

No. 09-367

In The
Supreme Court of the United States

—◆—
BRIAN RUSSELL DOLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF AMICUS CURIAE
THE NATIONAL CRIME VICTIM LAW INSTITUTE
SUPPORTING RESPONDENT**

—◆—
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INTERESTS OF AMICUS CURIAE¹

Amicus Curiae, the National Crime Victim Law Institute (NCVLI), is a non-profit educational organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and providing information to crime victims and crime victims' attorneys through its website, www.ncvli.org. NCVLI also participates as amicus curiae when a case presents an issue of national importance regarding crime victims' rights. NCVLI believes that a crime victim's statutory right to restitution, as provided by the Crime Victims' Rights Act, 18 U.S.C. § 3771, should inform the Court's decision in this case.



¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of Amicus' intention to file it.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Neither Petitioner Dolan nor Respondent United States cited a statute that is critical to the proper resolution of this case: the Crime Victims' Rights Act (CVRA). Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-62 (codified as amended at 18 U.S.C. § 3771 (Supp. 2009)). The CVRA specifically promises crime victims that they will have a protected "*right* to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6) (emphasis added). Further, the law commands that courts "shall ensure that the crime victim is afforded the rights" provided in the CVRA. 18 U.S.C. § 3771(b)(1). The victims in this case did not waive the right to restitution. With un-waived "rights" to restitution, as well as the congressional command to courts, firmly in mind, it is clear that the 90-day claims processing rule at issue in this case cannot strip crime victims of their entitlement to restitution.

The statutory landscape urged by Amicus does not leave criminal defendants without the ability to enforce the 90-day rule. A defendant who desires a restitution decision within 90 days need only request the same of the district judge. District judges can be presumed to follow the law. In the rare case where a district judge refuses to follow the 90-day statutory command, the defendant can then seek a writ of mandamus in the court of appeals to force compliance with the time limit.

Defendants, rather than crime victims, are properly assigned the responsibility of alerting district courts to the need to follow the 90-day rule. Criminal defendants, unlike crime victims, are constitutionally guaranteed legal counsel. The record in this case demonstrates the difficulties that crime victims without legal counsel face when attempting to secure restitution. This Court should not compound those problems by forcing crime victims to monitor and enforce a 90-day time limit.



ADDITIONAL FACTUAL BACKGROUND

Both Petitioner Dolan and Respondent United States recount the facts in this case as though the case presents a mere institutional dispute about who will cover some medical bills. The rule of law the Court announces in this case will, however, have tremendous impact on the lives of individual crime victims around the country – individuals like Evan Tisnolthtos. Mr. Tisnolthtos is a member of the Mescalero Apache Indian Tribe who at the time of the crime worked in maintenance. J.A. 26. Dolan brutally assaulted Mr. Tisnolthtos, and left him lying by the side of a road covered in blood. J.A. 23. Mr. Tisnolthtos was then taken to a hospital in critical condition, having suffered head injuries, broken ribs, and a broken nose. He required a ventilator to breath. J.A. 24. Although Mr. Tisnolthtos recovered substantially from the attack, he continues to suffer lingering effects from the injuries, such a headaches, blurred

vision, and numbness on the left side of his face. J.A. 26.

When contacted by the probation office, Mr. Tisnolthtos reported that he was employed at the time of the crime and had lost \$7,000 in wages as a result of the attack. He also explained that he had been unemployed since the assault. As a result of the injuries he suffered, he is physically weaker and fears not being able to perform required job duties. J.A. 26. Mr. Tisnolthtos did not have a check stub from his job or letter from employer at the time of his interview with the probation office, but he indicated that he would make an attempt to provide such information later. J.A. 26-27.

When the probation office did not receive any further documentation from Mr. Tisnolthtos, it simply declined to recommend any restitution. The record does not contain anything suggesting that Mr. Tisnolthtos was informed of this decision of the probation office.

