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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The essence of the Government's argument is that restitution under the Mandatory Victims Restitution Act (MVRA) can be imposed at any time, without regard to either the deadlines imposed by the MVRA itself or the law regarding finality in criminal adjudication. The Government acknowledges 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.'" U.S. Br. 10 (quoting Petr. Br. 12). But it then argues the opposite, claiming that a court can change a defendant's criminal sentence to impose restitution long after that sentence has become final.

The Government's argument is unpersuasive. To be sure, the MVRA requires restitution as part of a defendant's punishment. But it is no different from other mandatory sentencing provisions; the law may require a certain punishment, but that punishment must be properly imposed. As this Court confirmed in *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), when a court fails to impose a mandatory sentence (there, a 25-year, rather than a 10-year, prison term, *id.* at 2562-63), that error can be corrected only by following the "dispositive direction regarding sentencing errors" provided by Congress. *Id.* at 2566. A court cannot "'sally forth' on [its] own motion," *id.* at 2565 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of reh'g en banc)), to correct errors in disregard of clear statutory directives, compounding its initial error with a second one.

In this case, the district court sallied forth to cure its initial error by imposing restitution long after the statutory deadline. That second error – the only error before this Court – requires reversal.

The Government's approach not only misreads the MVRA, but it dramatically undermines existing doctrine regarding finality and appealability in criminal cases. The Government's proposal for piecemeal litigation is unsupported by precedent, offers no outer boundary on a court's ability to increase a defendant's sentence, and creates constitutional as well as practical difficulties. For all these reasons, it must be rejected.

I. THE "NOTWITHSTANDING" CLAUSE OF 18 U.S.C. § 3663A(a)(1) DOES NOT OVERRIDE THE REQUIREMENTS OF THE MVRA ITSELF.

The Government's primary argument is that the text of the MVRA elevates the duty to impose restitution over all other obligations in the Act. The first sentence of Section 3663A begins "Notwithstanding any other provision of law . . . ." 18 U.S.C. § 3663A(a)(1). The Government argues that these words mean that courts retain the power to impose restitution even after the 90-day deadline of Section 3664(d)(5) has expired. U.S. Br. 13. The Government's interpretation fails for two principal reasons. First, it misreads the notwithstanding clause, and second, it proves too much: if taken seriously, it would undermine the entire statutory structure.

1. The Government focuses on the word "notwithstanding" to the exclusion of the word "other."

The phrase "notwithstanding any *other* provision of law" means what it says. If any *other* law conflicts with Section 3663A, the MVRA supersedes *that* law. For example, absent Section 3663A(a)(1), a court's restitution decisions would be discretionary. *See* 18 U.S.C. § 3663 (providing that courts "may order" restitution in specified cases); *id.* § 3553 (directing courts to consider a number of factors in determining the sentence to be imposed); *United States v. Gordon K.*, 257 F.3d 1158, 1162 n.2 (10th Cir. 2001). Section 3663A(c) removes that discretion for cases within its ambit. So courts can no longer, for example, consider the defendant's ability to pay or the interests of third parties other than the victim.

But "notwithstanding any other provision of law" does not mean "notwithstanding *this* provision." Section 3663A *itself* requires compliance with the procedures in Section 3664. 18 U.S.C. § 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."). As this Court recently reiterated, "[a] specific provision . . . controls one[s] of more general application." *Bloate v. United States*, No. 08-728, slip op. at 10 (Mar. 8, 2010) (alterations in original) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991)). Here, the specific language of Section 3663A(d) requiring compliance with Section 3664 controls over the general language of Section 3663A(a)(1).

The Government's reading also ignores the words that immediately follow the "notwithstanding" clause: courts are directed to impose restitution "when sentencing a defendant." 18 U.S.C.

§ 3663A(a)(1). Under the Government's reading, the statute should have stated "when sentencing a defendant or at any time thereafter." But Congress did not say that. This Court should not insert new words into the MVRA while disregarding existing ones.

