No. 09-367

In the Supreme Court of the United States

BRIAN RUSSELL DOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
ELIZABETH D. COLLERY
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When a crime victim is entitled to restitution but the victim's loss is not ascertainable at least ten days before the defendant's sentencing, 18 U.S.C. 3664(d)(5) provides that "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." The question presented is:

Whether a district court's failure to calculate restitution within 90 days after sentencing deprives the court of any authority to award restitution under 18 U.S.C. 3663A, which provides that "the court shall order * * * that the defendant make restitution to the victim of the offense."

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OPINIONS BELOW

The order of the court of appeals granting panel rehearing in part (Pet. App. 1a-3a) is unreported. The amended opinion of the court of appeals (Pet. App. 4a-26a) is reported at 571 F.3d 1022. The opinion and order of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2009. A petition for rehearing was granted in part on June 26, 2009 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on September 23, 2009, and was granted on January 8, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 1153. He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $104,649.78 in restitution. The court of appeals affirmed. Pet. App. 4a-26a.

1. On September 9, 2006, petitioner picked up Evan Tissnolthtos, a hitchhiker, on an Indian reservation in southeastern New Mexico. The two men began to argue, and petitioner assaulted Tissnolthtos, leaving him on the side of the road, bleeding and unconscious. A police officer discovered Tissnolthtos, and he was airlifted to a hospital. Tissnolthtos sustained serious injuries, including a broken nose, wrist, leg, and ribs. His injuries required a lengthy hospital stay that included multiple surgeries, resulting in medical bills exceeding $100,000. Pet. App. 5a-7a, 28a-29a; J.A. 22-23.

2. A grand jury in the District of New Mexico returned an indictment charging petitioner with assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 1153. Pet. App. 6a. Petitioner pleaded guilty. *Ibid.* In his plea agreement, petitioner acknowledged that his sentence could include "restitution as * * * ordered by the Court." J.A. 18.

Before sentencing, the probation office prepared a presentence report (PSR) that noted that the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L.

No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, "is applicable to this case." J.A. 27. The MVRA makes restitution to victims mandatory for specified crimes, including crimes of violence and certain offenses against property. See 18 U.S.C. 3663A(c) (identifying offenses to which the MVRA applies). It provides that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of" an offense covered by the statute, the district court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). Accordingly, the PSR stated that the MVRA "requires the Court to enter a restitution order." J.A. 25. The PSR detailed Tissnolthtos's extensive injuries, including his need for future surgery, and indicated that Tissnolthos would attempt to document his claim of $7000 in lost wages. J.A. 26-27. The PSR also explained that the probation office was still trying to obtain information from the Indian Health Service about Tissnolthtos's total medical costs, and stated that the office would forward the information to the court upon receipt. J.A. 27.

The district court held petitioner's sentencing hearing on July 30, 2007. J.A. 31. At the hearing, the court raised the issue of restitution, and the government informed the court that it was trying to locate the victim, and that "there is a bill of $80,000 that's still outstanding from the hospital." J.A. 35. Under the MVRA, "[i]f 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." 18 U.S.C. 3664(d)(5). The government therefore suggested that the district court allow "90 more

days for restitution." J.A. 35. The district court agreed to "leav[e] the question of restitution open-ended because we don't have a good number at this point." *Ibid.* In imposing sentence, the district court noted that "restitution is applicable," but explained that it would leave the issue "open, pending the receipt of additional information." J.A. 39-40. The court advised petitioner that he should "anticipate that such an award will be made in the future." J.A. 40.

The district court entered judgment the same day. J.A. 3. The judgment stated 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, the probation office issued an addendum to the PSR, stating it had "received additional information regarding requested restitution in this matter," namely, that "[t]he cost of [Tissnolthtos's] medical care and treatment totaled $105,559.78." J.A. 52. The addendum noted that Section 3664(d)(5) required the court to "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing, which in this case shall be October 28, 2007." *Ibid*.

The district court did not hold a hearing on restitution until February 2008. J.A. 53-57. At the hearing, petitioner suggested that the district court no longer had authority to order restitution because more than 90 days had elapsed since sentencing. J.A. 54-55. The district court ordered supplemental briefing on that question, J.A. 56-57, and it then held a second restitution hearing. At that hearing, defense counsel conceded that

petitioner had notice of the restitution amount within the 90-day period, adding that "[w]e always knew restitution would be an issue." J.A. 64.

On April 24, 2008, the district court entered a memorandum opinion and order in which it held that it still had the authority to issue a restitution order, notwithstanding the expiration of the 90-day period. Pet. App. 27a-48a. In reaching that conclusion, the court emphasized that "restitution is mandatory for crimes of violence" and that "Congress intended Section 3664(d)(5) to protect victims." *Id.* at 44a-45a. It also noted that petitioner had "received the functional equivalent of statutory notice" and was "unable to demonstrate prejudice" from the delay in ordering restitution. *Id.* at 45a. The district court ordered petitioner to pay restitution of $104,649.78 in nominal periodic payments of $250. *Id.* at 47a.[1]

3. The court of appeals affirmed. Pet. App. 4a-26a. Petitioner argued "that the 90-day deadline set by [Section] 3664(d)(5) is jurisdictional" and that the district court's power to order restitution "expired 90 days after * * * sentencing." *Id.* at 9a. The court of appeals rejected that argument, noting that Section 3663A(a)(1) provides 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." *Ibid.* (quoting 18 U.S.C. 3663A(a)(1)) (brackets and emphasis in original). In enacting that provision, the court explained, "Congress * * * decided that defendants who have committed certain offenses should *never* be able to avoid restitution." *Id.* at

[1] The restitution award was equal to the costs calculated in the addendum to the PSR, as corrected for certain mathematical errors identified by the district court. J.A. 54.