The court set Dolan's sentencing for June 28, 2007. Shortly before this sentencing date, the Government filed a motion to continue to permit the victim's sister to allocute at the sentencing hearing. J.A. 28. The district court granted the motion, setting sentencing for a later date. J.A. 30. The record is silent as to whether Mr. Tisnolthtos was ultimately informed of the time and place of the new sentencing hearing, and its impact on his right to restitution.

At the sentencing on July 30, 2007, the district judge asked whether any representatives of the

victim's family wanted to be heard. The prosecutor informed the court that there was a representative of the family, apparently the sister, but that she did not want to be heard. J.A. 34.

The district judge asked whether the victim advocate had been in contact with the victim. The advocate stated: "The agent was still trying to look for the victim, and I don't know – we're trying to work through his sister to see if we can locate him, through his sister, but there is a bill of \$80,000 that's still outstanding from the hospital." J.A. 35. The judge then held the issue of restitution open, pending receipt of further information.

Ultimately, the court held another hearing on restitution more than 90 days later. At this later hearing, the Government did not indicate that it had made any further efforts to contact the victim and inform him that his right to \$7,000 in restitution would be in jeopardy unless he provided additional documentation. The Government did, however, diligently follow up on its right to receive restitution for the Indian Health Service, ultimately obtaining an order for restitution in the amount of \$104,649.78. The court did not order any payment in favor of the direct victim of the crime, Mr. Tisnolthtos.



ARGUMENT**I. THE DISTRICT COURT'S FAILURE TO ACT WITHIN 90 DAYS DOES NOT ELIMINATE A VICTIM'S RIGHT TO RESTITUTION UNDER THE CRIME VICTIMS' RIGHTS ACT.****A. The Crime Victims' Rights Act Affords Victims a Protected "Right" to Restitution.**

The Crime Victims' Rights Act arose from the efforts of the crime victims' movement to gain broad and enforceable rights in the federal criminal justice process.² In April 2004, crime victims' advocates met with congressional leaders and decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. Victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights. 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

² For background about the Act, *see generally*, Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 591-92 (2005); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, BYU L. Rev. 835, 852-924 (2005); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, Utah L. Rev. 861 (2007).

The Crime Victims' Rights Act gives victims "the right to participate in the system." 150 CONG. REC. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). *See generally*, Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, Utah L. Rev. 289 (1999) (describing crime victim participation rights). The CVRA provides various rights for crime victims in the process, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process (including sentencing), and the right to be treated with fairness. 18 U.S.C. § 3771(a) (2006). Of particular relevance to this case, the CVRA promises victims that they will have "*the right to full and timely restitution as provided in law.*" 18 U.S.C. § 3771(a)(6) (emphasis added).

This background about the CVRA is important because it demonstrates that Petitioner Dolan is wrong to suggest that "victims generally do not have standing to bring claims under the [Mandatory Victim Restitution Act]." Br. for Pet. at 26 n.12. Whatever may have been the accuracy of this claim before Congress passed the CVRA,³ there is no doubt of its

³ Cases were split on this question before the October 2004 passage of the CVRA. *Compare United States v. United Security Savings Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (concluding victim has no standing to challenge district court's decision on how to allocate restitution among victims) *with United States v. Perry*, 360 F.3d 519, 524-33 (6th Cir. 2004) (holding crime victim had standing under the Victim and Witness Protection

(Continued on following page)

inaccuracy now. The CVRA explicitly confers standing on victims to independently assert their rights – including their right to restitution under laws like the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663. The CVRA provides that rights can be “assert[ed]” by “[t]he crime victim or the crime victim’s lawful representative, and the attorney for the Government.” 18 U.S.C. § 3771(d)(1). The CVRA also broadly provides that courts must “ensure that the crime victim is afforded” the rights contained in the law. *Id.* § 3771(b)(1).

