No. 09-

IN THE

Supreme Court of the United States

BRIAN RUSSELL DOLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Sara N. Sanchez
SHEEHAN, SHEEHAN & STELZNER, P.A.
P.O. Box 271
Albuquerque, NM 87103

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Kevin K. Russell
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

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QUESTION PRESENTED

Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Russell Dolan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order of the Court of Appeals for the Tenth Circuit granting the petition for rehearing, adding a footnote to the original panel opinion, and denying the petition for rehearing en banc (App. 1a-3a) is unpublished. The opinion of the Court of Appeals for the Tenth Circuit as amended (App. 4a-26a) is published at 571 F.3d 1022. The district court's opinion (App. 27a-48a) is unpublished.

JURISDICTION

The order of the court of appeals denying petitioner's petition for rehearing en banc was filed on June 26, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The full text of 18 U.S.C. §§ 3663A and 3664 is set out in the Appendix at pages 49a-60a. Section 3663A(a)(1) provides that courts sentencing a defendant convicted of specified offenses shall order "restitution to the victim of the offense."

Section 3664(d)(5) provides:

> 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. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, provides that federal courts shall order restitution as part of the sentence in specified criminal cases. It further provides that an order of restitution "shall be issued and enforced in accordance with section 3664." *Id.* § 3663A(d). Section 3664 in turn provides that if the victim's losses cannot be obtained 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." 18 U.S.C. § 3664(d)(5). This case presents the question, over which the courts of appeals are deeply and intractably divided, whether a district court can nonetheless issue a restitution order once the time period set by Section 3664(d)(5) has expired.

1. On September 9, 2006, on the Mescalero Indian Reservation in southeastern New Mexico, two tribe members, petitioner Brian Russell Dolan and Evan Ray Tissnolthtos, got into a fight. Tissnolthtos was seriously injured. When petitioner returned

home, he informed his sister about the fight. She immediately contacted Bureau of Indian Affairs police, who questioned and subsequently arrested petitioner. Neither petitioner, because he was intoxicated at the time, nor Tissnolthtos, because of his injuries, remembered the relevant events clearly.

2. Because the offense was committed in Indian country, petitioner was charged in the United States District Court with assault resulting in serious bodily injury. *See* 18 U.S.C. § 1153 (conferring federal jurisdiction over crimes within Indian country); *id.* § 113(a)(6) (governing assaults).

Petitioner pleaded guilty. The May 30, 2007, Presentence Investigation Report (PSR) prepared by the United States Probation Officer noted that the MVRA applied to the case. The PSR explained that Tissnolthtos had claimed lost wages, but had failed to provide any documentation to support the claim. Pet. App. 29a. It also indicated that Tissnolthtos's medical expenses had been covered by the Indian Health Service – an agency within the federal Department of Health and Human Services – but that the agency had not responded to "repeated requests for medical expenses borne by the agency for the victim's treatment." Pet. App. 29a.

The district court originally scheduled sentencing for June 28, 2007, but granted a continuance at the government's request until July 30, 2007, to allow the victim's sister to appear at the hearing. Pet. App. 29a n.2. At the July 30 hearing, the district court discovered that the amount of potential restitution had not yet been fixed, although the government

estimated that there was an outstanding hospital bill for roughly $80,000. Pet. App. 30a. Rather than postpone the sentencing or impose a restitution obligation on the basis of the preliminary information, the court proceeded to sentence petitioner to a term of twenty-one months' imprisonment and three years' supervised release. The court noted that it was leaving open the matter of restitution, pending the receipt of additional information, but planned to order restitution. *Id.* The judgment, entered on July 30, 2007, left blank the amount of restitution, stating that

> Pursuant to the Mandatory Restitution Act, restitution is applicable; however no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time.

Pet. App. 31a.

Slightly more than two months later, the probation office prepared an addendum to the PSR containing detailed restitution information about the medical expenses the United States had incurred on the victim's behalf. Pet. App. 31a. Although the addendum noted that the MVRA required the court to fix the amount of restitution within 90 days after sentencing – that is, by October 28, 2007 – the court did not set a hearing until February 4, 2008, 190 days after the original sentencing. Pet. App. 32a.

At the February 4 hearing, petitioner argued that the district court lacked the power to impose restitution because the 90-day period provided for in

Section 3664(d)(5) had lapsed. Pet. App. 32a. After ordering additional briefing, the district court set a final hearing for April 11, 2008. Pet. App. 32a. Following that hearing, on April 24, 2008, 270 days after petitioner had been sentenced, the district court held that despite the expiration of the 90-day period, it had the power to require petitioner to pay restitution and it ordered him to pay $104,649.78 in restitution to the federal government in payments of $250 per month. Pet. App. 48a.