2. Taken seriously, the Government's interpretation of the "notwithstanding" clause proves too much. The Government provides no rationale for singling out the 90-day deadline from other mandatory provisions of the MVRA. If the Government is right about courts' authority – indeed, obligation – to provide restitution after the 90-day deadline has passed, then why does it concede that the 60-day deadline's restrictions in Section 3664(d)(5) *do* bind the district court? *See* U.S. Br. 18. Similarly, if the Government's reading is correct, a court should order restitution even if the Government fails to meet its burden of proof under Section 3664(e). And why stop at overriding deadlines within the MVRA? For example, the Government's reading would require courts of appeals to disregard failures to file timely notices of appeal if restitution is at stake. The "notwithstanding" clause cannot be understood to override everything. Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

II. A MANDATORY RESTITUTION TERM, LIKE ANY OTHER MANDATORY PUNISHMENT, CAN BE IMPOSED ONLY WITHIN THE TIME AUTHORIZED BY LAW.

The Government is simply wrong to claim that Section 3664(d)(5) "is a procedural regulation, not a criminal statute." U.S. Br. 20 n.2. Congress located the MVRA in Title 18 ("Crimes and Criminal Procedure"). The statute repeatedly refers to "sentence[s]" and "sentencing." *See, e.g.*, 18 U.S.C. § 3663A(a)(1), (b)(1)(B)(i)(II), (c)(1), (c)(3)(B); *id.* § 3664(d)(1), (d)(2)(A)(iv), (d)(5), (*o*), (*o*)(1). The foundation of this Court's decision in *Hughey v. United States*, 495 U.S. 411 (1990), is that restitution operates, and is intended to operate, as part of a criminal sentence. *See* Petr. Br. 27 n.13, 39; J.A. 48 (denominating the restitutionary term of a judgment a "criminal monetary penalt[y]").[1]

Federal criminal sentences are subject to a variety of constraints. These include strict time limits on courts' ability to amend or correct sentences once pronounced. The MVRA modifies those limits only in a narrow way. Its timing requirements can easily be met, as they are in virtually every case. In this case,

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[1] The courts of appeals overwhelmingly agree that restitution is a criminal punishment. *See, e.g.*, *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006), *cert. denied*, 549 U.S. 1316 (2007); *United States v. Perez*, 514 F.3d 296, 298 (3d Cir. 2007); *United States v. Hayes*, 32 F.3d 171, 172 (5th Cir. 1994); *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005); *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002); *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir.), *cert. denied*, 525 U.S. 975 (1998).

however, they were not. That the MVRA is mandatory provides no excuse for these failures.

1. Federal law refers to the sentence for an offense in the singular. *See, e.g.*, 18 U.S.C. § 3553(a) ("[t]he court shall impose *a* sentence" that complies with various criteria) (emphasis added); Fed. R. Crim. P. 32(k) (the judgment should contain "*the* sentence") (emphasis added). The components of a sentence interact with one another. In determining a sentence "sufficient, but not greater than necessary" to achieve Congress's varied purposes, 18 U.S.C. § 3553(a), a court is directed to consider, among other things, the relationship between any fine it might impose and whatever restitution it will order. *See id.* § 3572(b) (directing a court to "impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution"). Similarly, the amount of harm or loss to the victim (with a few differences) will inform both the recommended length of imprisonment under the Sentencing Guidelines and the amount of restitution. *See* 18 U.S.C. § 3663A(b) (stating that the restitution order turns on "damage to or loss or destruction of property" and "bodily injury"); U.S.S.G. § 2B1.1 (2009) (detailing offense levels based on amount of loss).

2. The Federal Rules of Criminal Procedure provide the framework for imposing a sentence and entering judgment. Following conviction, preparation of a presentence report, and an opportunity to object to the contents of the report, *see* Fed. R. Crim. P. 32(c)-(g), the judge must pronounce sentence on the defendant in open court, Fed. R. Crim. P.

43(a)(3). The court having pronounced sentence, Rule 32(k) directs it to "set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence" in a written judgment. The judge then "must sign the judgment, and the clerk must enter it." *Id.* That sentence constitutes a final judgment.