These changes were intended to make victims “an independent participant in the proceedings.” 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). As the legislative history of the CVRA explains, “Without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims’ rights is acceptable.” 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

Act, as amended by the MVRA, to challenge district court’s decision vacating victim’s lien); *see also United States v. Kones*, 77 F.3d 66 (3d Cir. 1996) (allowing crime victim-patient to appeal denial of restitution after physician convicted of mail fraud).

B. Victims Do Not Waive Their Right to Restitution Under the Crime Victims' Rights Act Merely Because the District Court Fails to Act in a Timely Fashion.

At its core, Petitioner Dolan's argument is that the victims in this case waived the right to restitution guaranteed in the CVRA. Notably, if the right to restitution was not waived, then the plain language of the CVRA obligated the district court to order restitution.

The CVRA states that “[i]n any court proceeding involving an offense against a crime victim, the court *shall ensure* that the crime victim is afforded the rights described [in the CVRA].” 18 U.S.C. § 3771(b)(1) (emphasis added). The only way that a district court can “ensure” that a victim is afforded rights under the Mandatory Victim Restitution Act is to award restitution.

Congress enacted the CVRA after the MVRA. Therefore, even assuming the validity of Dolan's arguments about construing the MVRA, the CVRA's specific command that the court “shall ensure” that crime victims receive their rights – including their specifically promised right of restitution – would prevail over any general inference that a victim would lose restitution if the court did not act within 90 days. It is hornbook law that “[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement. . . .” *Lockhart v. United States*, 546 U.S.

142, 149 (2005) (Scalia, J., concurring). Consequently, a district court would be in violation of the CVRA if it did not ensure a victim's right to restitution.

The victims in this case certainly did not waive the right to restitution. There is no evidence that, for example, Mr. Tissnolthtos, was even aware that a statutory deadline was involved in the restitution award, much less that he had some obligation to act before the passage of the deadline. Before a victim is found to have waived an important statutory right to restitution there should at least be some evidence that the waiver was informed and voluntary. *Cf. United States v. Olano*, 507 U.S. 725, 733 (1993) (finding procedures for determining waiver “all depend on the right at stake”).

Indeed, in passing the CVRA, Congress was specifically concerned that victims should not be deemed to have waived their rights without clear evidence of a voluntary choice to do so. As the Senate co-sponsor of the legislation explained, “The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right.” 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

Nothing in the record in this case reveals an affirmative waiver of the right to restitution. Accordingly, the CVRA required the district judge to ensure

that the right to restitution was respected, and that required ordering restitution.

II. THE PROPER REMEDY WHEN A DISTRICT COURT FAILS TO ACT IN A TIMELY FASHION IS FOR A DEFENDANT TO SEEK PROMPT ACTION FROM THE DISTRICT COURT AND, IF NECESSARY, FROM THE COURT OF APPEALS.

A. A Defendant Who Needs a Restitution Order Imposed in 90 Days Can Obtain Relief from the District Court and Court of Appeals.

While Petitioner Dolan attempts to conjure the specter of an innocent defendant who serves months and months in prison, unable to appeal his sentence because the district court delays determining the final restitution calculation, Br. for Pet. at 30, the reality is that defendants can simply take an immediate appeal of any prison sentence, as the Government explains in its brief. Br. of the U.S. at pp. 25-26. Moreover, even if it were true that the defendant had to wait to take an appeal of the sentence until after the 90-day period, the defendant can simply request that the district judge follow the law and impose sentence within the 90-day period. There is simply no

reason to think that district judges will fail to comply with their statutory obligation when asked to do so.⁴

In this case, Petitioner Dolan never requested that the district court act within 90 days. Instead, so far as can be discerned from the record, he waited until the time limit had passed and then, essentially, cried “Gotcha!” Had he wanted a hearing within 90 days, everything in the record suggests that he could have obtained one by simply requesting one.