In the opinion accompanying its restitution order, the district court noted that "the United States Courts of Appeal have not reached a consensus on the true effect of the 90-day requirement" and that they "differ[ed] over whether a district court has the authority to order restitution after the 90-day interval has elapsed." Pet. App. 35a. After reviewing "the vast array of positions taken by the circuit courts," Pet. App. 42a, it declined to adopt a plain language reading of Section 3664(d)(5). Instead, it "look[ed] to Congressional intent to decipher the true meaning of Section 3664(d)(5)." Pet. App. 42a. Because the MVRA was intended to provide restitution to victims, "[a]llowing a defendant to escape restitution simply because of a fortuitous chain of events would hardly serve the interests of justice." Pet. App. 43a.

3. Petitioner appealed to the Tenth Circuit, renewing his claim that the district court lacked the

ability, once the 90-day period of Section 3664(d)(5) had expired, to order restitution.[1]

The court of appeals affirmed. It rejected the claim that Section 3664(d)(5)'s 90-day deadline was "jurisdictional," in the sense that "the district court's power to enter any restitution order expired 90 days after [petitioner's] sentencing." Pet. App. 9a (emphasis omitted). Instead, the court of appeals embraced a "better-late-than-never principle," Pet. App. 13a, that it found rooted in "[t]he plain language of the Act, longstanding canons of construction, the MVRA's legislative history, and [its] own case law," Pet. App. 9a.

The court of appeals' analysis began by referring to the MVRA's directive that "*[n]otwithstanding any other provision of law*, when sentencing a defendant convicted of [an offense covered by the Act], the court *shall* order . . . restitution." Pet. App. 9a (quoting 18 U.S.C. § 3663A(a)(1) (emphasis and alterations the court's)). It reasoned that the obligation to order restitution thus "overr[ode] conflicting provisions of any other section" of the Act, including the time limits of Section 3664(d)(5). Pet. App. 10a (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)). It also relied on the title of Section 3664 – "*Procedure* for issuance and enforcement of order of restitution." Pet. App. 9a (quoting 18 U.S.C. § 3664

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[1] Petitioner also challenged the restitution payment schedule ordered by the district court, but he does not raise that issue here.

(emphasis added by the court)). The use of the word "procedure" indicated that Section 3664(d)(5) was not a jurisdictional statute, but was simply a "claims processing" rule. Pet. App. 11a.

Second, with respect to canons of statutory construction, the court of appeals pointed to a principle against "readily infer[ring] congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." Pet. App. 12a (quoting *Barnhart v. Peabody Coal*, 537 U.S. 149, 160 (2003)). Although Section 3664(d)(5) required restitution to be ordered within 90 days, it had "no other language purporting to deny district courts the authority to enter late restitution orders." Pet. App. 13a.

Third, the court of appeals asserted that the MVRA's legislative history reinforced its conclusion. The Senate Committee Report accompanying the Act, it declared, "makes plain that its emphasis on the need for speed and finality arises out of concern for victims, not victimizers." Pet. App. 16a. Quoting its prior decision in *United States v. Dando*, 287 F.3d 1007, 1010 n.4 (10th Cir. 2002), the court declared that "Congress intended the 90 day limitation period to protect victims against the dissipation of defendants' assets and not to protect defendants from a drawn-out sentencing process or to establish finality." Pet. App. 17a.

In light of its analysis, the Tenth Circuit adopted a position that it described as "consistent . . . with the decisions of the First, Second, Fourth, and Ninth Circuits, each of which has held, as we do, that the

passing of § 3664(d)(5)'s deadline does not toll the death knell of the district court's subject matter jurisdiction." Pet. App. 18a (citing cases from those circuits). It noted, however, that there were decisions from other circuits taking a range of positions, some permitting and others precluding the imposition of restitution after the 90-day period had run. Pet. App. 19a n. 2 (citing cases from the Sixth, Seventh, and Eleventh Circuits).

4. Petitioner moved for rehearing and rehearing en banc. The panel granted the petition for rehearing "for the limited purpose" of adding a footnote to its original opinion to address petitioner's claim that its opinion conflicted with an earlier Tenth Circuit case, *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005). Pet. App. 1a. The petition for rehearing en banc was denied. Pet. App. 3a.

5. This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve an ever-widening circuit split on an important and recurring question of federal law. The courts of appeals have adopted at least three distinct positions with respect to the power of district courts to order restitution outside of the 90-day window provided for in Section 3664(d)(5).

The question whether district courts have the power to order restitution without complying with the procedures laid out in Section 3664(d)(5) is an important one. Federal courts order restitution in thousands of cases each year and the consequences of

district courts' failure to adhere to the strictures of Section 3664(d)(5) has produced a steady stream of litigation reaching inconsistent results. Petitioner's challenge to the order in this case would have succeeded in at least three circuits and the likely outcome is unclear in yet a fourth. This case presents an ideal vehicle both to resolve the issue and to clarify that the plain language of Section 3664(d)(5) precludes district courts from ordering restitution outside the time limits set by Congress.

I. The Courts Of Appeals Are Deeply Divided Over The Power Of District Courts To Order Restitution Outside Of The Time Limits Set By Section 3664(d)(5).