9a-10a. Accordingly, "while the 90-day deadline is surely a command of the Act, it can be reasonably understood only as a subsidiary command to the Act's primary and overriding directive that restitution *must* be ordered for certain crimes." *Id.* at 10a. The court concluded that "Congress did not intend to divest the district court of all power over restitution awards after 90 days." *Id.* at 11a. Section 3664(d)(5), the court held, established a "claims processing procedure" that was intended to "ensur[e] the timely completion of * * * statutory obligations to the public," not to restrict "federal court subject matter jurisdiction." *Id.* at 11a, 13a.

In reaching that conclusion, the court of appeals distinguished between mandatory deadlines for litigants, such as the deadline for filing a notice of appeal, and "mandatory obligations on government officials to perform duties on behalf of the public." Pet. App. 15a. With respect to the latter category of obligations, the court concluded that the failure to perform as Congress intended did not eliminate the obligation itself, observing that "[i]t would be a strange thing indeed if a bureaucracy or court could avoid a congressional mandate by unlawful delay." *Id.* at 13a. The court found it unnecessary to consider what remedy might be appropriate if a defendant could establish prejudice from delay, noting that petitioner "does not purport to identify any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner." *Id.* at 21a.

SUMMARY OF ARGUMENT

The Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, provides that "[n]otwithstanding any other provision of law,

when sentencing a defendant convicted of" an offense covered by the statute, the district court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). The statute directs that if the victim's losses are not ascertainable before the defendant is sentenced, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). The court of appeals correctly held that a district court does not lose its authority to order restitution simply because it fails to determine the amount of the victim's losses before that 90-day period elapses.

Petitioner asserts that, under Section 3664(d)(5), the district court's delay should relieve him of any obligation to pay restitution. That argument finds no support in the text of the MVRA. While Section 3664(d)(5) requires the court to act within 90 days, nothing in the statute provides that the court loses the power to act if it misses that deadline, and this Court has held that "[t]here is no presumption or general rule that for every duty imposed upon the court * * * there must exist some corollary punitive sanction for departures or omissions." *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990). To the contrary, when "a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63-64 (1993). Applying any other interpretive principle would conflict with the basic obligation to order restitution that the statute imposes on a sentencing court.

Petitioner's position also disregards the statutory context and legislative history. The MVRA contains a

variety of procedural guarantees aimed at promoting the interest of victims in obtaining full restitution. Section 3664(d)(5) is one such guarantee, serving to protect victims against undue delay. Nothing in the statute or its history suggests that Congress established those deadlines to protect *defendants* from delay. The district court's failure to comply with a statute intended to protect victims provides no reason to confer a windfall on a defendant at his victim's expense.

Petitioner suggests that Section 3664(d)(5) is a mandatory claim-processing rule, the violation of which precludes judicial action, but that is simply a restatement of his flawed argument that the statute prohibits the district court from ordering restitution after the 90-day deadline. Section 3664(d)(5) is unlike other provisions that this Court has treated as claim-processing rules because it imposes a duty on the court, not on any of the litigants.

Petitioner also argues that allowing district courts to fix the amount of restitution more than 90 days after sentencing will lead to piecemeal appellate litigation and interfere with the orderly administration of justice. Those policy considerations provide no basis for departing from the statutory text and history, and in any event, petitioner's concerns are overstated. Cases in which a defendant separately appeals his sentence and a restitution award will be relatively infrequent, and courts will often be able to consolidate the two appeals. Thus, the interpretation adopted by the court below will not significantly burden courts of appeals.

Finally, because petitioner has made no effort to show that the district court's delay in ordering restitution prejudiced him in any way, this case presents no occasion to consider what remedy might be appropriate

if a defendant could show prejudice. Although the district court erred in delaying the award of restitution, that error caused no harm to the defendant, and therefore provides no basis for setting aside the court's order.

ARGUMENT

A DISTRICT COURT'S FAILURE TO MEET THE 90-DAY DEADLINE OF SECTION 3664(d)(5) DOES NOT EXTINGUISH ITS OBLIGATION TO ORDER RESTITUTION

A. The Text Of The MVRA Mandates That A District Court Award Restitution, And The Court's Mere Failure To Meet A Statutory Deadline Does Not Alter That Obligation

The court of appeals correctly held that a district court should order restitution even when more than 90 days have elapsed after a defendant's sentencing. In arguing to the contrary, petitioner relies on Section 3664(d)(5), which provides that if the victim's losses cannot be ascertained ten days before sentencing, the district court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). According to petitioner, if the district court fails to meet that deadline, it no longer has any power to award restitution. That interpretation of Section 3664(d)(5) is contrary to the canon that a statute requiring that an act be performed by a particular deadline does not, without more, eliminate the power to act if the deadline is missed. It is also at odds with Section 3663A(a)(1), which provides that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a covered offense], the court shall order * * * restitution." 18 U.S.C. 3663A(a)(1). That provision confirms Congress's intent that courts award

restitution even when the 90-day deadline has not been met.

