No. 09-367

In the Supreme Court of the United States

BRIAN RUSSELL DOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

When the victim of a defendant's crime is entitled to restitution and 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," subject to a good-cause extension for losses discovered later. The question presented is:

Whether a district court's failure to calculate restitution within 90 days after sentencing is per se prejudicial error that requires that the restitution award be vacated.

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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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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. Pet. App. 6a. 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 a hitchhiker, on an Indian reservation in southeastern New Mexico. The two men began to argue, and petitioner assaulted the hitchhiker, leaving him on the side of the road, bleeding and unconscious, where a police officer discovered him. The victim sustained serious injuries, including a broken nose, wrist, leg, and ribs. Pet. App. 5a-6a, 28a-29a; Gov't C.A. Br. 4-5.

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. Petitioner pleaded guilty. Pet. App. 6a; Gov't C.A. Br. 1.

At a sentencing hearing on July 30, 2007, the district court stated that it had "insufficient information" to determine the amount of restitution petitioner owed. Pet. App. 29a-30a. Accordingly, the district court left the issue of restitution "open, pending the receipt of additional information," while informing petitioner that he should "anticipate that such an award will be made in the future. *Id.* at 30a. The court entered judgment the same day, and the judgment stated that restitution was applicable but that the court was awaiting information about the amount owed. *Id.* at 30a-31a.

On February 4, 2008, the district court held a hearing on restitution. Petitioner argued that the district court no longer had the authority to order restitution because it had missed the deadline set forth in 18 U.S.C. 3664(d)(5), which requires that the court "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." During a subsequent hearing on the issue, defense counsel conceded that petitioner had notice of the restitution amount within the 90-day period, and that "[w]e always knew restitution would be an issue." Gov't C.A. Br. 3 (quoting 4/11/08 Tr. 8); Pet. App. 8a.

On April 24, 2008, the district court entered a memorandum opinion and order in which the court concluded that it still had the authority to issue a restitution order, notwithstanding the expiration of the 90-day period. It ordered petitioner to pay restitution of $104,649.78 in monthly payments of $250. Pet. App. 27a-48a; Gov't C.A. Br. 4.

3. The court of appeals affirmed. Pet. App. 4a-26a. The court rejected petitioner's argument that Section 3664(d)(5) imposes a "jurisdictional bar to untimely restitution orders." *Id.* at 5a. After considering the statutory language, the legislative history, and its own prior case law, the court of appeals concluded that "Congress did not intend to divest the district court of all power over restitution awards after 90 days." *Id.* at 11a. Instead, the court of appeals concluded that Section 3664 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 the defendant could establish prejudice from the 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. Finally, the court held that the district court's determination of the amount of restitution had adequately accounted for petitioner's financial condition. *Id.* at 22a-26a.

ARGUMENT

Petitioner contends (Pet. 8) that this case implicates "an ever-widening circuit split" on whether 18 U.S.C. 3664(d)(5) precludes the entry of a restitution award more than 90 days after sentencing. That is incorrect. Because petitioner's appeal challenged only the district court's jurisdiction to enter a restitution order, this case is an inappropriate vehicle for considering the question petitioner now attempts to raise. In any event, the court of appeals noted that petitioner had made no effort to show that he was prejudiced by the district court's delay in imposing restitution, and under those circumstances, seven courts of appeals have held that Section 3664(d)(5) does not preclude the delayed entry of a restitution

award. Although the Eleventh Circuit has taken a contrary view, its decision predates most of the other decisions addressing the issue, and there is reason to believe that the court may reconsider its position. This Court recently denied review in a case presenting this question, see *United States* v. *Dupre*, 129 S. Ct. 2158 (2009), and further review is likewise unwarranted here.

1. Congress enacted the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, to make restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. See S. Rep. No. 179, 104th Cong., 1st Sess. 18-20 (1995). Under the MVRA, the district court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). To accomplish its aim of establishing and enforcing restitution orders, the MVRA imposes statutory deadlines on various actors at sentencing. 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). "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." 18 U.S.C. 3664(d)(5). The 90-day period may be extended if a victim, with "good cause," subsequently discovers further losses. *Ibid*.