As acknowledged by both the Tenth Circuit in this case, Pet. App. 19a n.2, and the Eighth Circuit only one week later in *United States v. Balentine*, 569 F.3d 801, 803 (8th Cir. 2009), courts of appeals have reached "varying results" with respect to the question whether district courts can order restitution even if they fail to comply with the procedures of Section 3664(d)(5). "Varying" is an understatement. The courts of appeals are deeply, increasingly, and intractably fractured over the proper construction of a statute that comes into play thousands of times each year.

A. The Conflict Among The Courts Of Appeals Is Widespread And Longstanding.

A majority of the courts of appeals have now weighed in on the validity of restitution orders that are issued more than ninety days after a defendant

has been sentenced. Their answers differ strikingly. The Seventh and Eleventh Circuits do not permit district courts to issue such orders. The Third Circuit permits such orders only by tolling the 90-day period in cases where the defendant is responsible for the delay. The Second and Ninth Circuits apply a prejudice standard to untimely orders (with the Second also adopting a tolling rule, but for a different class of cases than those tolled by the Third Circuit). The Sixth Circuit's position seems to be that restitution orders issued more than ninety days after sentencing are permissible in cases where some restitution was ordered within the period established by Section 3664(d)(5). Finally, the Eighth and Tenth Circuits seem prepared to uphold all restitution orders, without regard for their compliance with Section 3664(d)(5).

1. ***The Seventh and Eleventh Circuits.*** The Seventh and Eleventh Circuits have adopted a straightforward interpretation of Section 3664(d)'s 90-day provision. They have held that a district court does not have the power to order restitution if it fails to follow the time limit imposed by Section 3664(d)(5).

In *United States v. Farr*, 419 F.3d 621 (7th Cir. 2005), the defendant was sentenced in 2001 to a term of imprisonment; the judgment directed "that restitution was 'to be determined' and that the 'determination of restitution is deferred to unknown [sic].'" *Id.* at 622. More than two years later, the probation office discovered that the restitution had never been ordered. When the district court was informed, it ordered Farr to pay roughly $200,000 in

restitution as a condition of his supervised release. *Id.* at 623.

The Seventh Circuit reversed, and held that the "plain language" of Section 3664(d)(5) denied the district court the power to order restitution. 419 F.3d at 625. "[F]ederal courts possess no inherent authority to order restitution, and may do so only as explicitly empowered by statute." *Id.* at 623 (quoting *United States v. Donaby*, 349 F.3d 1046, 1052 (7th Cir. 2003)). When "courts are expressly directed to comply with the procedures set forth in § 3664," *Farr*, 419 F.3d at 625, they are empowered to order restitution only if they follow its timing requirements. Save in one, statutorily provided circumstance involving newly discovered losses after entry of a restitution order, a district court does not have authority to order restitution once the 90-day period had passed.[2]

The Seventh Circuit firmly rejected any argument from legislative purpose:

> [G]iven the clear time limit set forth in § 3664(d)(5), it cannot be said that it was Congress's intent to allow district courts to order restitution at any time. The statutory

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[2] The Seventh Circuit recognized that there could be limited circumstances "which would restart the ninety-day period so that a new order of restitution could be issued in compliance with § 3664(d)(5)'s time limit," 419 F.3d at 625, but emphasized that the cases in which this occurred involved timely, but otherwise flawed, restitution orders.

> language in § 3664(d)(5) sets forth an unambiguous requirement that courts ordering restitution as a condition of supervised release do so within ninety days of sentencing. We may not overlook the statute's plain language to further what may be a broader statutory purpose. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (when statutory language is unambiguous, courts must apply the plain meaning and not speculate that the legislature intended to say something different).

Id. at 625.

The Eleventh Circuit has repeatedly taken the same categorical approach as the Seventh Circuit. In January 2000, the defendant in *United States v. Maung*, 267 F.3d 1113 (11th Cir. 2001), was sentenced to a term of imprisonment followed by supervised release. The judgment "ordered him to pay restitution, but it deferred determination of the amount of restitution 'pending further hearing.'" *Id.* at 1117. More than six months later, after a period during which active negotiations over the amount of restitution had occurred, the Government sought a restitution order. Over the defendant's objection that Section 3664(d)(5) did not permit such an order because more than ninety days had passed since his sentencing, the district court entered an order requiring Maung to pay over $200,000 in restitution and amended its final judgment to incorporate that amount. 267 F.3d at 1117.

The Eleventh Circuit reversed the restitution order "because it was untimely." *Id.* at 1114. Like the Seventh Circuit, the Eleventh construed the "plain language of the statute" as authorizing district courts to order restitution only within ninety days of sentencing. *Id.* at 1122. In interpreting a statute, a court should look beyond "the plain meaning of its words" only if "the statutory text is unclear" or the plain language "produces a result that is not just unwise but is clearly absurd." *Id.* at 1121 (internal quotation marks omitted). Neither circumstance obtained here: "The requirement, plain on the face of § 3664(d)(5), that a district court enter a restitution order within 90 days of sentencing, and not thereafter, generally will not produce an absurd result." *Id.* at 1122. The Eleventh Circuit hypothesized that the "strict 90-day limit" might be equitably tolled in cases where a defendant's "bad faith delay" prevented a court from complying with Section 3664(d)(5). 267 F.3d at 1122. But it rejected the Government's argument that the statute should be tolled to fulfill a broad congressional purpose. It also rejected the Government's argument that untimely restitution orders should be permitted absent a showing of prejudice to the defendant:

> [T]here is no prejudice requirement in the statute, and we are not convinced that we should read one into it. . . . [W]e are governed by the language Congress enacts, not by purported designs or intentions that conflict with that language. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia,

> J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions.").