1. Petitioner correctly points out (Br. 12) that the 90-day provision of Section 3664(d)(5) is a "deadline, rather than an aspirational admonition," and that it therefore "cannot be disregarded by a district court." Because Section 3664(d)(5) is mandatory, a district court has a duty to make a final determination of a victim's losses within 90 days after sentencing. It does not follow, however, that the appropriate sanction when a court misses the 90-day deadline is to prohibit it from ordering restitution altogether. Petitioner identifies no provision of the statute that prescribes such a remedy for a violation of Section 3664(d)(5), and there is none.

Petitioner's construction of Section 3664(d)(5) is incompatible with the rule that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63-64 (1993). This Court has repeatedly endorsed that principle, declining to "infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003). As the court of appeals recognized, "Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches the chance to avoid their obligations just by dragging their feet." Pet. App. 13a.

This Court has explained that "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire

when the job is supposed to be done." *Peabody Coal*, 537 U.S. at 161; *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the deadline * * * does not mean that official lacked power to act beyond it."); *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake."); see 3 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 57:19, at 74 (7th ed. 2008) ("The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory."). That rule rests on "the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States* v. *Nashville, Chattanooga & St. Louis Ry.*, 118 U.S. 120, 125 (1886).

The rule applies even when the relevant "agency" is a federal court and the underlying proceeding is a criminal case. In *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), this Court held that a district court's failure to conduct a pretrial detention hearing within the time limits specified by the Bail Reform Act of 1984, 18 U.S.C. 3142(e) and (f), did "not defeat the Government's authority to seek detention." 495 U.S. at 717. While noting that "the time limitations of the Act must be followed with care and precision," the Court observed that the Act was "silent on the issue of a remedy for violations" of those limits. *Id.* at 716. The Court then explained that "[t]here is no presumption or general rule

that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Id.* at 717. In the context of the duty to hold a timely bail hearing, the Court held that "the sanction for breach is not loss of all later powers to act." *Id.* at 718. Instead, noting that "[a]utomatic release contravenes the object of the statute," and recognizing that some errors in the application of statutory time limits are "inevitable," the Court saw "no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants" whenever such errors occur. *Id.* at 720-721.

The reasoning of *Montalvo-Murillo* is directly on point here. Like the Bail Reform Act, the MVRA requires action within a specified time limit, but it is silent on any penalty for failure to meet that time limit. And like the Bail Reform Act, the MVRA serves important public purposes, which petitioner's reading would frustrate by conferring a windfall on defendants at the expense of victims. As in *Montalvo-Murillo*, the district court's failure to act on time therefore does not mean that it is powerless to act at all.

Petitioner attempts (Br. 27 n.13) to distinguish *Montalvo-Murillo* on the ground that pretrial detention is a "regulatory device," while restitution is "punitive." Even assuming that petitioner is correct, he fails to explain why the distinction should matter. As the Court noted in *Montalvo-Murillo*, bail determinations involve "a vital liberty interest." 495 U.S. at 716. The Court's holding in that case rested not on an assumption that the interests at stake were unimportant but rather on a recognition that a statutory deadline for action does not

imply loss of authority to act when the deadline is missed. Petitioner's further observation (Pet. Br. 27 n.13) that the MVRA involves a "final determination" rather than a "preliminary inquiry" also fails to distinguish *Montalvo-Murillo*. The deprivation that pretrial detention entails is "final" in the sense that liberty once lost cannot later be restored. And many of this Court's prior cases concluding that an agency retains the power to act after a time limit for mandatory action has expired likewise involved final actions. See, *e.g.*, *Peabody Coal*, 537 U.S. at 153; *Brock*, 476 U.S. at 256 & n.3.

2. Reading Section 3664(b)(5) to disable a court from ordering restitution once the 90-day deadline has passed would conflict with the court's fundamental obligation under the statute. Section 3663A states that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a covered offense], the court shall order * * * restitution." 18 U.S.C. 3663A(a)(1). In light of that provision, the court of appeals correctly held that the 90-day deadline "can be reasonably understood only as a subsidiary command to the Act's primary and overriding directive that restitution *must* be ordered for certain crimes." Pet. App. 10a.

Petitioner suggests (Br. 19 n.8) that giving that directive its ordinary meaning "makes no sense because it renders Section 3663A(d), which requires compliance with Section 3664, meaningless." But Section 3663A(d) merely provides that "[a]n order of restitution under [Section 3663A] shall be issued and enforced in accordance with Section 3664," which specifies the procedures governing the issuance of restitution awards. Those procedural provisions are not rendered "meaningless" simply because a court can award restitution after missing Section 3664(d)(5)'s deadline (or failing to comply

perfectly with any of the other specified rules). See *Montalvo-Murillo*, 495 U.S. at 717-718 ("reject[ing] the contention that if there has been a deviation from the time limits of [a] statute," the resulting proceeding is not one "conducted 'pursuant to'" the procedural provisions of that statute). Instead, the procedural provisions retain meaning because they notify the court, the parties, and the victim of their respective roles in determining restitution.

In particular, the Section 3664(d)(5) deadline has meaning because it imposes a duty on district judges to order restitution within the statutory time limit. Although there may be cases, such as this one, in which court misses the deadline, "district judges can be presumed to insist upon compliance with the law," and therefore it is not appropriate to "invent a remedy to satisfy some perceived need to coerce the courts * * * into complying with the statutory time limits." *Montalvo-Murillo*, 495 U.S. at 721; see *Mickens* v. *Taylor*, 535 U.S. 162, 173 (2002) (rejecting the proposition that "there must be a threat of sanction (to wit, the risk of conferring a windfall upon the defendant) in order to induce 'resolutely obdurate' trial judges to follow the law") (quoting *id.* at 208 (Souter, J., dissenting)); see also *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1990) ("Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements.").

