

06-4196-cr

To Be Argued By:
CHRISTINE SCIARRINO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4196-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

BASIL J. KYLES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

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**Statement of Issues
Presented for Review**

- I. Whether the district court retained inherent authority to amend the payment schedule for – as opposed to the amount of – restitution to be paid by the defendant during his term of incarceration.

- II. Whether the district court’s order directing the defendant to pay restitution “in accordance with the guidelines of the Inmate Financial Responsibility Program” impermissibly delegated the responsibility for setting a restitution payment schedule to the Bureau of Prisons.

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Preliminary Statement

This supplemental brief addresses the two questions posed by the Court's June 4, 2009 order: (1) whether the district court had inherent authority, under 18 U.S.C. § 3663(f) (1993), to amend the defendant's restitution payment schedule during the defendant's term of incarceration; and (2) if so, whether the district court's September 1, 2006 order (amending the defendant's restitution payment schedule) complied with this Court's

decision in *United States v. Mortimer*, 94 F.3d 89 (2d Cir. 1996).

First, as set forth in more detail below, the district court retained inherent authority to modify the defendant's restitution payment schedule during his term of incarceration, especially where, as here, the defendant had no legitimate expectation of finality in the restitution payment schedule as originally established.

Second, although the district court retained the inherent authority to revise the defendant's restitution payment schedule, the court's most recent revision to that order was improper. In September 2006, the court revised the restitution order to provide that the defendant should make payments "in accordance with the guidelines of the Inmate Financial Responsibility Program." Under *Mortimer*, that order impermissibly delegated responsibility for setting the restitution payment schedule to prison officials.

Because of the improper delegation of authority in this case, the district court's September 1, 2006 order should be vacated and the case remanded for entry of a new order of restitution.

Statement of Facts¹

The defendant was convicted by a jury on one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d). On September 9, 1993, the district court sentenced the defendant to 262 months' imprisonment and 5 years' supervised release. As relevant here, the judgment further provided, in a section titled "Special Conditions of Supervised Release," as follows:

The Defendant shall make restitution to the [bank] in the amount of \$4,133 on a schedule to be determined by the United States Probation Office.

DA 1. This judgment entered on September 15, 1993, GA 5, and was affirmed on appeal, *United States v. Kyles*, 40 F.3d 519 (2d Cir. 1994), *cert. denied*, 514 U.S. 1044 (1995).

On October 19, 1998, the district court signed an "Order Amending Judgment," providing as follows:

With respect to the repayment of restitution in this case, the defendant shall pay restitution of \$2 per month, while incarcerated. The court may adjust

¹ This section largely mirrors, with minor edits, the Statement of Facts from the Government's original brief. As in the Government's original brief, citations are to the Defendant's Appendix ("DA") and the Government's Appendix ("GA").

the amount of the monthly repayment according to the defendant's ability to pay.

DA 2; GA 9. The defendant never appealed this decision.

On the basis of "information furnished from the Bureau of Prisons," the district court signed another "Order Amending Judgment" on June 5, 2006. Similar in structure to the 1998 order, this order provided as follows;

[T]he judgment and restitution order entered in this case is hereby amended to reflect an increase in the defendant's restitution payment obligation from \$2 each month to \$25 each month, while incarcerated.

The court may in the future adjust the amount of the monthly payment according to the defendant's ability to pay.

DA 3; GA 14 (docket entry). The defendant filed a notice of appeal from this decision on June 26, 2006. GA 14, GA 16.

In response to an *ex parte* request for reconsideration of this order, on July 14, 2006, the district court stayed enforcement of the amended judgment to allow the defendant and the Government time to submit briefing. GA 14. After receipt of those submissions, on September 1, 2006, the district court entered the final order at issue in this case, an "Order on Increase in Restitution Payments." DA 4-6; GA 15. This order vacated the order dated June 5, 2006 and set forth the defendant's restitution obligation as follows:

The defendant's restitution payments shall be increased in accordance with the guidelines of the Inmate Financial Responsibility Program. *See* 28 C.F.R. §§ 545.11 and 545.12.

DA 6. The defendant filed a notice of appeal on September 11, 2006. GA 15, GA 20. On June 26, 2007, this Court consolidated the defendant's appeals from the 2006 orders, and dismissed the earlier one as moot.

