

No. 09-8640

IN THE SUPREME COURT OF THE UNITED STATES

FU SHENG KUO AND SHENGJI WANG, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court is deprived of authority to order restitution under 18 U.S.C. 3663 when it fails to do so within 90 days of sentencing, as required by 18 U.S.C. 3664(d)(5).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 588 F.3d 729.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2009. The petition for a writ of certiorari was filed on January 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the District of Hawaii, petitioners were each convicted of

conspiring to hold two women in involuntary servitude, in violation of 18 U.S.C. 241. Petitioner Kuo was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. Petitioner Wang was sentenced to 62 months of imprisonment, to be followed by three years of supervised release. In addition, petitioners were ordered to pay approximately \$20,000 in restitution to their victims. The court of appeals affirmed. Pet. App. 1a-11a, 12a-14a, 18a-20a.

1. In 2006, Wang traveled to China and recruited two women, Y.H. and J.C., to come to American Samoa under the pretense that they would be employed in a grocery store. When they arrived, the women were taken to a brothel operated by Kuo, where they were locked up, threatened with beatings, and forced to work as prostitutes. After several months, they escaped and reported Kuo and Wang to the police. Pet. App. 4a-5a.

2. Under a plea agreement, Kuo and Wang pleaded guilty to a single-count information alleging a violation of 18 U.S.C. 241, which prohibits conspiracy to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of any right secured by the Constitution, namely, the Thirteenth Amendment right to be free from involuntary servitude. Pet. App. 5a-6a. On January 16, 2008, at the conclusion of a joint hearing, the district court sentenced Kuo and Wang. Id. at 6a. The court included restitution in its oral sentence, but it did not check the

appropriate box on the written judgment forms indicating that restitution had been ordered. Id. at 16a, 22a; Gov't C.A. Br. 3.

On February 29, 2008, the government filed a motion seeking the distribution of \$4226 seized from Kuo's residence during her arrest, as well as mandatory restitution of \$12,000 each for Y.H. and J.C. under 18 U.S.C. 1593. A few weeks later, the United States filed an amended motion seeking restitution under 18 U.S.C. 3663, rather than 18 U.S.C. 1593, which does not apply to a violation of Section 241. Pet. App. 6a; Gov't C.A. Br. 3-4.

On April 30, 2008, the district court granted the amended motion in part, ordering distribution of the \$4226 seized from Kuo's residence, but denying the additional amount on the ground the motion did not contain sufficient supporting information. Thereafter, the United States filed a renewed motion for restitution in which it provided additional documentation of the victims' losses. Pet. App. 6a.

On June 30, 2008, the district court granted the government's amended restitution motion. The court ordered restitution in the amount of \$8500 for Y.H. and \$11,050 for J.C. The court ordered that the \$4226 seized from Kuo's residence be credited towards those amounts. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-11a. Petitioners did not challenge the portion of the restitution order requiring that the \$4226 seized from Kuo's residence be divided

equally between the two victims, but they did challenge the remainder of the restitution order. Id. at 11a. As relevant here, they contended that the district court lacked the ability to order restitution beyond the 90-day time limit set by 18 U.S.C. 3664(d)(5), which provides that “[i]f the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, * * * the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.” Pet. App. 7a-8a. The court of appeals rejected that argument. Following circuit precedent, the court held that “the failure to comply with [the procedural requirements of section 3664] is harmless error absent actual prejudice to the defendant.” Id. at 7a (quoting United States v. Cienfuegos, 462 F.3d 1160, 1163 (9th Cir. 2006) (brackets in original)). That is so, the court explained, because the “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.” Id. at 7a-8a (quoting Cienfuegos, 462 F.3d at 1163). The court went on to conclude that because petitioners “received oral notice at sentencing that they would be ordered to pay restitution,” they “made no showing of prejudice occasioned by the minimal delay in this case.” Id. at 8a.

Although the court of appeals rejected petitioners' timing argument, it held that the district court had erred in calculating the restitution amount. Pet. App. 8a-10a. It therefore vacated and remanded for recalculation of the restitution award. Id. at 11a.

DISCUSSION

Petitioners ask this Court to decide whether a district court is deprived of authority to order restitution under 18 U.S.C. 3663 when it fails to do so within 90 days of sentencing, as required by 18 U.S.C. 3664(d)(5). On April 20, 2010, this Court heard argument in Dolan v. United States, No. 09-367, which presents a similar question.

This case involves restitution ordered under 18 U.S.C. 3663, while Dolan involves restitution ordered under 18 U.S.C. 3663A. Both statutes, however, provide that restitution ordered thereunder "shall be issued and enforced in accordance with section 3664." 18 U.S.C. 3663(d); 18 U.S.C. 3663A(d). Accordingly, both cases involve the question whether the district court retains the ability to order restitution beyond the 90-day deadline established by 18 U.S.C. 3664(d)(5). The Court should therefore hold the petition in this case pending its resolution of Dolan and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in Dolan v. United States, No. 09-367, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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