Should a district court refuse for some reason to comply with its obligation to order restitution within the Section 3664(d)(5) time limit, it would be violating a clear duty, and an appellate court could issue a writ of mandamus to compel it to act. See *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380-381 (2004). Indeed, 18

U.S.C. 3771 gives crime victims a specific statutory right to seek a writ of mandamus to correct a violation of their rights to "full and timely restitution" and to "proceedings free from unreasonable delay." 18 U.S.C. 3771(a)(6), (7) and (d)(3). Thus, Section 3664(d)(5) remains meaningful even though its violation does not deprive the district court of the power to order restitution.

B. Petitioner's Interpretation Of Section 3664(d)(5) Disregards The Statutory Context

This Court has emphasized that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Here, an examination of the MVRA as a whole confirms that the district court retains power to order restitution even if it misses the 90-day deadline of Section 3664(d)(5).

1. The MVRA is one of a series of enactments that have dramatically altered the role of restitution in federal criminal cases in the last 30 years, with the system changing from one in which victims were rarely afforded any restitution to one in which full restitution is often mandatory. The victim's role in the sentencing process has likewise been transformed. While previously viewed as mere bystanders, victims are now participants who have identifiable rights that both the government and the courts are bound to protect.

Congress began effecting that transformation in 1982, with the Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291, 96 Stat. 1248. That statute permitted federal courts, when sentencing defendants convicted of certain offenses, to order restitution in addition to any other penalty authorized by law. 18 U.S.C.

3579(a)(1) (1982). Since then, Congress has continued to expand the availability of restitution in the federal system. Most significantly, in 1996, Congress adopted the MVRA, which made restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. 18 U.S.C. 3663A(a)(1), 3664(f)(1)(A). And it reiterated and expanded upon victims' rights in the Crime Victims' Rights Act of 2004, Pub. L. 108-405, Tit. I, § 102(a), 118 Stat. 2261 (18 U.S.C. 3771), which, as noted above, affords victims "[t]he right to full and timely restitution as provided in law," 18 U.S.C. 3771(a)(6), and gives them the ability to enforce those rights through mandamus.

As a result of those enactments, federal law now contains a detailed procedural framework intended to afford most identifiable victims full restitution at sentencing. After a conviction or guilty plea, the government must provide the probation officer with a list of known victims and suggested restitution amounts "not later than 60 days prior to the date initially set for sentencing." 18 U.S.C. 3664(d)(1). The victims may submit additional information about their losses directly to the probation officer. 18 U.S.C. 3664(d)(2)(A)(iii) and (v). Both the probation officer and the government must communicate with the victims about the restitution process, advising them of the time and place of the sentencing hearing and their opportunity to submit loss information. 18 U.S.C. 3664(d)(1) and (2). And the defendant must provide the probation officer with an affidavit "fully describing [his or her] financial resources." 18 U.S.C. 3664(d)(3).

The probation officer must then "conduct an investigation and submit a report that contains sufficient information for the court to order restitution." Fed. R. Crim.

P. 32(c)(1)(B); see 18 U.S.C. 3664(a). Once the probation officer has completed the report, the court "may require additional documentation or hear testimony," 18 U.S.C. 3664(d)(4), or it may refer the matter to a magistrate judge or special master. 18 U.S.C. 3664(d)(6). If that process fails to identify an "ascertainable" victim loss "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." 18 U.S.C. 3664(d)(5).

The district court must then order "restitution to each victim in the full amount of each victim's losses," and "without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A) and (2). Once entered, a restitution order can be modified in a number of specified ways. See 18 U.S.C. 3664(*o*). Of particular relevance here, a victim has 60 days from the discovery of "further losses" to petition for an amended restitution order, and the victim may obtain such an order "upon a showing of good cause" for failing to include such losses in the initial claim. 18 U.S.C. 3664(d)(5). In addition, the district court may adjust the payment schedule if the defendant's economic circumstances change. 18 U.S.C. 3664(k).

2. Viewed as a whole, the MVRA makes clear that securing an award of full restitution to all identifiable victims is now an integral part of federal sentencing. Thus, restitution must be ordered even when the defendant's financial situation makes the victim's receipt of actual compensation doubtful, 18 U.S.C. 3664(f)(1)(A); when the victim declines to cooperate in obtaining restitution, 18 U.S.C. 3664(g)(1); when the victim chooses not to personally receive any restitution, 18 U.S.C.

3664(g)(2); or when the victim has already been compensated through another source, 18 U.S.C. 3664(f)(1)(B).

Given that statutory background, it would be highly anomalous if Section 3664(d)(5) were construed to mean that a district court's delay in ordering restitution extinguishes the court's power to make that order, with a concomitant denial of a victim's rights. Petitioner's interpretation of Section 3664(d)(5) would have the perverse consequence of allowing a district court's erroneous delay in complying with its obligations to confer a windfall on defendants at the expense of the societal goals furthered by restitution and of the victims the statute was enacted to protect.