In the instant appeal, the Government originally moved to vacate and remand this case for further proceedings. This Court denied that motion without prejudice to the Government's proposing remand in a responsive brief, and ordered the Government to brief two additional issues. After the Government submitted its brief, again proposing remand, this Court directed the parties to brief two additional issues.

Summary of Argument

I. At the time of the defendant’s sentencing, 18 U.S.C. § 3663(f) provided that a “court may require that [a defendant convicted of an offense under this title] make restitution . . . within a specified period or in specified installments.”² In a decision under this restitution statute, this Court stated that a district court had authority to modify a sentencing order when such an order does not carry the “legitimate expectation of finality.” *See United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994) (“*Porter I*”). As applied in this case, the defendant could have had no legitimate expectation of finality about the schedule of his restitution payments. From the beginning, and as regularly reaffirmed by the district court, there was no doubt that the payment schedule was subject to revision. Accordingly, the district court retained inherent authority to revise the restitution payment schedule during the defendant’s term of incarceration.

Moreover, to the extent the district court’s original judgment was ambiguous, the court retained inherent authority to interpret the ambiguity. *See United States v. Spallone*, 399 F.3d 415 (2d Cir. 2005). The original judgment was ambiguous about whether the court intended the defendant’s restitution obligation to begin during his term of incarceration; the court’s subsequent 1998 order clarified that the court, indeed, intended the defendant to pay restitution while incarcerated. The defendant never

² Unless otherwise indicated, citations are to the statutes in effect at the time of the defendant’s sentencing in 1993.

appealed that decision and so should not be heard to complain now about a restitution payment obligation while he is incarcerated. To the extent he complains about subsequent modifications to the restitution payment schedule, those complaints are foreclosed by the language from the 1998 order making clear that further modifications were contemplated and authorized.

II. The district court's September 1, 2006 order improperly delegated the judicial function of setting a restitution payment schedule to the Bureau of Prisons. The district court's order directed the defendant to make restitution payments "in accordance with the guidelines of the Inmate Financial Responsibility Program," but this Court expressly disapproved a virtually identical order in *Mortimer*. Because the order here impermissibly delegates authority to the Bureau of Prisons, it should be vacated.

Argument

I. The district court retained inherent authority to adjust a restitution payment schedule after entry of the sentencing judgment.

The district court's original judgment, entered in 1993, directed the defendant to pay \$4,133 in restitution to the victim bank. DA 1; GA 5. Over the next thirteen years (while the defendant was still incarcerated), the district court modified the restitution payment schedule three times: In 1998, the court modified the payment schedule to require the defendant to pay \$2 per month while incarcerated, and in the course of this modification, notified the defendant that the court could adopt future modifications to the payment schedule based on the defendant's ability to pay. DA 2. Next, on June 5, 2006, the court again modified the payment schedule to increase the payment obligation to \$25 per month, and again notified the defendant that the schedule was subject to modification by the court. DA 3. When the defendant complained about this modification, the court vacated that judgment, and directed instead that the defendant's restitution payment obligation would be "increased in accordance with the guidelines of the Inmate Financial Responsibility Program." DA 6.

The defendant appealed the 2006 orders and argues (in both his original brief and his supplemental brief) that the district court lacked authority to enter the orders modifying his restitution payment schedule during the term of his

incarceration.³ While the Government agrees that the 2006 order should be vacated and the case remanded for entry of an order setting a proper restitution schedule, the Government contends that the court had inherent authority to modify the *restitution payment schedule* during the term of his incarceration, especially where, as here, the restitution order created no expectation of finality as to the payment schedule.⁴

³ The defendant also argues that the district court was without authority to amend the restitution payment schedule in 1998, but he did not appeal that order. Accordingly, while this brief discusses that order, the validity of that order is not before the Court at this time.

⁴ The defendant notes that the Government's position in this case has been "confusing." The Government originally argued to vacate and remand the case to the district court for clarification of the court's intent with respect to the defendant's restitution payment obligation. After this Court denied that motion, the Government filed its brief arguing that the district court lacked authority under Rule 35 to modify the restitution order years after the judgment originally entered. The Government continues to believe that Rule 35 limits the court's authority to modify a criminal judgment in most circumstances, but upon further research and consideration – prompted by this Court's June 4, 2009 order – the Government has concluded that in the unusual circumstances presented by this case, the district court had inherent authority to modify the restitution payment schedule portion of the criminal judgment during the defendant's term of incarceration.

Although the Government's legal theories have evolved, the Government has consistently advocated a remand to the
(continued...)

