying with Section 3664(d)(5), but courts could award that amount in disregard of the 90-day limit. *Cf. Hollingsworth v. Perry*, 130 S. Ct. 705, 706 (2010) (per curiam) (explaining that "[c]ourts enforce the requirement of procedural regularity on others, and must follow those requirements themselves").

3. Section 3664(d)(5) is best understood as a mandatory rule for processing the Government's "initial claim for restitutionary relief." As a claims-processing rule, Section 3664(d)(5)'s 90-day limit cannot be disregarded by a court when properly invoked by a defendant.

In recent years, this Court has clarified that where statutes or court rules set clear time limits on a party's ability to seek relief from a court, adherence to those limits is mandatory. *See Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (reiterating the status of Fed. R. Crim. P. 45(b) as an "inflexible . . . demand for a definite end to proceedings").[10] In *Eberhart*, this Court stated that timelines in criminal procedure are "rigid," and "district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." 546 U.S. at 17. Similarly, in *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court found that the time limits governing bankruptcy court proceedings "limit[] [the court's] discretion" and are "unalterable" when a party properly objects. *Id.* at 456.

Section 3664(d)(5) is a claims-processing statute. It places a series of responsibilities on the Government, the party that seeks a restitution order as part of a criminal sentence. Those responsibilities include providing information to the court by a fixed time, seeking an extension of time when necessary, and ultimately obtaining an order. For example, the Government must collect and provide to the court information regarding a victim's losses. *See* 18 U.S.C. §§ 3664(a), 3664(d)(1)-(2). It also must seek either a postponement of sentencing or an order under Section 3664(d)(5) setting the time for a final

[10] Though the Tenth Circuit recognized that "[p]rocedures for processing claims and arguments are of course important, and respect for them may be mandatory in certain circumstances," Pet. App. 11a, once it had concluded that Section 3664(d)(5) was not jurisdictional in the narrow sense, it failed to analyze the 90-day time limit as a mandatory claims-processing rule.

determination of the victim's losses. Finally, the burden of proving the victim's loss "shall be on the attorney for the Government." 18 U.S.C. § 3664(e).

In this case, Section 3664(d)(5) told the Government that to obtain a restitution order as part of petitioner's sentence, it needed either to provide the information necessary in time for the sentencing itself or to seek a restitution order from the court within 90 days after the sentencing. The Government did neither, and as a result, no restitution order was entered during the time period provided by the statute. Because petitioner properly objected to the Government's untimely attempt to obtain restitution outside the statutory time period,[11] the court lacked power to enter that order.

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[11] Like other mandatory claims-processing rules, the 90-day limit in Section 3664(d)(5), under certain circumstances, may be subject to waiver or to tolling. *See, e.g.*, *United States v. Cheal*, 389 F.3d 35, 48 (1st Cir. 2004) ("Where the defendant failed to object [to the order of restitution] below, we review only for plain error."); *United States v. Terlingo*, 327 F.3d 216, 222 (3d Cir. 2003) (permitting tolling "when the delay is caused in significant part by the defendant"); *United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000) (permitting tolling to take account of "the defendant's own purposeful misconduct"), *cert. denied sub nom. Gall v. United States*, 531 U.S. 1101 (2001).

Neither of those circumstances obtains in this case. Petitioner did not waive his objection to the untimely restitution. He timely objected in the district court, *see* J.A. 54, and preserved that claim on appeal. *See* Pet. App. 5a. Nor was the 90-day period tolled; as the Government conceded at the restitution hearing, "we're not claiming that the 90 days were tolled." J.A. 65. And, as both the district court and the court of appeals recognized, the failure to meet the 90-day deadline in this case was in no way attributable to petitioner. Pet. App. 18a; J.A. 56.