3. Petitioner emphasizes (Br. 20-21) that the second sentence of Section 3664(d)(5) permits a victim who discovers additional losses to petition the court for an "amended restitution order" within 60 days. According to petitioner (Br. 21), that provision would be unnecessary if Section 3664(d)(5) did not deprive a court of the power to enter a restitution order more than 90 days after sentencing. That is incorrect. Once the district court enters a restitution order, the order is final, see 18 U.S.C. 3664(*o*), and therefore the second sentence of Section 3664(d)(5) is necessary to give the court continuing authority to amend the order. By contrast, when no order has been issued, no statute divests the district court of its obligation under Section 3663A to impose restitution. Indeed, far from supporting petitioner's claim, the second sentence of Section 3664(d)(5) demonstrates that Congress intended for *all* of the victim's losses to be compensated by the defendant, even when doing so requires an amended restitution order, unless the need for such an amended order was the fault of the victim. Congress's desire that victims receive full com-

pensation is inconsistent with petitioner's claim that a victim should forfeit any claim to restitution if the district court is dilatory.

C. The Legislative History Of The MVRA Confirms That The Lapse Of The Section 3664(d)(5) Deadline Does Not Defeat A Victim's Right To Restitution

Because the statutory language compels the interpretation adopted by the court of appeals, there is no need for this Court to resort to legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989). Nonetheless, the legislative history of the MVRA serves to further refute petitioner's interpretation. That history demonstrates what is apparent from Section 3663A: Congress's "intent that courts order full restitution to all identifiable victims of covered offenses." S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995) (*Senate Report*). The result petitioner seeks here would frustrate that intent.

The Senate Judiciary Committee observed in discussing Section 3664(d)(5) that "the need for finality and certainty in the sentencing process dictates that [the restitution] determination be made quickly, but also recognizes that justice requires that this particular aspect of the criminal sentence be subject to review in the light of changed circumstances." *Senate Report* 20. The Committee went on to emphasize that "restitution must be considered a part of the criminal sentence, and * * * justice cannot be considered served until full restitution is made." *Ibid*. As the First Circuit has observed, the Committee's discussion "did not relate the 90-day requirement to the interests of defendants" in avoiding delay. *United States* v. *Cheal*, 389 F.3d 35, 49 (2004). Indeed, in discussing the Committee's efforts to create

a "streamlined process" for awarding restitution, the report explained that those procedures would be lawful because "[t]he 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." *Senate Report* 20.

Thus, the Senate Judiciary Committee report confirms that the MRVA was designed to serve the interests of justice, which Congress equated with the swift award of full compensation to victims. Congress displayed no interest in protecting *defendants* from delays in awarding restitution, let alone any intent to award defendants a windfall at the expense of victims when such delays occur. Accordingly, as several courts of appeals have observed, the history suggests that the MVRA's "intended beneficiaries are the victims, not the victimizers." *Cheal*, 389 F.3d at 49 (quoting *United States* v. *Grimes*, 173 F.3d 634, 639 (7th Cir. 1999)); see *United States* v. *Zakhary*, 357 F.3d 186, 191 (2d Cir.) ("[T]he purpose behind the statutory ninety-day limit on the determination of victims' losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of defendants' assets."), cert. denied, 541 U.S. 1092 (2004).[2]

[2] Petitioner relies (Br. 39-41) on the rule of lenity, but that rule has no application here. The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," thereby ensuring that individuals have "'fair warning concerning conduct rendered illegal.'" *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). Section 3664(d)(5), however, is a procedural regulation, not a criminal statute, and it does not render any conduct illegal or set the substantive boundaries of punishment. It therefore is not subject to the rule of lenity. In any event, even where the rule of lenity is otherwise relevant,

D. Petitioner's Reliance On Cases Involving "Claims-Processing" Rules Is Misplaced

In the court of appeals, petitioner argued that the district court lost jurisdiction to enter a restitution order once 90 days had elapsed after sentencing. Pet. App. 9a. The court of appeals correctly rejected that argument, determining "that the 90-day deadline set by [Section] 3664(d)(5) is [not] jurisdictional." *Ibid.* As this Court has explained, "jurisdiction" refers only to "the courts' statutory or constitutional *power* to adjudicate [a] case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004); cf. *Bowles* v. *Russell*, 551 U.S. 205, 210 (2007) (discussing this Court's "longstanding treatment of statutory time limits *for taking an appeal* as jurisdictional") (emphasis added).

Petitioner now recognizes that Section 3664(d)(5) is not jurisdictional, arguing instead (Br. 28) that it is "a mandatory claims-processing rule." That is simply another way of restating petitioner's conclusion that Section 3664(d)(5) prohibits a district court from entering a restitution order more than 90 days after sentencing. For the reasons explained above, petitioner's interpretation of Section 3664(d)(5) is contrary to its text, statutory context, and legislative history.

In attempting to portray Section 3664(d)(5) as a "claims-processing statute," petitioner argues (Br. 24-

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it is reserved for cases involving a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived, * * * [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). Because the statutory language is clear, there is no need to resort to the rule of lenity here.

25) that it places upon the government, as "the party that seeks a restitution order," the responsibility of obtaining that order within the statutory time limits. That reasoning rests on a misunderstanding of the system Congress created for awarding restitution to victims of federal crimes. Restitution is not an alternative penalty that the government has the option of requesting at sentencing. It is a right of the victim, which the court must award unless extraordinary circumstances make doing so impracticable. 18 U.S.C. 3771(a)(6); see 18 U.S.C. 3663A(c)(3). Nor is the government solely responsible for ensuring an award of restitution: district courts share an important part of that responsibility. For example, both the government and the district court (through its probation officer) must communicate with the victims and collect information sufficient to order restitution. 18 U.S.C. 3664(a), (d)(1) and (2)(A). And the court is not limited to the information the government provides but "may require additional documentation or hear testimony." 18 U.S.C. 3664(d)(4). In addition, victims themselves may participate directly in sentencing proceedings by submitting information to the probation officer on the extent of their losses, 18 U.S.C. 3664(d)(2)(A)(iii) and (vi), by being heard at sentencing, 18 U.S.C. 3771; Fed. R. Crim. P. 32(c)(1)(B) and 60(a)(3), and by petitioning the court directly should an amended restitution order be appropriate because of additional losses or a change in the defendant's economic circumstances, 18 U.S.C. 3664(d)(5) and (k).