Once a sentence is imposed, federal law sharply limits judicial authority to correct it. The district court itself has only fourteen days to do so, running from "the oral announcement of the sentence." *See* Fed. R. Crim. P. 35(a), (c). Rule 35 was amended expressly to limit the period within which district courts retain the power to correct a sentence: a prior version of the rule permitted correction "at any time." The "vast majority" of courts of appeals have treated the rule's time limit as jurisdictional. *United States v. Shank*, 395 F.3d 466, 469-70 (4th Cir.) (surveying the caselaw), *cert. denied*, 544 U.S. 1062 (2005).

Federal law also strictly limits the time within which a sentence can be appealed. *See* Fed. R. App. P. 4(b) (defendants must file a notice of appeal "within 14 days," and the Government "within 30 days," after either the entry of judgment or the filing of a notice by the opposing party). These time limits, too, are strictly enforced. *See Coppedge v. United States*, 369 U.S. 438, 441-42 (1962). Absent a timely appeal, the sentence cannot later be corrected (except, under limited circumstances, through the habeas process).

This rule that sentences can be corrected only through the processes Congress has provided operates even in cases involving mandatory terms, as this Court's recent decision in *Greenlaw v. United*

States, 128 S. Ct. 2559 (2008), shows. *Greenlaw* held that neither litigants *nor courts themselves* can correct errors in a defendant's sentence – including the error of failing to impose a required prison term – except through the procedures provided by law. *See id.* at 2569.

3. The MVRA requires that restitution as a criminal punishment be imposed "when sentencing a defendant," 18 U.S.C. § 3663A(a)(1) – not at some other time of the court's, the Government's, or the victim's choosing. Thus, as the Government recognizes, courts will generally impose restitution at the same time that they pronounce the other elements of a defendant's sentence. *See* U.S. Br. 26. But the MVRA provides a limited authorization for courts to change a defendant's sentence to include restitution beyond the 14 days that might be provided by Fed. R. Crim. P. 35(a). If the victim's losses are not yet ascertainable, Section 3664(d)(5) permits the court to nonetheless proceed with the other parts of the sentence, and directs the court to "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." Thus, when a court complies with the MVRA, it will impose restitution "when sentencing a defendant," or within 90 days thereafter. *Id.*

Section 3664(d)(5) also provides a distinctive pathway for amending a restitution order after it has been imposed. If a victim "subsequently discovers further losses," and can show "good cause" for not having included them "in the initial claim for restitutionary relief," he has 60 days to "petition the court

for an amended restitution order." *Id.*[2] But the 90-day and 60-day rules do not mean that Congress silently repealed the limits contained in Fed. R. Crim. P. 35(a) and Fed. R. App. P. 4(b).

4. There are numerous opportunities within the rules to ensure that restitution occurs by the MVRA's deadlines. In this case, neither the Government nor the courts below ever identified any obstacle that would have prevented compliance. U.S. Br. 14, 26; *see also* J.A. 56 (court stating "I'm not sure why we're just getting together today when we had this information back in October").

Instead, there were a series of omissions. Neither the Government nor the probation office met its responsibilities under Section 3664(d)(5) to inform the court "10 days prior to sentencing" that the victim's losses had not yet been ascertained. Only at sentencing did the Government inform the court that the amount had not been determined. J.A. 34-35.

There, the district court announced an intention to "just leave the question of restitution open-ended,"

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[2] Under the MVRA, victims also possess a number of procedural opportunities. *See, e.g.*, 18 U.S.C. § 3664(d)(2) (requiring the probation officer to provide various information to victims and to provide an opportunity for them to submit information about their losses); *id.* § 3664(m)(1)(B) (providing assistance to victims in obtaining the restitution due to them). 18 U.S.C. § 3771, commonly known as the Crime Victims' Rights Act (CVRA), provides victims various rights to participate in the sentencing process. The CVRA recognizes, however, that a victim's "right to full and timely restitution" is only "as provided in law," 18 U.S.C. § 3771(a)(6), thus locating that right within existing practices. *See In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005).