The court of appeals tried to distinguish Section 3664(d)(5) from other claims-processing rules by insisting that those rules "pertain[]" to "parties," whereas the MVRA pertains to a "public interest" – namely, providing restitution to victims. Pet. App. 15a. In this case, of course, the Government was seeking restitution only for itself – that is, for expenses incurred by the United States Department of Health and Human Service's Indian Health Service. J.A. 52. But even in cases where individual victims are the ultimate recipients of the restitution the Government obtains, this does not change the fact that the Government and the defendant are the only *parties* to the sentencing process.[12] The plain language of Section 3664 treats the Government as "the party" who bears the burden of proof on disputed questions regarding the amount of a victim's loss. 18 U.S.C. § 3664(e). This conclusion is reinforced by the fact that Section 3664(d)(5) hands off to the victim a right "to petition the court" on his behalf only to seek "amend[ment]" of a preexisting restitution order, *see supra* pp. 20-21. *See also* 18 U.S.C. § 3664(k) (permitting "any party" – which at this point is defined also to "include[e] the victim" – to petition the court to "adjust" the payment schedule). Thus although the MVRA authorizes the Government to seek restitution as part of a defendant's criminal sentence, it does not

[12] Indeed, victims generally do not have standing to bring claims under the MVRA. *Cf. United States v. United Security Savings Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (victim has no standing to challenge district court's decision on how to allocate restitution among victims).

fundamentally alter the structure of criminal sentencing.[13]

The 90-day rule's status as a mandatory claims-process rule is further reinforced by Congress's choice of more flexible language in other parts of Section 3664, including provisions regarding timing. Section 3664(k), for example, provides that a sentencing court "may . . . adjust the payment schedule" – but not increase the total amount to be paid – "on its own motion or the motion of any party" and can do so at any time "[u]pon recei[ving]" notice of a change in the defendant's economic circumstances. It sets no express deadline or time limit. Cf. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of a mandatory 'shall' in the

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[13] The court of appeals' heavy reliance on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), *see* Pet. App. 13a-15a, fails to comprehend this point. The statute at issue in *Montalvo-Murillo* was the Bail Reform Act, not a claims-processing statute. The pretrial detention provisions of the Bail Reform Act establish a "regulatory device [designed] to assure the safety of persons in the community and to protect against the risk of flight." *Montalvo-Murillo*, 495 U.S. at 719-20. They were not "formulate[d] . . . as punishment." *United States v. Salerno*, 481 U.S. 739, 747 (1987). The specific provision at issue in *Montalvo-Murillo*, 18 U.S.C. § 3142(f), concerned the requirement that a suspect receive a determination at his "first appearance before [a] judicial officer" as to whether he should be detained pending trial.

The situation here is different. Restitution under Title 18 is punitive, not regulatory. *See Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986). And Section 3664(d)(5) is intended to resolve "the final determination" of a defendant's criminal sentence, not to channel a preliminary inquiry.

very same section."). In three other subsections of Section 3664, Congress expressly provided that the Government should take actions "to the extent practicable." *See* 18 U.S.C. § 3664(a) ("report shall include, to the extent practicable, a complete accounting of the losses to each victim"); *id.* § 3664(d)(1) (Government shall consult with identified victims "to the extent practicable"); *id.* § 3664(d)(2) (probation officer shall provide notice and affidavit form "to the extent practicable"); *see also id.* § 3664(d)(4) (privacy of records filed or testimony taken shall be maintained "to the greatest extent possible"). By contrast, Section 3664(d)(5) sets a mandatory requirement involving a fixed number of days.

In this case, as the Tenth Circuit recognized, the "district court's restitution order was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act." Pet. App. 5a. Because that deadline is a mandatory claims-processing rule, which petitioner timely invoked, the plain language of Section 3664(d)(5) barred the Government from obtaining a restitution order as part of petitioner's sentence.

B. The Final Judgment Rule Requires Treating Section 3664(d)(5) As A Limit On When Restitution Can Be Ordered.

The time limit in Section 3664(d)(5) functions to assure that the sentencing process reaches finality within a reasonable period. Allowing district courts to hold open that process beyond the 90 days provided would undermine the orderly administration of criminal justice. These problems

are avoidable because the MVRA sets out a sensible structure which can easily be followed.