Accordingly, petitioner errs in arguing that restitution is merely a "claim" that the government "processes" at sentencing. The government must seek restitution on the victim's behalf, and the court (except in rare circumstances not applicable here) must award it. If the gov-

ernment fails to provide the probation officer with a listing of the amounts subject to restitution, it does not relieve the probation officer of the independent responsibility to "submit a report that contains sufficient information for the court to order restitution." Fed. R. Crim. P. 32(c)(1)(B); see 18 U.S.C. 3664(a). Nor does it allow the court to neglect its own responsibility to award such relief to victims. 18 U.S.C. 3663A(a)(1); see, *e.g.*, *Grimes*, 173 F.3d at 640.

Significantly, Section 3664(d)(5) does not specify that the government must obtain any order of restitution within 90 days of sentencing. Instead, it requires "the *court* [to] set a date for the final determination of the victim's losses" within that time frame. (emphasis added). Alhough it is no doubt good practice for all parties, including the government, to remind the court of its duty to act within the 90-day period, nothing in Section 3664(d)(5) requires the government to file a motion requesting compliance with the time limit.[3]

That feature of Section 3664(d)(5) serves to distinguish the cases on which petitioner chiefly relies (Br. 23-

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[3] In any event, if Section 3664(d)(5)'s time limit were truly a "rigid" limitation on the court's authority in the sense that petitioner contemplates (Br. 24), the government's filing of such a motion would not suffice to preserve the victim's right to restitution; the court would actually have to make a timely award. Accordingly, petitioner's concession (Br. 35 n.16) that the timely filing of a motion to comply with the deadline would, through tolling principles, permit the entry of a restitution order more than 90 days after sentencing fatally undermines the logic of his argument (Br. 27) that Section 3664(d)(5) is a "mandatory claims-processing rule." True claims-processing rules are "inflexible" and "unalterable" when a party objects, as petitioner recognizes. Br. 24. Petitioner's acknowledgment that tolling must apply here concedes that Congress cannot have intended the passing of the 90-day deadline to defeat its paramount objective of awarding restitution.

24), each of which involved a rule setting a deadline by which a *litigant* must file a particular pleading or claim. See *Carlisle* v. *United States*, 517 U.S. 416 (1996) (motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c)(1)); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam) (motion for a new trial under Federal Rule of Criminal Procedure 33); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (objection to a debtor's discharge under Federal Rule of Bankruptcy Procedure 4004(a)). No such rule is involved here. Neither the government nor the victim defaulted on any statutory requirement that Congress set as a precondition to restitution. Instead, the district court failed to perform its "mandatory obligation * * * on behalf of the public" to enter a restitution order within 90 days of sentencing. Pet. App. 15a. That error did not deprive the district court of its authority to act but merely delayed the victim's receipt of the award of restitution to which he was entitled.

E. Reading Section 3664(d)(5) To Penalize Victims For A Delay In Ordering Restitution Is Not Necessary To Protect The Orderly Administration Of Justice

Petitioner asserts (Br. 28) that the court of appeals' interpretation of the MVRA "undermine[s] the orderly administration of criminal justice" by preventing the sentencing process from achieving finality, promoting piecemeal appeals, and interfering with the administration of corrections. Petitioner's arguments amount to a claim that reading the statute as written would yield bad policy, but that is no basis for disregarding the plain statutory text. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In any event, petitioner's policy concerns are unfounded.

Petitioner contends (Br. 28-31) that the 90-day time limit in Section 3664(d)(5) must be interpreted to ensure that a final appealable judgment is issued within a reasonable time after sentencing. The premise of his argument is that a defendant cannot appeal the judgment in a criminal case until the district court has made a final determination about restitution. That is incorrect. Instead, as soon as a district court imposes sentence and issues a judgment reflecting that sentence, the judgment is appealable. See Fed. R. App. P. 4(b); *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."). That is true even where, as here, the sentence leaves the determination of restitution open. See *Cheal*, 389 F.3d at 51 (holding that a sentence that "impose[s] a restitution obligation" is a final, appealable judgment even if it does not specify the amount of restitution). It simply is not the case, as petitioner appears to assume, that a sentence—hence, a final judgment—must await fixing the amount of restitution. Indeed, Section 3664(d)(5) directly refutes this theory by providing that the "final determination of the victim's losses" may sometimes take place "after sentencing."

Contrary to petitioner's suggestion (Br. 31-32), the filing of a notice of appeal does not divest the district court of jurisdiction to fix the amount of restitution. Instead, under *Griggs* v. *Provident Consumer Discovery Co.*, 459 U.S. 56 (1982), the notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Id.* at 58. If the judgment under appeal does not finally resolve the amount of restitution, the district court retains jurisdiction to determine that amount. In that respect, the determination of the amount of restitution is analogous to the determination

of the amount of attorney's fees to be awarded to a prevailing party. This Court has held that a judgment may be final even if the district court has not yet made a determination of fees, *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), and the district court retains jurisdiction over that question even if the losing party has filed a notice of appeal.