2. In the court of appeals, petitioner argued that the district court lost jurisdiction to enter a restitution or-

der once 90 days had elapsed after sentencing.[1] The court of appeals understood that petitioner was raising such a challenge, and therefore it considered whether the 90-day time limit in Section 3664 was intended to "strip a court of subject matter jurisdiction to entertain a dispute." Pet. App. 11a. It correctly answered that question in the negative. 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, 454-455 (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 concedes that Section 3664(d)(5) is not "jurisdictional," arguing instead that it is "an inflexible claim-processing rule." Pet. App. 29 (quoting *Kontrick*, 540 U.S. at 456). Because petitioner failed to raise that argument below, this case is not an appropriate vehicle for considering it.[2]

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[1] See, *e.g.*, Pet. C.A. Br. 1 (stating, in the "Jurisdictional Statement," that "at issue in this appeal is whether the district court had jurisdiction under the [MVRA] § 3664(d)(5), to impose restitution more than 90 days after sentencing"); *ibid.* (identifying the "Issue Presented for Review" as "[w]hether the district court lacked jurisdiction pursuant to 18 U.S.C. § 3664(d)(5) to order restitution over 90 days after sentencing"); *id.* at 9 (asserting that "[t]he district court lacked jurisdiction to order restitution 268 days after [petitioner's] sentencing"); *id.* at 10 (arguing that "[t]he Court reviews de novo the district court's legal conclusion that it had jurisdiction"); see also *id.* at 17.

[2] Petitioner criticizes the court of appeals (Pet. 29) for "its assumption that if Section 3664(d)(5) was not 'jurisdictional' in the strongest sense of the word * * * then untimely restitution orders are permissi-

2. Even if petitioner had preserved his argument that Section 3664(d)(5) is a non-jurisdictional but "inflexible" procedural rule, that argument would not merit this Court's review. 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); see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990) (calling Rule 52's "principle of harmless-error analysis * * * the governing precept in most matters of criminal procedure"). This Court requires "strong support" before it will conclude that another provision has repealed Rule 52 by implication. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)). Moreover, when a statute fails to specify any particular consequence for noncompliance with a timing provision, courts typically do not impose their own coercive remedy. See *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157-163 (2003); *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993).

Those courts of appeals that have considered the application of Rule 52 to the MVRA have all concluded that a violation of the MVRA's timing provisions does not necessitate voiding of the restitution order. For

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ble." But petitioner made just that assumption in his brief, arguing that "[i]n the event [the court of appeals] finds that the district court did have jurisdiction to order restitution," the court should proceed to review the amount of the order—without regard to its timeliness—by holding that "the district court failed to impose a restitution payment schedule that takes into consideration [petitioner's] financial resources, assets, projected income and financial obligations, as required by 18 U.S.C. § 3664(f)(2)." Pet. C.A. Br. 10.

example, the Second Circuit, examining the purpose behind the MVRA, recognized that its intent was to award restitution in all cases and that the 90-day time limit was inserted by Congress to "protect crime victims from the willful dissipation of defendants' assets," not to protect defendants. *United States* v. *Zakhary*, 357 F.3d 186, 191, cert. denied, 541 U.S. 1092 (2004). For that reason, seven courts of appeals (including the court below) have concluded that a district court's delay in issuing a restitution order should not inure to the defendant's benefit, at least where the defendant was not prejudiced by that error. Pet. App. 20a-21a; *United States* v. *Bogart*, 576 F.3d 565, 573 (6th Cir. 2009) ("[T]he district court's error in failing to comply with § 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.) ("just as the failure to conform with the ninety-day limit constitutes harmless error absent prejudice, so too does the failure to comply with [a separate] ten-day limit [in Section 3664(d)(5)]"), cert. denied, 546 U.S. 856 (2005); *Zakhary*, 357 F.3d at 191; cf. *United States* v. *Cheal*, 389 F.3d 35, 48-49 & n.15 (1st Cir. 2004) (reviewing for plain error a violation of the 90-day limit to which the defendant did not object in the district court).

The decision below is fully consistent with those decisions, because the court of appeals determined that the delay in imposing restitution did not prejudice petitioner, explaining that petitioner had not "identif[ied] 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. The court expressly reserved the question of what remedy would be appropriate, if any, in a case where "a defendant could establish prejudice arising from the district court's failure to enter restitution within the 90-day deadline," and that issue is not presented here. *Id.* at 20a.