1. The final judgment in a criminal case occupies a critical position. Federal law contemplates that all aspects of a defendant's punishment, including restitution, will be imposed in a single sentence, *see* 18 U.S.C. §§ 3551(b), 3554, 3556, and that that sentence will be embodied in a final judgment. *See* Fed. R. Crim. P. 32(k)(1) (requiring that the "judgment of conviction . . . must set forth" the "adjudication and the sentence"). In a criminal case, "a judgment or decision is final for the purpose of appeal only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *Parr v. United States*, 351 U.S. 513, 518 (1956) (quotation marks omitted). As this Court recently reiterated, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

Without a final judgment, a defendant cannot appeal either his conviction or any component of the punishment imposed. *See* Fed. R. App. P. 4(b). As this Court has repeatedly emphasized, "[f]inality as a condition of review" has long been applied with special force in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324 (1940)).

Restitution under the MVRA must be understood in light of these principles. As such, restitution must

be determined – either by the court or by operation of law – before the sentence is complete and judgment becomes final. Section 3664(d)(5) tells the court to complete sentencing by determining restitution within 90 days. If the court does so, it will produce a final judgment which can be appealed. *See* 18 U.S.C. § 3664(*o*) (describing "a sentence that imposes an order of restitution" as the "final judgment"). If the court does not do so, expiration of the 90-day limit will render final any sentence already pronounced.

Any other reading produces constitutional difficulties. As a matter of due process, preventing a defendant from appealing his conviction and sentence for a substantial amount of time "might raise constitutional problems of significant proportions." *Corey v. United States*, 375 U.S. 169 (1963). But that is what would happen under the Tenth Circuit's "better-late-than-never principle." Pet. App. 13a. Under that principle, a judgment in a criminal case can leave restitution outstanding, and thus not become final, for an indefinite period. In this case, for example, petitioner had spent 19 months in custody, and was on supervised release, by the time the district court eventually purported to make a "final determination." Consider a defendant identical to petitioner in all respects except for the fact that the defendant had contested either his guilt or the length of his sentence. That defendant would have been precluded from appealing by the Tenth Circuit's rule until he had served nearly all his time.

Thus, to avoid constitutional difficulties, Section 3664(d)(5) must be read to set a mandatory 90-day deadline. That reading avoids constitutional

difficulty because any judgment entered in an MVRA case becomes final no later than 90 days after sentencing regardless of whether restitution has been ordered. Thus, at worst, the defendant's ability to appeal would be postponed only for a short time.

Trying to cure the constitutional difficulty by permitting appeals from conviction or from other parts of a defendant's sentence while restitution remains outstanding runs afoul of the strong rule against piecemeal litigation. At best, the court of appeals will be entertaining the defendant's appeal on his conviction or sentence while the district court is adjudicating the restitution claim. Should the defendant or the Government disagree with the district court's restitution determination, this will produce a second appeal. "[C]ourts have consistently given effect" to the "congressional policy against interlocutory or 'piecemeal' appeals" for as long as criminal "appeals of right have been authorized." *Abney v. United States*, 431 U.S. 651, 656 (1977).

More likely, because restitution is not collateral to the sentence, when the defendant files an appeal challenging his conviction or term of imprisonment, the district court will lose jurisdiction over the case. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.") As such, restitution cannot be ordered until that appeal is resolved, which may take many months or even years. During that entire time period, of course, the victim has no prospect of

receiving a restitution award. And after that delay, the piecemeal appeal problem remains: if restitution is ordered, the defendant (and the Government) will then have the right to file a second appeal regarding the restitution order. As this Court has noted:

> [J]udicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. . . . *[E]ncouragement of delay is fatal to the vindication of the criminal law*.

Cobbledick, 309 U.S. 323 at 325 (1940) (emphasis added). Contrary to the Tenth Circuit's hypothesis, later is *not* better in the realm of criminal justice.

Finally, the "better-late-than-never" rule produces problems for the administration of corrections as well as for judicial administration. The judgment not only sets out the sentence, but also marks the point at which a defendant who is sentenced to imprisonment is committed to the custody of the United States Bureau of Prisons. A federal prisoner is often sent to a correctional facility far away from the courthouse where he was sentenced. *See* 18 U.S.C. § 3621(b) (BOP may designate any "appropriate and suitable" institution). Because the defendant's presence is required for additional restitution proceedings, *see* Fed. R. Crim. P. 43(a)(3), the commitment either cannot occur, or, if it does, the defendant will have to be transported back to the sentencing jurisdiction, interrupting any

correctional treatment that the court has recommended or ordered. *Cf.* J.A. 38 (recommending that petitioner participate in the BOP's drug and alcohol treatment program).