The law governing restitution at the time of the defendant's sentencing in 1993 was the Victim and Witness Protection Act of 1982 ("VWPA"), codified principally at 18 U.S.C. § 3663. That statute authorized a district court to order restitution as part of a criminal sentence. *See* 18 U.S.C. § 3663(a); *Porter I*, 41 F.3d at 70 ("Section 3663 provides, in short, that the order of restitution is part of the sentencing process."). The statute further authorized the district court to "require that [a defendant convicted of an offense under this title] make restitution . . . within a specified period or in specified installments." 18 U.S.C. § 3663(f)(1).⁵

Although the VWPA expressly authorized the amendment of a restitution order, under certain conditions, when the restitution order was a condition of supervised

⁴ (...continued)

district court. At a minimum, the district court's multiple orders in this case have generated significant confusion. The Government respectfully suggests that in the unique factual and legal circumstances of this case, the most appropriate resolution of this case would be a remand for further proceedings before the district court.

⁵ The Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1227, significantly altered the law governing restitution, including the law governing modification of restitution orders, but those alterations are irrelevant to the issue presented by this case. *See* 18 U.S.C. §§ 3663A, 3664 (2000) (historical and statutory notes) (providing that MVRA only applies to sentencing proceedings for convictions on or after the effective date of the Act, April 24, 1996).

release, *see* 18 U.S.C. § 3663(g), in 1993, there were no express provisions authorizing a district court to modify a restitution payment schedule during a defendant's term of incarceration. The absence of an *express* provision authorizing amendments, however, does not preclude a finding that the court had *inherent* authority to amend the restitution payment schedule.

A. The district court retained inherent authority to modify the scheduling of restitution payments during the defendant's term of incarceration because the original sentencing order did not create any expectation of finality as to scheduling.

In *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980), the Supreme Court reasoned that “Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the [Due Process] Clause.” Accordingly, “the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase.” *Id.* In *Porter I*, this Court discussed *DiFrancesco* in the context of a challenge to a restitution order. In the course of remanding the restitution order to the district court, the *Porter* Court noted that *DiFrancesco* had “altered the long-standing double jeopardy rule against increased punishment by holding in substance that a sentence can be altered so long as the defendant has no legitimate expectation of finality in the original sentence.” 41 F.3d at 71. By contrast, “[w]here the restitution portion of a

sentence carries with it a legitimate expectation of finality, the traditional rule [*i.e.*, precluding an increase in punishment where the punishment has already been partly suffered] still may be applicable.” *Id.* See also *United States v. Porter*, 90 F.3d 64, 71 (2d Cir. 1996) (“*Porter II*”) (Van Graafeiland, concurring) (“[The Court] concluded [in *Porter I*] that such [an] increase [in restitution] might be made if the sentencing judge could make it clear in some way that the part of his sentence dealing with restitution was not a final order.”). Put another way, if the defendant could have reasonably expected that the payment schedule portion of the judgment would be subject to future amendment, then a supplemental order amending the payment schedule would not be improper.

While *Porter I* considered whether a district court may increase the *amount* of restitution owed by a defendant, the same logic would apply to consideration of whether the district court may alter the restitution payment schedule. See *United States v. Hayes*, 135 F.3d 133, 139 (2d Cir. 1998) (in challenge to restitution payment schedule, Court notes, with tacit approval, that the district court had contemplated issuing subsequent orders setting restitution payment schedule). Thus, in *United States v. Golino*, 956 F. Supp. 359 (E.D.N.Y. 1997), a case decided under the VWPA, the district court grappled with how to set a realistic restitution payment schedule given uncertainty about the future while at the same time remaining faithful to this Court’s directive in *Porter I* that a court not delegate to the probation department the authority to modify the payment schedule. Ultimately, the court concluded that in the absence of an express provision *precluding* the modification of a restitution payment schedule, it had

authority to establish a fixed restitution schedule while retaining the ability to modify that schedule if changed circumstances warranted an amendment. *Id.* at 366.

In contrast to the *Golino* court's reading, the defendant reads § 3663(f) to preclude a modification of his restitution payment schedule during his term of incarceration. This reading of the statute should be rejected. *First*, as explained by the *Golino* court, there is no *express prohibition* in the VWPA on modifications to a restitution order during a term of incarceration. Indeed, the relevant statutes demonstrate the inherent need to be able to modify restitution payment schedules to make the victim whole in the shortest time possible. For example, § 3663(f)(3) provides that restitution is due immediately unless the court orders otherwise. Section 3663(g), which allows modification of restitution payment obligations during supervised release, expressly permits modification based on a defendant's "employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay." While these factors are expressly set out with respect to modification of an order during supervised release, the same factors concerning ability to pay are all equally assessable during a term of incarceration.