J.A. 35, rather than "set[ting] a date," as Section 3664(d)(5) directs. The Government did not ask the court to set a date, either then or ever. Nor did it seek relief within the time provided by Fed. R. Crim. P. 35(a) for seeking correction after "oral announcement of the sentence," Fed. R. Crim. P. 35(c).

Later, in October 2007, the probation office received additional information regarding the medical bills, and informed the Government and the court that Section 3664(d)(5)'s deadline would run on October 28, 2007. J.A. 52. But the court still failed to set a date, and the Government continued to sit on its hands.

Finally, on October 28, 2007, the August 8, 2007, judgment became final by operation of law. *See* Petr. Br. 29-30. The Government might have appealed that judgment within thirty days, Fed. R. App. P. 4(b)(1)(B), seeking to excuse its inaction until then on the ground that the now-final sentence constituted plain error under Fed. R. Crim. P. 52(b) for not requiring restitution. Again, however, the Government did nothing, allowing the time to file its appeal to expire.

In light of the numerous opportunities to obtain full restitution for the Indian Health Service[3] in compliance with the MVRA, the Government should not now be heard to argue that the district court should have ordered restitution in the face of the MVRA's deadline.

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[3] Contrary to the implication of amicus curiae, *see* Br. of Amicus Curiae Nat'l Crime Victim Law Inst. at 18, the record suggests that the direct victim has not continued to seek restitution. *See* J.A. 27, 34-35.

5. As petitioner pointed out in his opening brief, Section 3664(d)(5) is a claims-processing statute. *See* Petr. Br. 24-28. The Government offers two responses. First, it suggests petitioner did not properly preserve this argument. *See* U.S. Br. 21 (claiming that petitioner instead argued that Section 3664(d)(5) is "jurisdictional"). Second, it suggests that because the Section directs courts (rather than litigants) to meet a deadline, it somehow cannot be a claims-processing rule. *See id.* at 23-24. Neither argument is persuasive.

Petitioner has already explained in detail that his position below is fully consistent with his argument here. Pet. Reply 2-4. Indeed, for all that the Government criticizes petitioner for sometimes using the word "jurisdictional," the Government itself called the 90-day deadline "quasi-jurisdictional" before the court of appeals.[4]

Moreover, the Government's purported distinction between rules directed at litigants and those directed at courts misses the point. While setting a date within 90 days of sentencing for final determination of restitution can be done only by a court, the overall structure of Section 3664(d) shows that the Government is in fact presenting a claim – albeit one for the benefit of the victim. The title of Section 3664 ("Procedure for issuance and enforcement of order of restitution") and the final words of Section 3664(d)(5) (referring to "the initial claim for restitutionary

[4] This language was used by the attorney for the Government at oral argument. Audio recording (MP3): oral argument in *United States v. Dolan*, held by 10th Circuit Court of Appeals, at 18:55 (Jan. 16, 2009).

relief") reinforce this conclusion. Whether a rule declares an "emphatic time prescription[]" that creates a "definite end to proceedings," *Eberhart v. United States*, 546 U.S. 12, 18, 19 (2005) (per curiam) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)), does not depend on whom it binds. The Government thus errs in suggesting that such inflexible timing rules matter only if they set deadlines "by which a *litigant* must file a particular pleading or claim." U.S. Br. 24.

III. THE GOVERNMENT'S APPROACH IS INCONSISTENT WITH A PROPER UNDERSTANDING OF FINALITY, AND IS UNWORKABLE AND CONSTITUTIONALLY PROBLEMATIC.

This Court has repeatedly held that defendants in criminal cases can appeal only from final judgments. *See* Petr. Br. 29. 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) (emphasis added) (quotation marks omitted).

In many cases, as in petitioner's, a defendant is subject to a term of imprisonment, a fine, an order to pay restitution, and more. His sentence is not final until the court determines each of these components. A defendant sentenced to a term of imprisonment by a court that also announces a plan to impose restitution in the future would not satisfy the standard announced in *Parr.* Thus, he could not appeal.