Id. at 1121. Thus, the Eleventh Circuit "let the chips fall where the plain language of the statute indicates they should." *Id.* at 1122.

The Eleventh Circuit has repeatedly adhered to its position. *See, e.g.*, *United States v. Kapelushnik*, 306 F.3d 1090, 1093-94 (11th Cir. 2002) (stating that when a district court "fails to make [a determination fixing the amount of restitution] within the 90-day limitations period, the judgment of conviction becomes final and contains no enforceable restitution provision"); *United States v. Raphael*, 181 Fed. Appx. 900, 901 (11th Cir. 2006) (per curiam) (same).

2. *The Second, Third, and Ninth Circuits.* Three other courts of appeals have recognized that Section 3664(d)(5) limits a district court's power to order restitution, but have nonetheless affirmed particular restitution orders either by tolling Section 3664(d)(5)'s 90-day limit or by treating violations of the deadline as harmless error.

a. *Tolling.* The Second Circuit has permitted tolling of the 90-day limit in a case where the defendant's bad-faith actions interfered with the sentencing court's ability to comply with Section 3664(d)(5). In *United States v. Stevens*, 211 F.3d 1 (2d Cir. 2000), *cert. denied sub nom. Gall v. United States*, 531 U.S. 1101 (2001), the district court initially sentenced Gall to incarceration, supervised release, and restitution, postponing the restitution order and directing the defendant to produce various documentation that would enable the court to fix the

amount. *Id.* at 3. Because Gall "stonewall[ed]" and "'flout[ed] the authority of the court' by concealing assets," *id.* at 4, the district court did not enter the restitution order until 117 days after the sentencing.

On appeal, the Second Circuit upheld the restitution order. In light of the statutory purpose, "Congress could not have intended to permit offenders to subvert the [restitution requirement] by using dilatory maneuvering to defeat a sentence of restitution. . . . [T]o vacate the restitution order where the defendant himself ran out the 90-day clock would be to reward him for willful defiance of the court's orders." *Id.* at 4-5. Thus, the Second Circuit "h[e]ld that the 90-day clock in § 3664(d)(5) may be tolled by the defendant's own purposeful misconduct." *Id.* at 5.

In *United States v. Terlingo*, 327 F.3d 216 (3d Cir. 2003), the Third Circuit offered a different tolling rule. It described the Second (and Tenth) Circuits as permitting tolling only when a defendant had acted in bad faith, *see id.* at 219 (citing *United States v. Stevens*, 211 F.3d 1 (2d Cir. 2000), and *United States v. Dando*, 287 F.3d 1007 (10th Cir. 2002)), and suggested that the Eleventh Circuit had left open that possibility.[3] The Third Circuit decided, however,

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[3] While the Eleventh Circuit has not actually used principles of tolling to affirm an untimely restitution order, it declined in *Maung* to say that Section 3664(d)(5) "can never be equitably tolled." *Maung*, 267 F.3d at 1122. It declined to toll the 90-day limit in Maung's case because the delay "was not caused by obstruction or bad faith tactics of the defendant" and there was

that in light of the statutory purposes, "even in the absence of any bad faith behavior the statute must be equitably tolled when the delay is caused in significant part by the defendant." 327 F.3d at 222. At the same time, it squarely stated that "[i]f the defendant played no significant part in causing the delay, however, equitable tolling will not be available." *Id.*

b. *Prejudice requirements.* In contrast to the Eleventh Circuit, which squarely refused to import a prejudice standard into Section 3664(d)(5),[4] the Second Circuit has "held that an extension of the proceedings beyond the 90-day period provides no basis for vacating the restitution order unless the defendant can show that the extension caused him actual prejudice." *United States v. Douglas*, 525 F.3d 225, 252-53 (2d Cir. 2008); *see also, e.g.*, *United States v. Zakhary*, 357 F.3d 186, 191 (2d Cir.), *cert. denied*, 541 U.S. 1092 (2004); *Stevens*, 211 F.3d at 5-6.