Second, the defendant cannot show that he had any expectation of finality with respect to his restitution payment schedule. Even under his own reading of the statute, the district court had authority to modify the

payment schedule up to at least 27 years after sentencing.⁶ Furthermore, the orders themselves eliminate any argument that the defendant had a legitimate expectation of finality in the schedule of his restitution payments. In the original sentencing judgment, the court directed that the defendant pay restitution “on a schedule to be determined by the United States Probation Office.” DA 1. By the very terms of this order, then, the defendant could have formed no expectation of finality about his restitution payment schedule, beyond the identity of the decisionmaker who would set the schedule.

Indeed, the defendant implicitly confirmed that he had not formed any expectation of finality when he chose not to appeal the first modification of his restitution payment schedule (the 1998 order). In other words, by failing to appeal, the defendant tacitly recognized that the district court had authority to make further scheduling determinations while he was still incarcerated. Moreover, to the extent there was any ambiguity on the authority of the court to modify the payment schedule, the 1998 order removed that ambiguity by expressly stating that “[t]he court may adjust the amount of the monthly repayment according to the defendant’s ability to pay.” DA 2. This language in the 1998 order – language that was never appealed by the defendant – *eliminates* any argument that the defendant had a *reasonable* expectation of finality in his restitution payment schedule.

⁶ The defendant was sentenced to 262 months’ imprisonment, or nearly 22 years, plus five years of supervision, for a total of nearly 27 years.

Although the district court first modified his restitution payment obligation in 1998, it is only now that the court has ordered the defendant to begin paying non-nominal sums that the defendant argues that the court lacked authority to modify a restitution payment schedule. And although the defendant points to limits on a court's authority to modify criminal judgments, and the absence of an express statutory authority for amendment, he does not explain how those limits apply in this case where the original order (by implication) and the subsequent modification of that order (by express statement) clearly contemplated further proceedings and modifications to the restitution payment schedule.

In sum, § 3663 contains no language expressly precluding a district court from modifying a restitution payment schedule during a defendant's term of incarceration. In the absence of any language precluding such a modification, and in light of statutory authority expressing a preference to make the victim whole as soon as possible, the statute should be read to allow a district court to modify the restitution payment schedule where, as here, the defendant had no legitimate expectation of finality in that schedule.

B. Alternatively, the district court retained inherent authority to clarify and interpret its ambiguous orders.

Even if the district court lacked the inherent authority under the restitution statutes to modify the restitution payment schedules, the court had inherent authority to clarify and interpret prior ambiguous orders. The sequence of events in this case demonstrates that the court's orders fell squarely within this authority.

In *United States v. Spallone*, 399 F.3d 415, 418 (2d Cir. 2005), this Court held that a district court “retains inherent authority to interpret ambiguities in its own orders and judgments” despite the fact that “a district court’s ability to correct or modify a sentence is narrowly circumscribed by Fed. R. Crim. P. 35 and 36.” In other words, when there is a term or provision that creates doubt as to the concrete meaning of the order, “[t]he district court [does] not exceed its authority in clarifying [the] ambiguity.” *Id.* Moreover, the *Spallone* Court held that it would “accord substantial deference” when the issuing judge reviews and interprets his own orders, and would “not reverse the judge’s construction of an ambiguity in his own words except for abuse of discretion.”⁷ *Id.* at 423.

⁷ Despite this statement of the standard review, in *Spallone* itself, the Court reviewed the order granting the motion to compel (the order that interpreted an ambiguity in the prior Rule 35 ruling) *de novo* because it was entered by a different district judge. *Id.* at 423.