2. These problems are avoided by a plain text reading of Section 3664(d)(5)'s 90-day rule as mandatory. Such a reading, moreover, fits easily within the existing structure of criminal sentencing.

First, if the Government has provided the court with sufficient information about the victim's losses, the clear language of Section 3663A(a)(1) requires that the restitution be ordered "when sentencing." Following that sentencing in open court, the district court enters a judgment on the docket and the sentence becomes final.[14]

Second, if the Government does not have sufficient information regarding the victim's losses prior to sentencing, it has two options. It can move to postpone the entire sentencing process for a reasonable time in order to obtain the information. (As this case shows, the Government often moves to postpone sentencing, for a variety of reasons, JA 28-29.) Or, under Section 3664(d)(5), the Government or the probation officer must notify the court of the

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[14] If the court refuses to enter restitution as part of the sentence, the Government can either move to correct the sentence under Fed. R. Crim. P. 35(c), or appeal pursuant to 18 U.S.C. § 3742(b)(1), on the grounds that the sentence omitting the required restitution is a sentence "in violation of law." But if the Government does not appeal, then the judgment becomes final regardless of any congressional directive that restitution be "mandatory." *See Greenlaw v. United States*, 128 S. Ct. 2559, 2562 (2008).

problem at least ten days prior to sentencing. Following that notification, the court shall "set a date for the final determination" of restitution "not to exceed 90 days after sentencing."[15]

At the initial sentencing, the court will pronounce the other aspects of the defendant's punishment, such as imprisonment, probation, special conditions of release, and the like. The Government must then provide the court with information necessary to impose restitution before the final-determination date set pursuant to Section 3664(d)(5). At that final sentencing, the court will pronounce restitution (and could revise any other aspects of the sentence that were interrelated with the restitution, *see* 18 U.S.C. §§ 3553(a)(7), 3572(a)(4)). Having done so, it should then enter final judgment. This need to determine the entire sentence before entering judgment explains why the wisest course is "not to enter the written judgment of conviction until the amount of restitution has been fixed." *United States v. Kapelushnik*, 306 F.3d 1090, 1094 (11th Cir. 2002).

If, as in this case, the district court has entered judgment before considering restitution, *see* J.A. 42, then it needs to amend that judgment once it has made a "final determination." An already-entered

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[15] If the Government has some (albeit incomplete) information regarding the amount of restitution, it could ask the court to go forward with sentencing and to enter a final judgment based on the materials then before it. Section 3664(d)(5)'s good-cause amendment provision could then come into play if the victim later discovers additional losses. *Cf.* 18 U.S.C. § 3664(*o*)(1)(C) (treating sentences that include a restitution order as final even though they can be amended for good cause).

judgment that was not final at the time it was entered because restitution was undetermined, however, automatically becomes final once the 90-day period provided by Section 3664(d)(5) expires. At that point, there is "nothing to be done," *Parr v. United States*, 351 U.S. 513, 518 (1956), because the district court has no statutory authority to order restitution.

If the court does not set a final-determination date, the Government, as the party seeking restitution, should ask the court to do so by filing a motion (just as any party requesting court action would do). If the Government does not do so and the date is never set by the court, when the 90 days runs, as it did here, the court loses authorization to impose restitution.[16]

What the Government cannot do, however, is sit idly by while the time to impose restitution expires – and the sentence becomes final – and then obtain an additional criminal penalty months or even years after sentencing. In this case, petitioner was sentenced in July 2007, the time for seeking a final determination of restitution expired in October 2007,

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[16] If the Government files a motion asking the court to set a date but the court fails to do so, the Government can seek mandamus. *Cf. United States v. Dooling*, 406 F.2d 192, 198 (2d Cir. 1969) (recognizing the Government's ability to seek mandamus ordering the trial court to enter judgment), *cert. denied sub nom. Persico v. United States*, 395 U.S. 911 (1969). The 90-day period would then be tolled. There could also be tolling if the Government had to seek mandamus because a court, despite having set a date and having received all necessary information from the Government, has failed to issue a timely restitution decision.

and it was not until April 2008, when petitioner was already "back at the reservation," J.A. 71, that the Government obtained the order that he pay it over $100,000.