The Government suggests the contrary. Even if mandatory restitution has not yet been imposed, and the judge intends to determine it later, the Government claims that "as soon as a district court imposes [a prison] sentence and issues a judgment reflecting that sentence, the judgment is appealable." U.S. Br. 25. That is wrong. Rule 4(b) and *Berman v. United States*, 302 U.S. 211, 212 (1937) – the authorities the Government cites – permit appeal of *final* judgments. But the sentence cannot be final while one of its component terms remains undecided.

The Government resorts to its novel view of appealability because it recognizes that *not* permitting a defendant to appeal his conviction or incarceration until restitution has been ordered – if there is limitless time to do so – poses practical and constitutional difficulties. But those difficulties can be avoided by adopting petitioner's plain-language interpretation.

1. Requiring that restitution be ordered within 90 days of sentencing simplifies the appeals process. Under petitioner's interpretation, the entirety of a criminal sentence, restitution and all, becomes determinate no later than 90 days after sentencing.[5]

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[5] The potential for later amendment of the order under the 60-day provision of Section 3664(d)(5) does not undermine the finality of the initial judgment. In Section 3664(*o*)(1)(C), Congress provides that a "sentence that imposes an order of restitution is a final judgment notwithstanding the fact" that it can subsequently be "amended under subsection (d)(5)." By contrast, in Section 3664(d)(5), Congress included the word "final" in its articulation of the potential 90-day extension for determining restitution, thereby indicating that it intended for there to be a final, appealable judgment within 90 days after sentencing.

The appellate process is then straightforward. Even a defendant whose restitution order takes place under the 90-day extension might file a notice of appeal after the initial sentencing and then an amended notice of appeal after the restitution order. (The first notice, however, would be premature, and thus protective, not effective.) Once the intended components of the sentence are all imposed, the judgment will be final. *See United States v. Lianidis*, 2010 U.S. App. LEXIS 5737, at *9 n.4 (3d Cir. Mar. 19, 2010) (judgment not final until six months after sentencing, when court entered an agreed order for criminal forfeiture). Under the Government's theory, on the other hand, two separate appeals result, with at best a hope for later consolidation. U.S. Br. 26.

2. The Government never tells this Court when, precisely, final judgment occurs in a case like petitioner's. If it occurs when his sentence of incarceration is reduced to a judgment, then he not only can, but presumably *must*, file his appeal of his conviction and partial sentence within fourteen days under Fed. R. App. P. 4(b). But under the Government's view, the restitution order will *also* be a final judgment, creating two such judgments in a single case. That cannot be. As this Court long ago stated, "[t]o say that there can be *two* final judgments" in a single case "involves a solecism." *Brooklyn Ins. Co. v. Dunn*, 86 U.S. 214, 225 (1874); *see also United States v. Booker*, 436 F.3d 238, 245 (D.C. Cir. 2006) (applying this rule to criminal sentencing); Petr. Br. 31-32.

Worse yet, the Government's position would often generate repetitive, and potentially conflicting, consideration of related issues. As petitioner explained earlier, a victim's losses will often be relevant to calculate both the term of imprisonment and the amount of restitution. *See supra* p. 6. The Government, however, would permit a sentencing court to order an imprisonment sentence or a fine while leaving restitution open indefinitely. An appellate court faced with an appeal involving only the prison sentence might be unable to assess the reasonableness of the sentence as a whole, due to not knowing the amount of restitution, *see* 18 U.S.C. § 3553(a)(7); it would thus be unable to decide the appeal that the Government posits should be filed. From the district court's perspective, problems would arise in ordering restitution after other components of the sentence have been appealed. If a defendant has appealed the issue of loss, as calculated for Guidelines purposes, a district court would be rightly hesitant to order restitution without waiting for the appellate decision. Or the court might discover, when it was too late, that it should have chosen to put the defendant on probation with community confinement and work release, *see* 18 U.S.C. § 3563(b)(11), (19), rather than impose a short sentence of imprisonment, in order to facilitate the earning of money to pay restitution. And under Section 3572(b), as noted, the determination of restitution could retroactively render the fine unlawfully excessive.