The Ninth Circuit has also adopted a prejudice standard. In *United States v. Marks*, 530 F. 3d 799 (9th Cir. 2008), for example, the court relied on the purpose and legislative history of the MVRA to conclude that "the failure to comply" with the "procedural requirements" of Section 3664(d)(5) "is

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"no indication that the defendant was any more at fault for the delay than the government." *Id.*

[4] The Eighth Circuit has also expressly rejected a prejudice standard. *See infra* page 20.

harmless error absent actual prejudice to the defendant." 530 F.3d at 812 (quoting *United States v. Cienfuegos*, 462 F.3d 1160, 1163 (9th Cir. 2006)); *see also United States v. Moreland*, 509 F.3d 1201, 1224 & n.6 (9th Cir. 2007) (applying harmless-error review to violations of Section 3664(d)(5) while noting the contrary approach of the Seventh Circuit in *Farr*), *vacated and remanded on other grounds*, 129 S. Ct. 997 (2009).[5]

3. ***The Sixth Circuit.*** The Sixth Circuit has issued a series of decisions that have treated restitution orders entered more than ninety days after sentencing differently depending on whether an initial order was entered within the period provided by Section 3664(d)(5).

In *United States v. Vandeberg*, 201 F.3d 805 (6th Cir. 2000), for example, the court was confronted with a situation in which, although an initial restitution order was entered within ninety days of sentencing, the district court later amended the order after the ninety days had run. The Sixth Circuit held that the district court had erred "by unilaterally

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[5] In a case concerning a different aspect of Section 3664(d)(5) – its requirement that notice of the amount of restitution sought be provided ten days before sentencing – the Fourth Circuit suggested in dicta that it would apply a harmless-error requirement to violations of the 90-day rule. *See United States v. Johnson*, 400 F.3d 187, 199 (4th Cir. 2005) (stating that "just as the failure to conform with the ninety-day limit constitutes harmless error absent prejudice, so too does the failure to comply with the ten-day limit").

amending and finalizing the restitution order without affording the parties an opportunity to object within the 90-day period." *Id.* at 814. Nonetheless, it affirmed the revised restitution order because the error was "harmless." *Id.* Because "[t]he MVRA permits amendments to restitution orders to reflect changed circumstances, [it] neither confers nor terminates a court's jurisdiction." *Id.*

In *United States v. Jolivette*, 257 F.3d 581 (8th Cir. 2001), by contrast, the Sixth Circuit confronted a case in which the district court's initial sentence, while it had indicated a plan to order restitution, had failed to set any amount within the 90-day period. It concluded that because "[a] federal court's power to order restitution is circumscribed by statute," once the "statutory deadline for calculating the amount of restitution due has passed," a district court could not, "consistent with the terms of the statute, set an amount of restitution." *Id.* at 583-84. The court found reinforcement for its conclusion in the rule of lenity:

> We believe that the statute makes clear the congressional intent to prohibit courts from making restitution determinations after the statutory period has run. But even if we found Congress's silence on the issue of what occurs if, as in this case, the court does not make such a determination, we would apply the well-settled rule requiring that any ambiguity in criminal statutes be resolved against the government and in favor of the criminal defendant. *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (rule of lenity

> requires that "ambiguous criminal statutes ... be construed in favor of the accused").

Id. at 584. In short, "because there was no timely judicial determination of the restitution amount, the judgment contains no enforceable restitution provision." *Id.*

The Sixth Circuit's most recent decision, *United States v. Bogart*, 2009 U.S. App. LEXIS 18126 (6th Cir. 2009), involved a revised order. The case involved a complex, multi-defendant fraud. In July 2004, the district court sentenced Bogart, ordering him to pay more than $3.3 million in restitution. Bogart subsequently filed a motion challenging the restitution order because the court had not determined the exact portion of the victims' losses for which he was responsible. After holding a hearing in April 2006 regarding the restitution obligations of each of the conspirators, in June 2007 the district court issued an opinion finding Bogart jointly and severally liable for only $2.5 million in restitution and ordering him to repay that amount at the rate of $500 per month.

On appeal, Bogart challenged the restitution order as untimely. The court of appeals affirmed. It distinguished *Jolivette* on the grounds that that case had arisen in the context of "a district court's failure to set *any* restitution amount." 2009 U.S. App. LEXIS 18126 at *16-17 (emphasis in the original). By contrast, in Bogart's case, there had been a timely restitution order, albeit one modified outside the 90-day limit. This made Bogart's case resemble

Vandeberg which, the court of appeals declared, had applied a harmless-error standard. *See id.* at *17-20.

4. *The Eighth Circuit.* By contrast, the Eighth Circuit in its recent opinion in *United States v. Balentine*, 569 F.3d 801 (8th Cir. 2009), squarely rejected the tolling and harmless-error approaches. *Id.* at 805 (stating that "Section 3664(d)(5) unambiguously imposes a 90-day time limit on restitution orders" and joining the Eleventh Circuit's rejection of a prejudice requirement). Nonetheless, it affirmed a district court's untimely restitution order under an entirely different theory that was based on this Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), a Bail Reform Act case. There, in the context of deciding that a court's failure to comply with the BRA's prompt hearing provisions did not require the release of a dangerous defendant, this Court pointed out that the Act was "silent on the issue of a remedy for violations of its time limits," *id.* at 716. In light of this fact and the general principle that the public interest should not be "prejudiced by the negligence of the officers or agents to whose care they are confided," *id.* at 718 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)), the court held violations of the prompt hearing provisions did not require release of individuals who should otherwise be detained. The Eighth Circuit adopted an identical rule with respect to Section 3664(d)(5) violations: "In light of Congress' clear intent to effectuate important public policy," Section 3664(d)(5) did not "divest the court of authority to order restitution if the timing provision was breached." 569 F.3d at 807. It ended

its discussion by quoting, with approval, from the Tenth Circuit's decision in this case. *Id.*[6]