In short, the criminal sentencing process has always been designed to produce a single judgment of conviction and sentence. Treating Section 3664(d)(5) as a mandatory limit on a district court's authority to impose restitution is the only way to harmonize the MVRA with this important principle.

C. Treating Section 3664(d)(5)'s 90-Day Deadline As Mandatory Best Fulfills The Purposes Of The MVRA.

Congress imposed a 90-day limit on the district court's power to enter restitution as a criminal penalty for three interrelated reasons. That deadline safeguards judicial resources, respects the defendant's rights, and protects victims' interests.

1. Congress did not intend to create a stand-alone, drawn-out restitution process. Indeed, the legislative history shows that Congress was "not unmindful of the costs to the justice system" produced by adding a duty of determining restitution to the workload of already busy district courts. S. Rep. No. 104-179, at 18 (1995). This concern is illustrated by the MVRA's provision that otherwise-mandatory restitution need not be imposed in cases involving a range of property crimes if the court finds either that "the number of identifiable victims is so large as to make restitution impracticable," 18 U.S.C. § 3663A(c)(3)(A), or if the court decides that "complex issues" would "complicate or prolong the sentencing process to a degree that the need to

provide restitution to any victim is outweighed by the burden on the sentencing process," *id.* § 3663A(c)(3)(B). Moreover, Congress intentionally incorporated procedures "streamlining the process for issuing and enforcing" orders of restitution, S. Rep. No. 104-179, at 18, into the preexisting criminal sentencing process.

2. Congress chose to use the criminal sentencing process because it already provides protection for a defendant's constitutional interests. The legislative history expressly makes clear that "the issuance of a restitution order is an integral part of the sentencing process that is to be governed by the same, but no greater, procedural protections as the rest of the sentencing process." S. Rep. No. 104-179, at 20.

The procedures provided by Section 3664 are designed to "protect[] the rights of *all* individuals," S. Rep. No. 104-179, at 21 (emphasis added), including, of course, defendants. That is why Congress emphasized that "the need for finality and certainty in the sentencing process dictates that [the restitution] decision be made quickly." *Id.* at 20. Congress recognized that defendants have a due process "right not to be sentenced on the basis of invalid premises or inaccurate information." *Id.* Section 3664(d)(5)'s time limits protect that interest. Like a statute of limitations, the 90-day limit protects a defendant from the "[p]assage of time . . . [which] may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with the ability to defend himself." *United States v. Marion*, 404 U.S. 307, 321 (1971). The same concerns apply to a defendant's

ability to rebut the Government's claim that a particular loss is attributable to his actions. Moreover, if restitution drags on long after the rest of a criminal case is over, this may pose special problems for defendants who have been transported to a prison on the other side of the country and who cannot contact or assist their lawyers in mounting a defense.

The Tenth Circuit misunderstood the statement in the legislative history on which it relied. Congress immediately followed the statement that the "sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information," Pet. App. 16a, with the assertion that "the provisions of this Act," S. Rep. 104-179, at 20, would provide adequate protection. Those protective provisions include the time limits set out in Section 3664(d)(5), which Congress assumed the Government and courts would follow.

3. Moreover, the deadline that Congress set in the MVRA best serves the policy goal of expediting victim compensation. Over the long run, the Tenth Circuit's "better-late-than-never principle" would not actually benefit victims. Instead, by removing any consequences from a court's failure to comply with the 90-day deadline, it will actually *delay* the prompt entry of restitution orders and work to the detriment of victims. *Cf. Toussie v. United States*, 397 U.S. 112, 115 (1970) (noting that statutes of limitations for crimes have the "salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity"). If it does not matter

when a restitution hearing is held and an order is entered, resolution of restitution claims may end up being postponed while district courts and prosecutors turn to other issues that seem more pressing. That is precisely, after all, what seems to have happened in this case. Neither the Government nor the district court paid sufficient attention to the requirement for speedy resolution of the Indian Health Service's claim for restitution.

In fact, to the extent that restitution under the MVRA serves as a substitute for the civil action that a victim would otherwise have to pursue to obtain restitution, delay in pursuing and obtaining restitution may force victims to file protective civil lawsuits. This result will not only cost victims time and resources, but will impose additional burdens on the courts in which such lawsuits are filed.