Petitioner points out (Br. 31) that there is a potential for multiple appeals when the amount of restitution is determined after sentencing. That may be true, but the burden imposed by such appeals is likely to be minimal. The victim's losses will frequently be ascertainable before sentencing, and the court need not invoke Section 3664(d)(5) at all. And in the majority of cases in which the court does invoke that provision, it can be expected to comply with the law and issue an amended judgment setting forth a "final determination of the victim's losses" within 90 days of sentencing. Federal appellate courts currently take more than a year, on average, to resolve a criminal appeal. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 2008 Annual Report of the Director* 107 (2009). Thus, should the defendant wish to appeal both the original judgment and the determination of the amount of restitution, the court of appeals will likely be able to consolidate the cases.

In any event, the MVRA places the goal of awarding restitution to victims above any policy of avoiding piecemeal criminal appeals. After all, even under petitioner's interpretation, the statute contains the potential for piecemeal appellate litigation because the second sentence of Section 3664(d)(5) permits victims to reopen restitution awards when they discover further losses. Accordingly, the interest in avoiding an occasional piece-

meal appeal cannot justify interpreting the statute to deprive blameless victims of their right to compensation simply because of timing errors by district courts.

Petitioner also complains (Br. 32-33) that the interpretation adopted by the court of appeals "produces problems for the administration of corrections" because it may require that a defendant be returned to court after he has already been committed to the custody of the Bureau of Prisons. But petitioner does not dispute that Section 3664(d)(5) allows a district court to make a final determination regarding restitution after sentencing. Assuming that the defendant must be returned to court for that final determination to occur, the Bureau of Prisons will incur the same burden regardless whether the 90-day period has expired. Thus, petitioner's argument reduces to a claim that restitution should be finally imposed at sentencing, or not at all. Whatever the merits of that view as a policy matter, Congress has adopted a different approach.

F. Because The Delay In Awarding Restitution Did Not Harm Petitioner, This Case Does Not Present The Question Whether Any Remedy Exists For Prejudicial Delay

1. Nearly all of the courts of appeals to consider the question have agreed with the court below that district courts retain the authority to order restitution after the 90-day period of Section 3664(d)(5) has expired, at least in the absence of any prejudice to the defendant. *United States* v. *Bogart*, 576 F.3d 565, 573 (6th Cir. 2009) ("[T]he district court's error in failing to comply with [Section] 3664(d)(5) was harmless."); *United States* v. *Balentine*, 569 F.3d 801, 807 (8th Cir. 2009) (affirming order where defendant did "not contend that entry of the untimely restitution order impeded her ability to

dispute the amount of restitution"), petition for cert. pending, No. 09-6760 (filed Sept. 28, 2009); *United States* v. *Marks*, 530 F.3d 799, 812 (9th Cir. 2008) ("[B]ecause the procedural requirements of section 3664 were designed to protect victims, not defendants, the failure to comply with them is harmless error absent actual prejudice to the defendant.") (citations omitted); *United States* v. *Johnson*, 400 F.3d 187, 199 (4th Cir.) ("[T]he failure to conform with the ninety-day limit constitutes harmless error absent prejudice."), cert. denied, 546 U.S. 856 (2005); *Zakhary*, 357 F.3d at 191 ("[A] district court's failure to determine identifiable victims' losses within ninety days after sentencing, as prescribed by [Section] 3664(d)(5), will be deemed harmless error to the defendant unless he can show actual prejudice from the omission."); cf. *Cheal*, 389 F.3d at 48-49 & n.15 (reviewing for plain error a violation of the 90-day limit to which the defendant did not object in the district court); but see *United States* v. *Maung*, 267 F.3d 1113 (11th Cir. 2001).

Some courts of appeals have suggested that a remedy may be available when a delay in ordering restitution actually prejudices a defendant by, for example, depriving him of evidence that he might have used to defeat a restitution claim. See, *e.g.*, *United States* v. *Moreland*, 509 F.3d 1201, 1224-1225 (9th Cir. 2007), vacated on other grounds, 129 S. Ct. 997 (2009); *Johnson*, 400 F.3d at 199. As the court below correctly concluded, this case presents no occasion to consider what remedy would be appropriate in such a case, because petitioner "does not purport to identify any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner." Pet. App. 21a.

Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Presumptively, Rule 52(a) applies to "*all* errors where a proper objection is made." *Neder* v. *United States*, 527 U.S. 1, 7 (1999). As this Court observed in *Montalvo-Murillo*, Rule 52's "principle of harmless-error analysis * * * is the governing precept in most matters of criminal procedure." 495 U.S. at 722. Thus, the Court in that case rejected the suggestion that a delay in holding a bail hearing should cause the release of a defendant otherwise subject to pretrial detention, noting that such release "has neither causal nor proportional relation to any harm caused by the delay in holding the hearing." *Id.* at 721. Because "the noncompliance with the timing requirement had no substantial influence on the outcome of the [bail] proceeding," the Court held that "the detention was harmless." *Id*. at 722. That reasoning is fully applicable here.