In *Spallone*, the defendant was originally sentenced to thirty months' imprisonment and three years of supervised release, with a special condition that he pay restitution to the United States. *Id.* at 418. The district court subsequently granted a Rule 35(b) motion for reduction of the defendant's sentence, in which it ordered that "the [incarcerated] defendant . . . be sentenced to time served." *Id.* at 419 (quoting *United States v. Spallone*, 99-CR-0317 (E.D.N.Y. Apr. 18, 2002)). Upon his release by the Bureau of Prisons, the defendant did not report to the United States Probation Department to begin his term of supervised release. The Government moved to compel the defendant to comply with the supervision and restitution provisions of his judgment of conviction, and the district court granted the motion, ordering the defendant to serve his term of supervised release and to pay restitution as ordered in the original judgment of conviction. In so ruling, the district court rejected the defendant's argument that its prior ruling on the Rule 35 motion had been "a superseding judgment imposing an entirely new sentence," finding instead that that ruling was "simply 'a mechanism to modify the incarceration aspect of the earlier judgment,' with no effect on the restitution and supervised release components of the judgment." *Id.* at 420 (quoting district court).

On appeal, this Court upheld the authority of the district court to clarify ambiguous portions of its earlier orders, concluding that the order granting the Government's motion to compel supervision and restitution did not exceed the court's authority. *Id.* at 422. That order did "not attempt to resentence [the defendant] or to correct a perceived error in [the order granting the

Rule 35 motion]. . . . Rather, the [order granting the motion to compel supervision and restitution] properly clarifies an ambiguity in the [Rule 35 order]” *Id.*

Here, just as in *Spallone*, the district court retained inherent authority to interpret an ambiguity in its original judgment. The court’s 1998 amendment properly clarified that ambiguity, and further authorized the subsequent amendments to the restitution payment schedule.

In light of the governing statutory scheme, the district court’s original judgment (entered in 1993) left ambiguous whether the court intended to impose a restitution obligation on the defendant during his term of incarceration. Under § 3663(f)(1), a district court could choose to order restitution to be paid either “within a specified period or in specified installments”; § 3663(f)(3) further provided that “[i]f not otherwise provided by the court under this subsection, restitution shall be made immediately.” The district court’s order only addressed restitution in the “Special Conditions” portion of the judgment leaving unclear whether the court (1) expressly remained silent as to restitution in the main body of the order pursuant to § (f)(3), so that restitution would be due immediately, and then, pursuant to § (f)(1), set forth a payment schedule in the “Special Conditions” portion in the event the debt was not satisfied by the time of release; or (2) expressly deleted any reference to restitution in the main body of the order and thus intended that restitution *only* be a condition of supervision under § (f)(1). In other words, the original judgment was ambiguous on whether the court intended the defendant to pay restitution during his term of incarceration.

With this ambiguity in the original judgment, the district court's 1998 order properly interpreted and resolved that ambiguity. In the 1998 order, the court ordered the defendant to pay \$2 per month during his incarceration, DA 2, thus making clear that the defendant was required to make restitution payments during his term of incarceration. This intent to impose a restitution obligation during the term of incarceration is further confirmed by the court's 2006 orders that amended the payment schedule during the term of incarceration. On this understanding, the special condition of supervised release was simply a mechanism for enforcing restitution payments during supervised release in the (likely) event that restitution had not yet been paid in full.

Furthermore, the district court's 1998 order – making clear that the defendant's restitution payment obligation began during his incarceration – was a reasonable interpretation of its original 1993 judgment. *Spallone*, 399 F.3d at 423 (holding that this Court affords substantial deference to district court's interpretations of its own orders and will not reverse unless interpretation is an abuse of discretion). With the underlying statutory framework, it was a permissible construction of the order, and it comported with the statute's preference for making the victim whole as soon as possible. Moreover, the defendant never appealed that decision, thus suggesting that he had no quarrel with the district court's interpretation that he was required to pay restitution while incarcerated. It was not until the court *increased* his restitution obligation that the defendant complained.

Although the defendant claims that the court lacked authority to amend its original judgment in 1998, the only question before the Court now is the propriety of the district court's September 1, 2006 order directing that the restitution payment schedule be set according to the guidelines of the IFRP. In 1998, the court interpreted its original order to provide for a restitution obligation during incarceration, and as discussed above, this interpretation was entirely proper. In the absence of a timely appeal, that decision is immune from attack. *See United States v. Machado*, 465 F.3d 1301, 1306 (11th Cir. 2006) (in absence of proper appeal, appellate court cannot review whether a judgment was defective, even if the asserted defect is that the district court lacked jurisdiction).