By creating a strong incentive for the Government to proceed expeditiously, treating the MVRA's 90-day deadline as mandatory best implements the balance Congress struck.

D. If Any Statutory Ambiguity Remains, The Rule Of Lenity Requires Treating The 90-Day Deadline As A Limit On The District Court's Sentencing Power.

Section 3664(d)(5) is not ambiguous. But if it were, the rule of lenity would require treating the 90-day provision as a limit on the district court's power.

Because the MVRA, like other criminal restitution provisions, is a penal statute, *see Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986), the rule of lenity requires resolving any ambiguity regarding the

construction of Section 3664(d)(5) in favor of defendants. As Chief Justice Marshall explained in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), which this Court recently characterized as its "seminal rule-of-lenity decision," *United States v. Santos*, 128 S. Ct. 2020, 2026 (2008), "[p]robability is not a guide which a court, in construing a penal statute, can safely take." *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

But rather than applying lenity, the court of appeals applied the forgiving approach taken to time limits in a variety of regulatory statutes. Pet. App. 12a-15a. It ignored the fact that the rule of lenity does not apply in those cases. Their holdings, therefore, cannot be incorporated mechanically into the criminal sentencing context.

Perhaps as a result of this error, the court engaged in a free-ranging policy analysis. As a result, despite recognizing that the district court's restitution order "was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act," Pet. App. 5a, it acted as if the words "mandatory" and "nothwithstanding" overrode every other word of the statute, including the specific time deadlines set in Section 3664(d)(5). Pet. App. 9a, 11a. The court also selectively plucked phrases out of the legislative history to buttress its decision to override Section 3664(d)(5)'s 90-day limit. Pet. App. 16a-17a.

This Court has already rejected, on the basis of lenity, similar policy and legislative history arguments in a closely analogous restitution case. In *Hughey v. United States*, 495 U.S. 411, 412-13

(1990), the Court addressed restitution under the Victim and Witness Protection Act, the predecessor to the MVRA. The question presented was whether a defendant charged with multiple offenses but convicted of only one could be required to make restitution for losses related to the other alleged offenses. The Government argued that the statute's purpose as identified in text and legislative history, as well as general policy concerns, supported upholding the district court's broad restitution order. *Id.* at 420. This Court refused to even consider that argument, finding that "longstanding principles of lenity . . . preclude our resolution of ambiguity against [the defendant] on the basis of general declarations of policy in the statute and legislative history." *Id.* at 421 (citations omitted).

Even if this Court were not to accept petitioner's plain language and structural arguments, at most it would be left with ambiguity as to whether district courts have the power to enter a restitution order that fails to comply with the 90-day time limit. The same longstanding principles of lenity that were dispositive in *Hughey* would be dispositive here. They would require holding that Section 3664(d)(5) creates a mandatory deadline.

II. THE ILLEGAL SENTENCE IMPOSED IN THIS CASE MUST BE REVERSED.

In its Brief in Opposition, the Government did not seriously contest the fact that out-of-time restitution orders constitute error. Instead, it framed the inquiry as whether violations of Section 3664(d)(5) constitute "prejudicial error." BIO i. They

do. Because an illegal sentence always affects substantial rights, its imposition cannot be harmless. Therefore, a defendant who timely objects to the imposition of such a sentence is entitled to have it reversed. This is particularly true in cases like this one, where the sentence is illegal because punishment was imposed outside of statutory time limits and after the August 8, 2007, judgment became final as a matter of law.

1. As an initial matter, it is important to be clear exactly which of the district court's errors is before this Court. It is *not* the district court's failure in the fall of 2007 to impose a restitution order required by the MVRA. Rather, the error before this Court consists only of the district court's later error in the spring of 2008: imposing restitution in violation of Section 3664(d)(5).

To be sure, in light of Section 3663A(a)(1), the district court erred in failing to order restitution either "when sentencing" petitioner or within the 90-day period provided in Section 3664(d)(5). The Government could have prevented that error had it filed a motion asking the district court to enter a timely restitution order. *See supra* p. 35. It did not do so. In fact, it completely dropped the ball, doing nothing until the district court – on its own motion, six months after the sentencing – ordered a restitution hearing. It cannot appeal that error now.