Thus, indefinitely severing restitution from the other parts of a sentence creates problems absent from *Budinich v. Becton Dickinson & Co.*, 486 U.S.

196 (1988), the civil case that the Government claims would allow piecemeal litigation here. There, the Court observed that "disassociated" civil judgments – such as judgments on liability and attorney's fees – are separately appealable because one claim "is *independent of*, and *unaffected by*, another . . . with which it happens to be entangled." *Id.* at 202 (emphasis added). But restitution is not independent of other sentencing issues.

3. The Government's attempt to read defendants' rights entirely out of the MVRA is incompatible with the fact that the Act is a criminal sentencing statute. The legislative history undermines the Government's contention that Congress had "no interest in protecting *defendants* from delays in awarding restitution" when it enacted the MVRA. U.S. Br. 20. That is not what Congress said. *See* Petr. Br. 37 (quoting S. Rep. No. 104-179, at 20 (1995)).

Congress sensibly built a firm deadline for restitution orders into the MVRA. Such a deadline serves as a bright-line mechanism for steering clear of constitutional problems. Under the Government's interpretation, there are no limits to how late the sentencing court may order restitution. It is blind to the double jeopardy and due process problems that could result. Due process problems can arise, for example, from erosion of evidence, or from the inability of the defendant to assist in his defense if his place of imprisonment is distant from the sentencing court. *See* Br. of Amicus Curiae Nat'l Ass'n of Crim. Def. Lawyers (NACDL) at 4-14; Petr. Br. 30-33, 37-38. And double jeopardy problems would arise if, as

the Government would apparently permit, a court were to impose restitution long after a defendant has completed the rest of his sentence. *See Jones v. Thomas*, 491 U.S. 376, 385 (1989); *Ex parte Lange*, 85 U.S. 163, 168-73, 176 (1874).

4. Finally, as petitioner explained in his opening brief, Petr. Br. 38-39, victims as a class are best served by rules that require restitution to be ordered in compliance with the 90-day deadline. The MVRA and CVRA together provide victims with a panoply of tools for assuring that their interests will be fully respected within the timeframe set out by Section 3664. Those time limits provide a victim with closure and enable him to know, after a clear date, whether he will need to file a civil suit. *See* Br. of Amicus Curiae NACDL at 16-17. By contrast, under the Government's proposal, there may be a temptation to place a final determination of restitution on the back burner. This will be especially true in cases where indigent defendants have no realistic prospect of paying the amount involved, *see* J.A. 68-70; Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1694 (2009) (describing empirical studies), and the case involves substantial terms of imprisonment and complex loss calculations. Treating Section 3664(d)(5) as a firm deadline avoids leaving victims in this uncertain position.

IV. IN LIGHT OF THE IMPORTANCE OF FINALITY TO CRIMINAL SENTENCING, THE GOVERNMENT'S DEPENDENCE ON *MONTALVO-MURILLO* IS MISPLACED.

In suggesting that district courts retain their authority to add restitution to a defendant's sentence after the 90-day deadline has expired, the Government turns to cases involving agency action that do not treat timing requirements as restrictions on an agency's power. *See* U.S. Br. 10-11. The Government then aggressively claims that the same forgiving standard "applies even when the relevant 'agency' is a federal court and the underlying proceeding is a criminal case." *Id.* at 11. It cites no case for this proposition, for indeed, there is none. Instead, it relies on a single case, *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), to bridge the gap.

Montalvo-Murillo cannot bear this weight. Most significantly, the finality concerns that animate deadlines governing criminal sentencing play no part in the provisional, regulatory determination of pretrial detention. In addition, the concerns that militated against releasing a pretrial detainee upon a violation of the Bail Reform Act's first appearance requirement cut the other way when it comes to violations of sentencing deadlines.