And while the September 2006 order cannot properly be classified as an order interpreting a prior ambiguous order, it was predicated on the fully proper 1998 order, and specifically the language authorizing future amendments to the payment schedule based on changes in the defendant's ability to pay. In other words, while the 1998 order properly interpreted a prior ambiguity, in the course of that interpretation, it made express what was also already inherent, *i.e.*, that the court had authority to modify the payment schedule to accommodate changes in the defendant's ability to pay. *See Part I.A., supra*. Accordingly, because the defendant never challenged the 1998 order, and because that order effectively eliminated any argument that he had a legitimate expectation of finality in the terms of his restitution payment schedule, the 2006 order that modified that schedule was entirely proper.

II. The September 1, 2006 order amending the defendant's restitution payment schedule impermissibly delegated authority for setting that schedule to the Bureau of Prisons.

In *Porter I*, this Court held that a district court may not delegate the “judicial function[]” of setting a restitution amount, or the scheduling of installment payments, to the Probation Office. 41 F.3d at 71. Following *Porter I*, this Court held similarly in *United States v. Mortimer*, 94 F.3d 89 (2d Cir. 1996), that a district court could not delegate post-sentencing decisions on restitution to the Bureau of Prisons under the IFRP. In *Mortimer*, the Court vacated a restitution order that required the defendant to participate in the prison’s IFRP and make restitution payments “in accordance with the policies of that program” because, under the program, payment schedules “are not fixed according to a predetermined formula, but rather vary at the discretion of the prison staff.” *Id.* at 91. The Court concluded that “the district court’s delegation of its authority to establish the installment amount and timing of [the defendant’s] . . . restitution payments to the Federal Bureau of Prisons . . . was error that requires us to vacate his sentence and remand for resentencing.” *Id.* (quoting *United States v. Miller*, 77 F.3d 71 (4th Cir.1996)). See also *United States v. Kinlock*, 174 F.3d 297, 301 (2d Cir. 1999) (district court may draw upon IFRP guidelines in setting a restitution payment schedule, “so long as discretionary authority to depart from the court’s order is not vested in prison officials”) (quoting *Mortimer*, 94 F.3d at 91 n.2).

The September 1, 2006 order in this case suffers from the same flaw as that identified in *Mortimer*. The September 1, 2006 order provided that “[t]he defendant’s restitution payments shall be increased in accordance with the guidelines of the Inmate Financial Responsibility Program. *See* 28 C.F.R. §§ 545.11 and 545.12.” The guidelines in the IFRP relied upon by the district court, however, vest discretion with prison officials to alter the payment amount. Specifically, pursuant to 28 C.F.R. § 545.11(b)(1) and (2), minimum installment payments are suggested, but prison officials retain discretion to require payments above or below the suggested amount. *See* 28 C.F.R. § 545.11(b)(1) (“This minimum payment may exceed \$25.00, taking into consideration the inmate’s specific obligations, institution resources, and community resources.”); 28 C.F.R. § 545.11(b)(2) (“Any allotment which is less than the 50% minimum must be approved by the Unit Manager. Allotments may also exceed the 50% minimum after considering the individual’s specific obligations and resources.”). Accordingly, because the restitution order vests discretion with prison officials to alter the restitution payment schedule, that order should be vacated and remanded with instructions to fix a schedule and amount of payments during the period of incarceration.⁸

⁸ Should this Court remand the case to the district court with instructions to set a schedule and amount of payments during the period of incarceration, the Government will provide to the district court a recommendation as to a proposed schedule and amount, in consultation with the Bureau of Prisons.

Conclusion

For the foregoing reasons, the district court's September 1, 2006 Order on Increase in Restitution Payments should be vacated and remanded for purposes of setting a schedule and amounts of payment of restitution during the remaining portion of incarceration and, if a balance remains, also setting a schedule and amounts of payment during the period of supervision.

Dated: September 25, 2009

Respectfully submitted,

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DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Christine Sciarrino". The signature is fluid and cursive, with a long, sweeping underline.

CHRISTINE SCIARRINO
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ADDENDUM

18 U.S.C. §§ 3663-3664 (1993)

§ 3663. Order of restitution

- (a) (1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.
- (2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.
- (3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.
- (b) The order may require that such defendant--
- (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--
- (A) return the property to the owner of the property or someone designated by the owner; or
- (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--
- (i) the value of the property on the date of the damage, loss, or destruction, or
- (ii) the value of the property on the date of sentencing,

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

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

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

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

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

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

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process

resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e) (1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in--

(A) any Federal civil proceeding; and

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

(f) (1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than--

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced--

(1) by the United States--

- (A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or
 - (B) in the same manner as a judgment in a civil action; and
- (2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

§ 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

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

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the

preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

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