The district court's April 24, 2008, restitution order came too late to cure an error that became final on October 28, 2007. The Government cannot now use the fact that petitioner later filed a timely appeal – not from his sentence, but from the illegal

restitution order – as a vehicle to obtain relief it did not timely seek. *Cf. Greenlaw v. United States*, 128 S. Ct. 2559, 2569 (2008) ("The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal.").

Having failed to impose restitution within the statutory time period, the district court committed a second and separate error when it entered a restitution order at a time when it lacked statutory authorization to do so. To this illegal order, petitioner made a timely objection and, when his objection was rejected by the district court, filed a timely appeal. Like the court of appeals, this Court has jurisdiction only to address the district court's second error.

2. The court's entry of a restitution order outside of the time allowed by statute was prejudicial and must be reversed. An error that "affect[s] . . . the sentence imposed," *Williams v. United States*, 503 U.S. 193, 203 (1992), requires reversal as it by definition "affect[s]" a defendant's "substantial rights." Fed. R. Crim. P. 52(a). *See also Puckett v. United States*, 129 S. Ct. 1423, 1433 n.4 (2009) ("When the rights acquired by the defendant relate to sentencing, the 'outcome' he must show to have been affected is his sentence."). Here, the court's error dramatically affected the sentence petitioner received: the district court ordered, absent any statutory authority, that petitioner pay more than $100,000. *See United States v. Randle*, 324 F.3d 550, 558 (7th Cir. 2003) ("In requiring Randle to pay

several thousand dollars in restitution, without a statutory basis for doing so, the error affects Randle's substantial rights."); *United States v. Ubakanma*, 215 F.3d 421, 428-29 (4th Cir. 2000) (same).

Illegal sentences are "routinely corrected" even where a defendant has failed to timely object. *United States v. Pawlinski*, 374 F.3d 536, 541 (2004) (Posner, J.) (reversing sentence that required payment of restitution to non-victim and thus overstepped statutory authority); *see also, e.g.*, *United States v. Wainwright*, 938 F.2d 1096, 1097-98 (10th Cir. 1991) (vacating restitution order, despite lack of objection below, for conduct unrelated to offense of conviction).[17] *A fortiori,* when a defendant has timely objected, as petitioner did here, an illegal sentence cannot be treated as harmless.

The court of appeals' assumption that the error here was not prejudicial, *see* Pet. App. 21a, *cf.* BIO 7-9, rested on its conflation of the error properly before it and the earlier error. By the time the district court acted in this case, *only* its wrongful disregard of Section 3664(d)(5) enabled it to impose restitution. *See* J.A. 64 (arguing that ordering restitution out of the time period "in and of itself, is prejudice").

An example clarifies this point. Suppose that a district court were to erroneously impose a five-year

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[17] The few courts of appeals that have held otherwise in cases analogous to this one, *see, e.g.*, *United States v. Douglas*, 525 F.3d 225, 252-53 (2d Cir.), *cert. denied* 129 S. Ct. 619 (2008); *United States v. Cienfuegos*, 462 F.3d 1160, 1162-63 (9th Cir. 2006), have mistakenly failed to recognize that entry by the court of a criminal sentence absent statutory authorization cannot be treated as simply an error of timing.

sentence in a case where the mandatory minimum sentence required by statute is ten years. Several years later, the court on its own initiative issues an order resentencing the defendant to ten years' imprisonment. If the defendant timely appeals from this second sentencing order, the court of appeals could not affirm the ten-year sentence by invoking harmless error analysis on the theory that the district court *could* have imposed the ten year sentence the first time around. The two errors do not cancel one another out.[18]

Likewise, the outcome in this case is an illegal sentence, and the fact that there was a time when a sentence just like it would have been legal is irrelevant. After Section 3664(d)(5)'s 90-day time limit had run, the court's later unauthorized imposition of restitution upon petitioner was unlawful, and absent this unlawful conduct,

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[18] This confusion may also explain the court of appeals' mistaken reliance on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990). Pet. App. 13a-15a. The error in *Montalvo-Murillo* was that the court did not make a prompt determination of whether Montalvo-Murillo should be detained. Montalvo-Murillo did not ask for a prompt determination; instead, he asked for (and received from the district court) an outright release from custody. This Court held that that remedy was inappropriate because it had "neither causal nor proportional relation" to the injury he had suffered. *See Montalvo-Murillo*, 495 U.S. at 721-22.