Petitioner attempts (Br. 45 n.18) to distinguish *Montalvo-Murillo*, but his claim here parallels the argument advanced and rejected in that case. Like Montalvo-Murillo, petitioner contends that a delay in holding a hearing deprived the court of its authority to act. Moreover, the result petitioner seeks—complete denial of restitution—is every bit as much of a "windfall" as the pretrial release Montalvo-Murillo requested. 495 U.S. at 720. Finally, petitioner is no more able than Montalvo-Murillo to show any harm from the delay. Indeed, petitioner acknowledged that he knew about "the total [amount of restitution] within the 90-day period," and he could not articulate any prejudice from the delay in awarding that amount. J.A. 64. Accordingly, "it is clear that the noncompliance with the timing require-

ment had no substantial influence on the outcome of the [restitution] proceeding," making the delay in awarding restitution "harmless." *Montalvo-Murillo*, 495 U.S. at 722.

2. In arguing that the delay in this case was not harmless, petitioner asserts (Br. 43) that the restitution award was "illegal" because the district court "lacked statutory authorization" to enter it. In petitioner's view (Br. 42), "[b]ecause an illegal sentence always affects substantial rights, its imposition cannot be harmless." See Br. 44 ("[A]n illegal sentence cannot be treated as harmless."). To the extent petitioner's argument assumes that sentencing errors are always prejudicial, it rests on a flawed premise, given that this Court has repeatedly applied harmless-error analysis to errors involving sentencing. See, *e.g.*, *Washington* v. *Recuenco*, 548 U.S. 212, 218-222 (2006); *Jones* v. *United States*, 527 U.S. 373, 401 (1999); *Williams* v. *United States*, 503 U.S. 193, 201-203 (1992). More importantly, petitioner fails to identify any statutory provision that prohibited the district court from awarding restitution in this case. To the contrary, as explained above, Section 3663A mandated an award of restitution. Thus, the award does not constitute an "illegal sentence."[4]

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[4] Courts have used the phrase "illegal sentence" to refer to a sentence that is substantively unauthorized by statute because, for example, it exceeds the maximum term authorized. See, *e.g.*, *United States* v. *Barwig*, 568 F.3d 852, 858 (10th Cir. 2009); *United States* v. *Vera*, 542 F.3d 457, 459 (5th Cir. 2008). A court may not order this kind of sentence regardless of the procedures it employs. But when a court enters a lawful sentence through procedurally flawed means, it is fully amenable to harmless-error analysis, as *Recueno*, *Jones*, and *Williams* confirm.

Section 3664(d)(5) did require the district court to "set a date for the final determination of the victim's losses" within 90 days of sentencing. Thus, error undeniably occurred in this case. But the error was simply the failure to hold the final hearing on restitution within the statutory time limit. Accordingly, the only prejudice that matters is harm resulting from the *timing* of the restitution award. No such harm is even alleged. See NACDL Amicus Br. 4-11 (suggesting various ways in which delay might prejudice a hypothetical defendant, but without arguing that any such prejudice occurred in this case).

3. Nor is there any merit to petitioner's argument (Br. 46-48) that prejudice must be presumed in his case because certain other rules regulating timing in court proceedings are not subject to harmless-error analysis. Section 3664(d)(5) is not a "statute of limitations," because it does not bar the assertion of claims after a specified period. See *Black's Law Dictionary* 1546 (9th ed. 2009). Nor is it intended "primarily to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). For similar reasons, Section 3664(d)(5) is not comparable to Federal Rule of Criminal Procedure 29(c), which sets time limits for bringing a motion for a judgment of acquittal. That rule imposes a deadline on a party to the proceeding, not on the court. See p. 24, *supra*. Petitioner's analogies therefore suffer from the same flaw as his effort to show that Section 3664(d)(5) is a "claims-processing" rule.

Finally, the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, does not assist petitioner, but in fact serves to illustrate why his claim fails. That statute requires a criminal defendant's trial to begin within 70 days of his indictment

or initial appearance. 18 U.S.C. 3161(c)(1). As petitioner points out (Br. 46-47), a failure to observe that time limit may result in a dismissal of the indictment. 18 U.S.C. 3162(a)(2). But courts have not inferred the remedy of dismissal based solely upon the statutory time requirements, as petitioner asks this Court to do. To the contrary, Congress specified that remedy. See *ibid.* ("If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant."). The Speedy Trial Act illustrates that when Congress intends to confer a benefit on a criminal defendant based upon a district court's failure to act within a specified time, it says so clearly. The failure to include any comparable provision in the MVRA confirms that Congress did not intend for restitution to be denied merely because the order imposing it was delayed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

ELIZABETH D. COLLERY
Attorney

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APPENDIX

1. 18 U.S.C. 3663A provides:

Mandatory restitution to victims of certain crimes

(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.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(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—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses 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.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3664 provides:

Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and 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. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) 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 in-

clude such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims

Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the

abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(*o*) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any

person against the United States or any officer or employee of the United States.

3. 18 U.S.C. 3771 provides:

Crime victims' rights

(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) RIGHTS AFFORDED.—

(1) IN GENERAL.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) HABEAS CORPUS PROCEEDINGS.—

(A) IN GENERAL.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) ENFORCEMENT.—

(i) IN GENERAL.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) MULTIPLE VICTIMS.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) LIMITATION.—This paragraph relates to the duties of a court in relation to the rights of a

crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) DEFINITION.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) BEST EFFORTS TO ACCORD RIGHTS.—

(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) ENFORCEMENT AND LIMITATIONS.—

(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in sub-

section (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's

denial of any crime victim's right in the proceeding to which the appeal relates.

(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) DEFINITIONS.—For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years

of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) PROCEDURES TO PROMOTE COMPLIANCE.—

(1) REGULATIONS.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of

Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.