There remains, of course, the theoretical possibility that some district judge somewhere for some speculative reason might fail to honor a defendant’s request for a restitution order within 90 days. Were such a case to arise, the defendant would still have a remedy: he could file a petition for a writ of mandamus with the appropriate Court of Appeals under 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21. The Tenth Circuit was quite clear in

⁴ Notably, the cases in the courts of appeals in which compliance with the 90-day requirement has been at issue have involved purely benign reasons for delay. *See, e.g., United States v. Vandenberg*, 201 F.3d 805, 814 (6th Cir. 2000) (court entered order for restitution within 90-day time frame but later entered amended judgment); *United States v. Farr*, 419 F.3d 621, 622 (7th Cir. 2005) (judge ordered restitution “to be determined” but later probation officer discovered it has never been determined); *United States v. Maung*, 267 F.3d 1113, 1122 (11th Cir. 2001) (active negotiations between the Government and the defendant during the 90-day period produced restitution hearing after 90-day period).

its ruling that district courts are obligated to impose restitution within 90 days. As it explained:

While we today decide the 90-day deadline is not a jurisdictional limit on the district court's authority to order restitution, our holding should *not* be misconstrued as suggesting the government has the discretion to seek, and the district court has discretion to enter, restitution on any time schedule they find convenient. The law remains that the district court *shall* enter a restitution order within 90 days. . . . District courts and the government must take steps to ensure compliance with the MVRA's deadline and the public interests it serves, just as they must with any other congressional command. Though district courts do not lose the authority to enter restitution after 90 days, the law remains the law and courts and the government alike are bound to follow it.

United States v. Dolan, 571 F.3d 1022, 1031 (10th Cir. 2009).

Under this understanding of the 90-day time limit, a writ of mandamus would lie from the court of appeals to a district court refusing to order restitution. This is true because the district court would "owe[] [a defendant] a clear nondiscretionary duty." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 392 (2004) (Stevens, J., concurring). Thus, a defendant would be protected were a district court to defy the law, and delay imposing restitution after the defendant had requested such an action.

B. Congress Has Not Authorized the Federal Courts to Shift the Burden of Enforcing the 90-Day Time Limit to Victims of Crime.

While it may be argued that a crime victim should bear the burden of notifying the trial judge of a pending 90-day deadline and pursuing an emergency writ of mandamus if it appeared that the trial judge were not going to act by the 90th day,⁵ such argument should be rejected. As a practical matter, shifting the burden from defendants to crime victims would effectively mean that victims would often forfeit their right to restitution. This is true because most crime victims are without legal counsel to alert them to the passage of a statutory deadline, much less to pursue legal action before the district court and potentially the court of appeals to enforce their rights. While Amicus, the National Crime Victim Law Institute, helps support twelve pro bono legal clinics for crime victims around the country,⁶ these clinics can provide legal support to only a tiny percentage of

⁵ On Petitioner Dolan's reading of the statute, a crime victim's mandamus petition on the 91st day would be moot, as the district court would have been stripped of jurisdiction to enter a restitution order after the passage of the 90th day. Dolan does not explain whether a crime victim's mandamus petition on the 89th day would be able to escape prematurity problems, since presumably the victims' right to action within 90 days would not be violated until the 90 days have passed.

⁶ For a description of the works of these clinics, see <http://www.ncvli.org/links.html>.

crime victims. By contrast, criminal defendants have the assistance of counsel – even in cases in which they are indigent. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

The facts of this case demonstrate some of the difficulties crime victims face when trying to secure their legal rights; facts which strongly counsel against shifting legal obligations away from represented criminal defendants to unrepresented crime victims. Specifically, the record discloses what appear to be clear violations of victims’ rights regarding restitution – violations that appear to have gone unnoticed because the individual victim was without legal counsel and the Government declined to press the victim’s claim for restitution, separate from its own claim.

After the crime and Dolan’s subsequent guilty plea, Mr. Tisnolthtos met with the probation office. He explained the grievous injuries he had suffered at the hands of Dolan and the economic consequences that were thrust upon him, both in terms of past lost income and future employment opportunities. After he indicated that his past lost income was \$7,000, the probation officer asked him to produce a paycheck or letter from his employer. Mr. Tisnolthtos said that he would make this attempt. When the probation officer did not receive any such documents, the officer simply wrote in the presentence report that the victim “was unable to produce documentation of his employment and wage at this time. Therefore, at this time his request cannot be ordered.” J.A. 27.