By contrast, the error from which petitioner appealed in this case – imposition of an illegal sentence – can be relieved only by reversing that sentence and thus is narrowly "tailored to the injury suffered." *Id.* at 721-22 (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

petitioner would not now be subject to a restitution order. The error here was not harmless.

3. This conclusion is reinforced by the general rule that violations of statutory time periods in criminal cases are not subject to harmless-error review. Petitioner is unaware of any limitations period in a criminal statute whose violation is ignored on the grounds that, had the time limit been observed, the Government could have obtained the same end result. Statutes of limitation "are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947). As this Court explained in *United States v. Marion*, 404 U.S. 307, 322 (1971), statutes of limitations "specif[y] a limit beyond which there is an irrebuttable presumption" of prejudice. *See also McIver v. Ragan*, 15 U.S. (2 Wheat.) 25, 30 (1817) (Marshall, C.J.) (courts cannot "insert in the statute of limitations[] an exception which the statute does not contain").

Nor does the harmless-error rule apply to Speedy Trial Act violations. If a defendant is not brought to trial within the period authorized by the Act, the indictment must be dismissed. 18 U.S.C. § 3162(a)(2). To be sure, Congress has softened the consequences of this dismissal somewhat, by providing that dismissals of *indictments* can be either with or without prejudice. *Id.* But if a district court were to erroneously deny a defendant's motion to dismiss the indictment and then proceed to trial, the ensuing *conviction* must be reversed without regard to whether the defendant was prejudiced. As

this Court declared in *Zedner v. United States*, 547 U.S. 489, 509 (2006), "harmless error review is not appropriate." If a defendant properly objects to an untimely prosecution, his conviction will be reversed. The fact that Congress crafted a remedy in Speedy Trial Act cases that leaves open the possibility of a new proceeding, while not including an equivalent option within the MVRA, shows that the ordinary principle controls: entry of an illegal, untimely restitution order requires reversal.

This Court, more generally, does not require a showing of prejudice before providing "relief to a party properly raising" mandatory timelines contained in the Federal Rules of Criminal Procedure. *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam). In *Carlisle v. United States*, 517 U.S. 416, 418 (1996), for example, the United States argued that the defendant's day-late motion for post-verdict acquittal was untimely and this Court agreed. The Court did not consider whether the Government was somehow disadvantaged before reversing the judgment in the defendant's favor. Defendants are entitled to invoke the same principle. *Cf. State v. Moen*, 919 P.2d 69, 76 (Wash. 1996) (rejecting state's contention that failure to comply with statutory time limit for restitution award was harmless).

4. If Congress had meant for courts of appeals to ask in each case whether a district court's restitution order came so late as to prejudice the defendant, it would have crafted a very different statute. That statute would simply have directed district courts to order restitution "within a reasonable time after

sentencing." Instead, Congress set a specific deadline.

To apply harmless-error analysis to that deadline would override a statutory limitations period in favor of a common-law laches approach, which has never been appropriate in criminal cases. There is no doubt that *at some point* the Constitution would prohibit a court's imposing restitution as part of a criminal sentence entered long ago.[19] To paraphrase this Court in *Carlisle*, the issue comes down to "nothing more cosmic than the question of timing – which we find answered by the text" – here, of the MVRA. *Carlisle*, 517 U.S. at 430-31. Where Congress has crafted a clear rule regarding criminal sentencing, there is no reason to undermine the certainty it provides to defendants, the judicial process, and victims.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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[19] Taken to its logical endpoint, the "better-late-than-never principle" violates the "constitutional prohibition against successive punishments for the same offense." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 769 (1994). This Court's double jeopardy jurisprudence makes clear that if restitution is not ordered before the defendant completes the portions of his punishment that were imposed earlier, the court's "power to punish for that offense [is] at an end." *Ex parte Lange*, 85 U.S. 163, 176 (1847).

Respectfully submitted,

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February 23, 2010