5. ***The Tenth Circuit.*** In this case, the Tenth Circuit recognized that the district court's restitution order "was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act." Pet. App. 5a. Nonetheless, it held that the order was "not an invalid one." Pet. App. 5a. It circumscribed Section 3664(d)(5)'s deadline with "the better-late-than-never principle." Pet. App. 13a.

The Tenth Circuit's approach thus conflicts with the rule adopted and applied by the Seventh and Eleventh Circuits. In those circuits, an untimely restitution order is invalid because district courts simply lack statutory authorization to order restitution except in compliance with Section 3664(d)(5).

The Tenth Circuit's approach also conflicts with the approach taken by the Third Circuit. There would be no need to discuss principles of tolling if orders entered outside the time period set by Section 3664(d)(5)'s deadline are presumptively valid. If, as the Tenth Circuit assumed, a district court retains

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[6] Somewhat puzzlingly, in light of its rejection of the harmless-error approach adopted by the Second and Ninth Circuits, the Eighth Circuit stated that it was not "decid[ing] today what, if any, remedies may be available to a defendant actually harmed by a district court's failure to abide by § 3664(d)(5)'s timing provisions." 569 F.3d at 807.

the power to order restitution at any time, there would be no need to stop the 90-day clock.

And the Tenth Circuit's rule conflicts with the Sixth Circuit's approach in *Jolivette* regarding the appropriate test for cases in which no restitution order was timely entered, as opposed to cases involving later revisions of restitution orders initially imposed within the 90-day window of Section 3664(d)(5). [7]

Moreover, while the Tenth Circuit acknowledged that "some of our sister circuits have held out the possibility that, if a defendant could establish prejudice arising from the district court's failure to enter restitution within the 90-day deadline, they might well craft some remedy to address any such prejudice," Pet. App. 20a (citing *Moreland* and

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[7] In *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004), the court of appeals upheld a restitution order entered 127 days after sentencing. The defendant, however, had not timely objected to the district court's plan, and thus the court of appeals reviewed the order only for plain error. *See id.* at 48. Citing the Sixth Circuit's decision in *Vandeberg*, the First Circuit rejected the defendant's claim that Section 3664(d)(5) was jurisdictional:

> This jurisdictional argument is undermined by § 3664's provision for continued revision of the restitution order in light of later discoveries of losses. Indeed, the title of the provision ("Procedure for issuance and enforcement of order of restitution") advertises its procedural nature, including the 90-day time frame.

Id. at 48-49.

Johnson), it expressed skepticism that a defendant could be relieved of an order to pay restitution "under *any* circumstances." *Id.* (emphasis added).

B. The Courts Of Appeals Are Incapable Of Resolving This Frequently Recurring Conflict.

The decisions discussed in Part I(A) of this petition show that courts of appeals have repeatedly been confronted with questions regarding Section 3664(d)(5)'s 90-day deadline. That is hardly surprising. According to the U.S. Sentencing Commission, in fiscal year 2008, district courts ordered restitution in more than 10,000 cases. *See* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, tbl. 15 (13th ed. 2008).

What the courts of appeals' opinions reveal, beyond the fact that issues regarding untimely restitution orders arise frequently and have produced a deep and wide circuit split, is that the lower courts' decisions are not converging on a consistent approach. Lower courts are well aware of the differing approaches. Many opinions contain surveys of the "varying results," *Balentine*, 569 F.3d at 803, reached in prior cases. *See also, e.g.*, *Terlingo*, 327 F.3d at 219-22; *Farr*, 419 F.3d at 626; Pet. App. 34a-40a. And the courts of appeals often acknowledge that the decision they are reaching in a particular case is inconsistent with the decisions reached by other courts. Just as telling, perhaps, are cases in which one court of appeals goes out of its way to declare that another court of appeals' decision claiming to be in harmony has in fact misconstrued the first court's approach. *See, e.g.*, *Farr*, 419 F.3d at

626 n.3 (stating that the Fourth Circuit had erred in *United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005), in "attributing [the] holding" that "district courts can enter restitution orders more than ninety days after sentencing provided that the delay does not prejudice the defendant" to the Seventh Circuit's decision in *United States v. Pawlinski*, 374 F.3d 536 (7th Cir. 2004)).

The fact that this year, three courts of appeals have confronted the issue yet again, have rejected the approaches taken by prior courts, and have propounded new rules demonstrates that the question has percolated long enough and this Court's intervention is warranted.