As a matter of law, this conclusion was wrong. First, the probation office was itself required to collect this information, rather than shifting the burden to the crime victim. Federal Rule of Criminal Procedure 32(d)(2)(B) requires that the probation office include in the presentence report “information that assesses any *financial*, social, psychological, and medical impact on any victim.” (Emphasis added). No doubt the probation office involved in this case was quite busy, but that does not provide a justification for failing to collect the necessary information. Notably, such simple steps as calling the victim’s employer may have revealed the information sought.

Even assuming that the probation office could properly require the victim to produce “documentation,” the probation office erred in telling Mr. Tissnolthtos that the documentation had to come from the victim’s employer in order for a restitution order to issue. Nothing in law requires employer documentation as a prerequisite to restitution. To the contrary, 18 U.S.C. § 3664(d)(2)(A)(vi) specifically provides that a victim can make a claim for restitution through his own affidavit. In fact, the probation office is required to “provide notice to all identified victims of . . . 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. . . .” 18 U.S.C. § 3664(d)(2)(A)(vi). The probation office is further required to “provide the victim with an affidavit form to submit. . . .” 18 U.S.C. § 3664(d)(2)(B). Nothing in the record suggests that Mr. Tissnolthtos

was provided an affidavit form, which would have obviated the need for him to track down something from his employer.

The probation officer was also wrong to suggest that “documentation” from a past employer was required as a precondition to a lost income claim. Courts have interpreted the MVRA as allowing restitution for future lost income, even future lost income for homicide victims. *See, e.g., United States v. Serawop*, 303 F. Supp. 2d 1259 (D. Utah 2004), *rev’d on other grounds*, 410 F.3d 656 (10th Cir. 2005), *restitution order reaffirmed in*, 409 F. Supp. 2d 1356 (D. Utah 2006), *aff’d*, 505 F.3d 1112, 1121 (10th Cir. 2007) (upholding restitution award to estate of 3-month old homicide victim). In passing the CVRA, Congress specifically endorsed this interpretation of the restitution statutes. *See* 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Because Mr. Tisnolthtos was entitled to restitution for lost future income, the probation office should not have imposed on him an impossible-to-meet obligation of providing “documentation” of something that had not yet happened. Instead, the probation office should have asked him to provide an affidavit about the nature of the losses or collected information on this subject on its own initiative.

After the probation office determined not to recommend any restitution for Mr. Tisnolthtos in the presentence report, the record is devoid of any evidence that this decision was communicated to Mr. Tisnolthtos, or that his opportunity to challenge the

decision was clearly opened to him. All the record reflects is that the victim's sister came to the sentencing. There is nothing in the record that she was made aware that her brother was requesting restitution, or that the probation officer had declined to put forward that request. Nor does the record reveal compliance with the CVRA's mandate that the victim be given "reasonable, accurate, and timely notice" of the sentencing hearing. 18 U.S.C. § 3771(a)(2).

In sum, the record in this case should suggest to the Court the difficulties that crime victims around the country face when seeking their rights, even *mandatory* restitution. Crime victims are often indigent and without legal counsel. They are not knowledgeable in federal restitution law – much less the time limits contained in the procedural implementing provisions of such law.

In view of the asymmetry between defendants, who are represented by legal counsel, and crime victims, who almost always must proceed on their own, the Court should not shift the burden of enforcement of the 90-day rule to victims. Instead, that burden is properly assigned to defendants. Where necessary, defense counsel can file a motion demanding to have the 90-day rule enforced. When defense counsel fails to do so (as in this case), the defendant should not be heard to complain about such failure – much less use this failure to deprive victims of restitution to which they are lawfully entitled.



CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Tenth Circuit below.

Respectfully submitted,

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