Montalvo-Murillo involved a preliminary determination under the Bail Reform Act of 1984, which provided in part that a hearing to determine eligibility for pretrial release "shall be held immediately upon the person's first appearance before [a] judicial officer." 495 U.S. at 714. The defendant was arrested

in New Mexico on a Wednesday, voluntarily transferred to Chicago to participate in a controlled drug delivery the next day, and then returned to New Mexico Friday night, appearing in court in Chicago and New Mexico in the process. *Id.* at 714-15. In the midst of his whirlwind travels, he did not receive a bail hearing at his "first appearance." This Court rejected his argument that the remedy for that failure should be automatic release from custody. *Id.* at 717.

1. Bail is not an area where finality plays an important role. The Government itself recognized this in *Montalvo-Murillo*, where it contrasted the deadlines for filing appeals contained in Fed. R. App. P. 4, which it said "must be strictly observed to assure the finality of judgments," with the timing rules in the Bail Reform Act, which it said "serve an entirely different purpose." U.S. Reply Br. at *17, 1990 U.S. S. Ct. Briefs LEXIS 1412, *Montalvo-Murillo*, 495 U.S. 711 (1990).

Finality, however, *is* central to sentencing. *See supra* pp. 12-14; Petr. Br. 28-33. Treating the 90-day deadline as a limit on courts' sentencing power is necessary to achieve finality. Therefore, under the Government's own analysis in *Montalvo-Murillo*, the MVRA's deadline cannot be analogized to the first-appearance requirement.

Moreover, bail determinations, unlike sentences, are understood to be provisional. The Bail Reform Act explicitly provides that a bail hearing "may be reopened, before or after a determination by the judicial officer, *at any time before trial*" if conditions change. 18 U.S.C. § 3142(f)(2)(B) (emphasis added).

By contrast, a sentence can only be amended under limited circumstances. *See supra* pp. 7-8.

2. Bail determinations differ from sentencing in a number of other ways. As this Court recognized in *Montalvo-Murillo*, bail is a "regulatory device" intended to maintain the status quo pending a criminal trial. 495 U.S. at 719. Bail determinations often "take place during the disordered period following arrest," *id.* at 720, which may make punctilious adherence to tight timing rules difficult. By contrast, criminal sentencing is by definition punitive and comes at the end of criminal proceedings. The MVRA's procedures under Section 3664 for issuing and enforcing restitution take place in an orderly environment that offers ample time for compliance. Thus, it is simply *not* "inevitable" that "errors in the application of the time requirements of [the MVRA] will occur." *Montalvo-Murillo*, 495 U.S. at 720. The "most diligent efforts of the Government and the courts" would almost certainly ensure compliance with the MVRA's deadlines. *Id.*[6]

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[6] Notably, the Government never argues here, as it did in *Montalvo-Murillo*, that complying with the MVRA presents any practical difficulties. *See* U.S. Br. at *28, 1989 U.S. S. Ct. Briefs LEXIS 1156, *Montalvo-Murillo*, 495 U.S. 711 (1990) ("Occasional procedural errors in the handling of detention hearings are inevitable, particularly since the Bail Reform Act requires the parties and the court to act with great dispatch in the often chaotic period following a defendant's arrest."); U.S. Reply Br. at *9-10, 1990 U.S. S. Ct. Briefs LEXIS 1412, *Montalvo-Murillo*, 495 U.S. 711 (1990) ("And, because detention proceedings are invariably conducted during the often-chaotic period immediately following a defendant's arrest, it is likely that minor errors in the application of the time limits of Section 3142(f) will continue to be made in a significant number of

3. Finally, the consequences of ordering automatic release are quite different from the consequences of limiting district courts' sentencing authority to the period expressly provided for by the MVRA. In the bail context, if courts are disabled from detaining defendants once there has been a violation of the first appearance requirement, then there is no alternative way to provide for public safety and to ensure defendants' appearances. Nor, under Montalvo-Murillo's theory, could the Government have obtained a hearing by appealing the district court's failure to hold a hearing at the first appearance.