C. This Case Presents The Right Opportunity For Resolving The Conflict.

This case presents a perfect opportunity for this Court to decide whether district courts have the power to order restitution outside the time limits set by Congress in Section 3664(d)(5).

The district court's restitution order "was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act." Pet. App. 5a. The issue was properly presented to both the district court and the court of appeals, and each wrote a lengthy opinion directly deciding the question presented.

Moreover, the conflict was outcome determinative in this case. The Seventh and Eleventh Circuits have each reversed restitution orders in cases in the same posture as petitioner's, stating that when a district

court fails to issue an order fixing the amount of restitution within Section 3664(d)(5)'s limitation period, it loses the power to order restitution later.

In addition, under the undisputed facts of this case, petitioner would also have prevailed under the Third Circuit's rule. The courts below recognized that petitioner was "not at all to blame for the missed deadline." Pet. App. 17a; see Pet. App. 44a (recognizing that this was not a "tolling situation"). The Third Circuit was clear: Section 3664(d)(5) imposes a 90-day limit on the district court's power to order restitution and while that limit can be tolled, "[i]f the defendant played no significant part in causing the delay, . . . equitable tolling will not be available." *Terlingo*, 327 F.3d at 222.

II. District Courts Lack The Power To Order Restitution Outside Of The Time Limits Set By Section 3664(d)(5).

The "power to fix the sentence for a federal crime" lies in the hands of Congress. *Mistretta v. United States*, 488 U.S. 361, 364 (1989). Thus, there is consensus among the courts of appeals that "[f]ederal courts do not have inherent power to order restitution. The power to order restitution must therefore stem from some statutory source." *United States v. DeSalvo*, 41 F.3d 505, 511 (9th Cir. 1994) (citation omitted); *accord United States v. Hensley*, 91 F.3d 274, 276 (1st Cir. 1996); *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006); *Farr*, 429 F.3d at 623; *Balentine*, 569 F.3d at 802.

The statutory source for restitution in petitioner's case was the combination of Sections 3663A and

3664. The Seventh and Eleventh Circuits were correct to hold that the plain language of Section 3664(d)(5) authorizes district courts to impose restitution orders only within a specific time frame. Section 3663A, the statutory provision authorizing restitution for specific categories of crimes, expressly provides that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664." 18 U.S.C. § 3663A(d). Section 3664(d)(5) in turn provides that if the district court cannot ascertain the amount of restitution in time to order restitution at sentencing, "the court shall set a date for the final determination of the victim's losses, *not to exceed 90 days after sentencing*." *Id.* § 3664(d)(5) (emphasis added). When district courts are uncertain about the amount of restitution to order, they have two options: they can delay sentencing until the victim's losses have been ascertained, in which case the 90-day period does not begin to run, or they can delay ordering restitution for ninety days to enable additional information to be obtained. In addition, under circumstances where the defendant's bad faith acts or omissions are responsible for the court's inability to fix the amount of restitution within the statutory window, the court can toll the 90-day period. And Section 3664(d)(5) itself provides for amending restitution orders under certain clearly defined circumstances. What district courts *cannot* do is arrogate to themselves the right to flout the statutory deadline and nonetheless impose a restitution order. *See Maung*, 267 F.3d at 1121.

The additional proviso in Section 3664(d)(5) regarding after-acquired knowledge of victims' losses reinforces the conclusion that Section 3664(d)(5) means what it says. That proviso states:

> If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

This directive would make no sense unless the 90-day period in fact imposed a deadline. If district courts retained the right to issue, or to revise, restitution orders "anytime—days, months, years, or decades—after the 90-day deadline," Pet. App. 10a, it would be unnecessary to have a specific, and sharply circumscribed, power to amend restitution orders for late-discovered injuries. *See Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1892 (2009) (courts "should not interpret a statute in a manner that makes some of its language superfluous").

The Tenth Circuit's decision to the contrary rests on three critical errors. The first was its purported plain language analysis. The Tenth Circuit essentially disregarded the language of Section 3664(d)(5) itself. Instead, it focused on the language of Section 3663A, the provision authorizing the imposition of restitution as part of a criminal sentence. In the Tenth Circuit's view, the language at the very beginning of Section 3663A(a)(1) –

providing that "[n]otwithstanding any other provision of law," a district court "when sentencing a defendant convicted of [a covered] offense . . . shall order" restitution – somehow trumped Section 3664(d)(5)'s time limits. That is simply incorrect. Subsection (a)(1) of Section 3663A cannot sensibly be read to trump subsection (d) of the *very same statute* – the subsection that directs courts to "issu[e] and enforc[e]" their restitution orders "in accordance with section 3664." To the contrary, Section 3664 actually constrains the operation of Section 3663A, by, for example, placing the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense . . . on the attorney for the Government." *Id.* § 3664(e). Thus, for example, it seems obvious that if the court is in equipoise as to whether the victim suffered a particular loss, it must refrain from ordering restitution. The Tenth Circuit never explains why Congress would have gone to the bother of writing explicit limitations, including time limits, into the statute if it had already declared in the opening line of subsection 3663A(a)(1) that none of what followed had to be obeyed.