3. Two early court of appeals decisions interpreting the MVRA concluded that a failure to quantify a restitution award within the time period specified in Section 3664(d)(5) voids the award. In *United States* v. *Jolivette*, 257 F.3d 581 (6th Cir. 2001), the district court included an open-ended restitution order, which the government conceded on appeal should be removed from the judgment. *Id.* at 582. The court of appeals held that the 90-day limit "makes clear the congressional intent to prohibit courts from making restitution determinations after the statutory period has run," that the judgment therefore contained no enforceable restitution provision, and that the judgment was consequently final for purposes of appellate review. *Id.* at 584.[3] Similarly, in

[3] The Sixth Circuit in *Jolivette* believed that, in order to find appellate jurisdiction, it first had to conclude that no further restitution proceedings would take place in the district court. See 257 F.3d at 583-584. Congress has since amended the MVRA to make clear that, once a restitution order is included in the judgment, the further proceedings to which the 90-day limit applies do not affect the finality of the district

United States v. *Maung*, 267 F.3d 1113 (2001), the Eleventh Circuit, relying on *Jolivette*, concluded that a restitution order imposed more than 90 days after sentencing was invalid and untimely, and it refused to examine whether the defendant was prejudiced by the delay. *Id* at 1120-1122. Instead, the court concluded that "there is no prejudice requirement in the statute, and we are not convinced that we should read one into it." *Id*. at 1121.

No other court of appeals has followed either *Jolivette* or *Maung*. To the contrary, the Sixth Circuit recently reconsidered and rejected its prior opinion in *Jolivette*. In *Bogart*, the court concluded that the expiration of the 90-day time period "does not deprive a district court of jurisdiction over a defendant's restitution proceedings," 576 F.3d at 571, and it went on to determine that "the district court's error in failing to comply with § 3664(d)(5) was harmless." *Id*. at 573.[4]

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court's judgment or the jurisdiction of the court of appeals to review that judgment. See 18 U.S.C. 3664(*o*)(1)(C).

[4] Petitioner contends (Pet. 17-20) that harmless-error analysis applies in the Sixth Circuit only when the district court enters an "initial" order within the 90-day time limit that does not specify the final amount of restitution. That interpretation of the court's case law makes little sense. Section 3664(d)(5) requires a "final determination" of the defendant's restitution obligation within 90 days of sentencing, so an "initial" order that fails to make such a determination would not comply with the statute. And there is no reason why harmless-error analysis would apply to such an error under Section 3664(d)(5) but not to a different error under the same provision, such as when the district court fails to enter any restitution order at all. In any event, the judgment here made clear that the district court intended to award restitution (Pet. App. 7a), so even under petitioner's interpretation of its cases, the Sixth Circuit would have reached the same result as the court below.

As a result, the Eleventh Circuit now stands alone in holding invalid all restitution orders issued outside the time period specified in Section 3664(d)(5). In an appropriate case, that court too may disavow its precedent in light of the more recent persuasive authority and closer examination of the issue by its sister circuits, just as the Sixth Circuit did in *Bogart*. See *e.g.*, *United States* v. *Garey*, 540 F.3d 1253 (2008) (unanimous en banc decision bringing the Eleventh Circuit's law on waiving the right to counsel through conduct into line with the rule in other circuits). Indeed, the Eleventh Circuit already has suggested, in dicta, that the 90-day time limit may be subject to equitable tolling in appropriate circumstances. See *United States* v. *Johnson*, 541 F.3d 1064, 1067-1068 (2008), cert. denied, 129 S. Ct. 2792 (2009).

4. Petitioner exaggerates the magnitude of the split in authority. First, he contends (Pet. 10-12) that in *United States* v. *Farr*, 419 F.3d 621 (2005), the Seventh Circuit "held that a district court does not have the power to order restitution if it fails to follows the time limit imposed by Section 3664(d)(5)." Pet. 10. In fact, *Farr* declined to address whether the harmless-error standard could be applied to Section 3664(d)(5), as the government had insufficiently raised the issue. 419 F.3d at 626 ("We have not had occasion to decide the issue and, because it has not been sufficiently raised here, we do not address it.") (footnote omitted). The issue thus remains open in the Seventh Circuit.

Petitioner also asserts (Pet. 15-16) that the decision below conflicts with the approach taken by the Third Circuit in *United States* v. *Terlingo*, 327 F.3d 216 (2003). That is incorrect. In *Terlingo*, the court of appeals applied equitable-tolling principles to extend the 90-day limit where the defendants were partially responsible

for the delay in awarding restitution. *Id.* at 219-223. *Terlingo* does not conflict with the decision below because it did not hold that Section 3664(d)(5) is a jurisdictional provision. Nor does *Terlingo* reject—or even address—the harmless-error approach taken in other circuits. And *Terlingo* cannot be viewed as an implicit rejection of harmless-error analysis, since both equitable tolling and harmless error may properly be applied to the same statute.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Indeed, as petitioner recognizes, the Second Circuit has done exactly that. Compare Pet. 14-15 (citing *United States* v. *Stevens*, 211 F.3d 1 (2000) (tolling), cert. denied, 531 U.S. 1101 (2001)), with Pet. 16 (citing *United States* v. *Zakhary*, *supra* (harmless error)).