The consequences here are quite different. Even after a court fails to order mandatory restitution within the period provided by Section 3664(d)(5), relief is available. As petitioner explained above, the Government can file a timely appeal. *See supra* p. 10.[7] And of course, victims retain their preexisting ability to seek restitution through the civil justice system. *See* 18 U.S.C. § 3664(*l*) (estopping defendants from denying the essential allegations of their offenses in suits brought by victims).[8]

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cases, despite the best efforts of agents, prosecutors, and magistrates.").

[7] In some cases, victims themselves could potentially seek mandamus under the CVRA. *See* 18 U.S.C. § 3771(d)(3).

[8] Indeed, to the extent that determining restitution in some drug- or property-crime cases "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," 18 U.S.C. § 3663A(c)(3)(B), the MVRA permits courts to leave victims to the civil process. (That provision does not apply here.)

V. HARMLESS ERROR ANALYSIS DOES NOT APPLY TO VIOLATIONS OF SECTION 3664(d)(5).

As petitioner explained in his opening brief, defendants subject to restitution orders that violate Section 3664(d)(5)'s deadline are like defendants subject to prosecution after the statute of limitations has run. Each is entitled to reversal without proving prejudice in his individual case. Petr. Br. 46.[9]

The Government's "harmless error" argument is premised on a fallacy – it points to the wrong event as the "error." Petitioner does not complain of the *failure* to impose restitution *within* the allowable 90-day extension period, but rather challenges the *imposition* of restitution *after* the allowable period had expired.

The Government's citations to cases in which this Court "applied harmless-error analysis to errors involving sentencing," U.S. Br. 30, are inapposite. Unlike the court here, which lost sentencing authority once Section 3664(d)(5)'s deadline passed, the sentencing courts in the Government's cases retained the authority to impose a sentence, but made mistakes in determining what the sentence should be. For example, in *Washington v. Recuenco*, 548 U.S. 212 (2006), this Court applied harmless error analysis to *Blakely* violations because it would be possible

[9] Petitioner does not dispute that a defendant can waive or fail properly to preserve his objections to a restitution order that violates Section 3664(d)(5), just as a defendant can waive objections to a prosecution in violation of a statute of limitations.

to determine that a properly instructed jury would have found facts sufficient to justify the sentence. Similarly, a decision that imposes a sentence based on an impermissible reason is reviewed for harmless error because it is possible that the court could have imposed that same sentence based on permissible reasons. *Williams v. United States*, 503 U.S. 193, 204 (1992); *see also Jones v. United States*, 527 U.S. 373, 402 (1999) (a court is authorized to impose a sentence based on an invalid factor if "absent [the] invalid factor, the jury would have reached the same verdict"). But here, absent the error of acting to order restitution when it had no authority to do so, the district court could *not* have ordered restitution.

None of the Government's cases involved violations of "firm deadlines." By contrast, *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), which the Government does not cite, *did* involve one. *Id.* at 2569. In *Greenlaw*, the Court vacated the circuit court's sua sponte increase of a sentence to conform to a mandatory minimum. *Id.* at 2570. The amicus curiae this Court appointed in support of the circuit court's judgment did not even suggest that harmless error analysis could apply. Nor did the Court raise that possibility. Instead, the Court found that the defendant could not be subject to the otherwise mandatory sentence because the "strict time limits on notices of appeal and cross-appeal" had expired. *Id.* at 2569. In other words, once the deadline for filing a notice of cross-appeal had expired, the defendant acquired a right: the right to "proceed anticipating that the appellate court will not enlarge his sentence." *Id.*

In this case, the 90-day deadline of Section 3664(d)(5) operates in the same way: once it passes, the defendant's sentence becomes final. The sentencing court loses authority to subsequently reopen the sentence and impose a restitution order. When it nevertheless does so, it commits an error which is not harmless to the defendant.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

1. Fed. R. Crim. P. 35 ("Correcting or Reducing a Sentence") provides, in pertinent part:

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error. . . .

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

2. Fed. R. App. P. 4 ("Appeal as of Right – When Taken") provides, in pertinent part:

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order – but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) – becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective – without amendment – to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.