Moreover, the Tenth Circuit's reading would lead to absurd results. Under its reasoning, a district court would be required to order restitution for losses "not included in the initial claim for restitutionary relief" without regard to whether the victim complied with the 60-day limit or whether there was "good cause" for the victim's failure. *Id.* § 3664(d)(5). After all, if the "notwithstanding" language trumps the 90-day deadline for initial restitution orders, there is no

principled reason for following the "good cause" and 60-day limits for amended orders either.

The second flaw in the Tenth Circuit's reasoning lies in its assumption that if Section 3664(d)(5) was not "jurisdictional" in the strongest sense of the word – because, for example, it gives courts the power to reopen their orders after the 90-day period has run for good cause – then untimely restitution orders are permissible. This Court has cautioned that "[j]urisdiction is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). To be sure, Section 3664(d)(5) is not "jurisdictional" in the sense that it "delineat[es] the classes of cases (subject-matter jurisdiction) [or] the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). But a rule need not be "jurisdictional" in this sense to constitute "an inflexible claim-processing rule." *Id.* at 456; *see Eberhart v. United States*, 546 U.S. 12, 19 (2005) (reiterating the status of Fed. R. Crim. P. 45(b) as an "inflexible . . . demand for a definite end to proceedings" despite its being "nonjurisdictional"[8]).

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[8] Fed. R. Crim P. 45(b)(1)(B) provides that, in general "[w]hen an act must or may be done within a specified period, the court on its own may extend the time . . . after the time expires if the party failed to act because of excusable neglect." But Fed. R. Crim P. 45(b)(2) states that "[t]he court may not extend the time to take any action under Rule 35" – the rule for correcting sentences – "except as stated in that rule." Courts of appeals have frequently held that Rule 45(b)(2) prohibits

Like other statutory deadlines, the time limit in Section 3664(d)(5) precludes courts from issuing untimely orders. The fact that statutes of limitations, for example, are subject to tolling and waiver and must be raised as an affirmative defense does not mean that a court has the power to adjudicate an untimely claim after a defendant has properly objected, as petitioner did here. *See Eberhart*, 546 U.S. at 17 (pointing out that district courts must observe "clear [time] limits" in criminal proceedings when those limits are "properly invoked").[9]

The third flaw in the Tenth Circuit's analysis was that it imported principles excusing official delay in civil cases into the context of criminal sentencing. None of the cases it cited for the proposition that time limits can be ignored in the service of overarching statutory purposes involved criminal punishment. The closest the Tenth Circuit came was its reliance on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), a case under the Bail Reform Act, whose pretrial detention provisions this Court has unequivocally described as regulatory rather than

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district courts from increasing an erroneous sentence after the seven-day window provided in Rule 35(a). *See, e.g.., United States v. Austin*, 217 F.3d 595, 597 (8th Cir. 2000).

[9] Nor, of course, when a statute of limitations has been properly invoked by a defendant does a court require a defendant to show prejudice. The purpose of having statutes of limitations, rather than relying on equitable concepts such as laches, is to avoid requiring a case-by-case inquiry into the effects of delay.

punitive. *United States v. Salerno*, 481 U.S. 739, 747 (1987). Criminal prosecutions are different. If the government delays in charging a defendant until the statute of limitations has run, for example, a court cannot revive the prosecution because it would be in the public interest to convict the defendant or in the crime victim's interest to obtain restitution. Similarly, the government's obligation to bring a defendant to trial within the time limits set by the Speedy Trial Act cannot be treated simply "as a spur to prompt action, [and] not as a bar to the tardy completion of the business" Congress mandated. Pet. App. 12a (quoting *Barnhart v. Peabody Coal*, 537 U.S. 149, 172 (2003)). While no equivalent presumption governs civil cases, the "rule of lenity" requires that "ambiguous criminal statutes . . . be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994). Thus, the Tenth Circuit's reliance on *Montalvo-Murillo*, which took the Bail Reform Act's "silen[ce] on the issue of a remedy for violations of its time limits," 495 U.S. at 716, as justification for striking the balance in favor of the government, is misplaced.

In light of a proper construction of the plain language of Section 3664(d)(5), there is "no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *see Maung*, 167 F.3d at 1121-22; *Farr*, 419 F.3d at 625. But even if one were to do so, beyond a few isolated restatements of the general principle that a restitution statute is intended to provide redress to victims, there is little to support the Tenth Circuit's position. In fact, given the various incentives busy federal courts face, it is

entirely possible that the Tenth Circuit's approach, by removing any adverse consequences from a court's failure to comply with the 90-day deadline, will actually *delay* the prompt entry of restitution orders and work to the detriment of victims. If it doesn't matter when a restitution hearing is held and an order is entered, resolution of restitution claims may end up being postponed while district courts turn to other issues that seem more pressing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Sara N. Sanchez
SHEEHAN, SHEEHAN & STELZNER, P.A.
P.O. Box 271
Albuquerque, NM 87103

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Kevin K. Russell
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

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