No. 09-367

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented here is "[w]hether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5)." Pet. i. Resolution of this case thus turns on two issues: (1) whether it violates the statute to impose a restitution order beyond the time limit; and (2) if so, whether such an error can be deemed harmless on appeal. In contrast to every other circuit that has addressed the first issue, the Tenth Circuit held in this case that the Mandatory Victims Restitution Act ("the Act" or "the MVRA") sets *no* enforceable time limit on a district court's power to award restitution. Adopting a "better-late-than-never principle," Pet. App. 13a, the court of appeals held that "notwithstanding any missed deadline, restitution must be awarded," Pet. App. 10a. Petitioner has already explained why the Tenth Circuit's decision is wrong. *See* Pet. 25-32.

The Government does not attempt to defend the Tenth Circuit's novel construction of the Act, a provision that governs federal courts in more than ten thousand proceedings each year. *See* Pet. 23. Instead, faced with an undeniable conflict among the courts of appeals and an indefensible ruling below on the merits, the Government offers three responses. First, it suggests that this case raises only the second issue – whether a violation of the Act can be deemed harmless – and argues that this case is "not an appropriate vehicle for considering" that issue. BIO 6. Second, it tries to downplay the magnitude of the conflict over the question presented, offering an unsupported hope that the preexisting and

longstanding split that the decision below exacerbates will somehow resolve itself without this Court's intervention. Third, it argues on the merits that violations of Section 3664(d)(5) can be deemed harmless on appeal. None of these arguments withstands scrutiny.

1. The Government's vehicle argument depends entirely on semantics. The Government points to places in petitioner's appellate brief where he used the words "jurisdiction" and "jurisdictional" to describe his arguments to claim that petitioner "failed to raise . . . below" the question on which he seeks certiorari. BIO 6.

The Government is wrong. Its references to the record below are highly, and misleadingly, selective. Petitioner's initial submission to the district court regarding Section 3664(d)(5) "request[ed] the court to find the statutory period in which restitution can be ordered has expired." Restitution Memorandum [Doc. No. 47] at 1 (Feb. 14, 2008). That memorandum never once used the word "jurisdictional" to describe petitioner's argument.[1]

The district court understood precisely the scope of petitioner's claim. It explained that although petitioner "admit[ed] that Section 3664(d)(5) is not an expressly jurisdictional statute," he contended that the district court "no longer ha[d] power to order"

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[1] The only time the word appears in petitioner's memorandum is within a quotation from the Sixth Circuit's opinion in *United States* v. *Vandeberg,* 201 F.3d 805, 814 (6th Cir. 2000), a case on which he did not rely. *See also* Pet. 17-18.

restitution. Pet. App. 41a.[2] Thus, when the district court announced that it "retain[ed] jurisdiction," Pet. App. 41a, 45a, 48a, it was holding simply that it continued to enjoy the power to order restitution even though the ninety-day period established by Section 3664(d)(5) had expired.

In the court of appeals, petitioner and the Tenth Circuit did sometimes use the words "jurisdiction" and "jurisdictional." But they used the words "jurisdiction," "authority," and "power" interchangeably to refer to "a court's power to decide a case or issue a decree." Black's Law Dictionary 927 (9th ed. 2009) (giving this definition of "jurisdiction"). For example, on the first page of its opinion, the court of appeals described petitioner's argument this way: "[Petitioner] contends that the district court's restitution order is void because it was entered too late, after a statutory deadline passed." Pet. App. 5a. When it later observed that "Dolan argues that the 90-day deadline set by § 3664(d)(5) is jurisdictional," it continued, in the very next sentence: "Put differently, he thinks the district court's power to enter any restitution order expired 90 days after his sentencing on July 30, 2007." Pet. App. 9a (emphasis omitted). *Compare also, e.g.*, Pet. C.A. Br. 11, 12, 13

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[2] This is the same point that petitioner made here. *See* Pet. 29 (explaining that while "Section 3664(d)(5) is not 'jurisdictional'" in the more limited sense adopted by this Court in *Kontrick v. Ryan*, 540 U.S. 443 (2004), "a rule need not be 'jurisdictional' in this sense to constitute 'an inflexible claim-processing rule'" (quoting *id.* at 456)). So it is somewhat puzzling that the Government acts as if petitioner has shifted ground. BIO 6.

(using the word "authority") *with id.* at 1, 9-10, 24 (using the word "jurisdiction").

At most, petitioner and the courts below may "have been less than meticulous" when they "used the term 'jurisdictional' to describe emphatic time prescriptions." *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (noting that other courts, "including this Court," have "more than occasionally" done the same). Petitioner and the lower courts "used the word 'jurisdiction' 'as a shorthand' to indicate a nonextendable time limit." *Id.* But while that distinction mattered in *Kontrick*, where the question was whether a limit applied despite a party's procedural default, here it does not. Petitioner properly invoked the time limit in Section 3664(d)(5) both before the district court and in the court of appeals, and the Government does not contend otherwise.

In short, petitioner asks this Court to review the same question he raised before the district court and the court of appeals: Whether a district court has the power to enter a restitution order after the time limit prescribed in Section 3664(d)(5) has expired. There are no obstacles to this Court reaching, and deciding, that question.

2. The Government claims that petitioner has "exaggerate[d] the magnitude of the split in authorities." BIO 11. That, too, is incorrect, and the Government's argument rests largely on its truncating of the question presented to include only the second issue.

a. The Government never addresses the central point in the petition: the Tenth Circuit held, in

conflict with the approaches taken by the Second, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, that the district court in this case *properly* issued a restitution order despite the fact that the ninety-day time limit established by Section 3664(d)(5) had "undoubtedly" expired. Pet. App. 5a. Put simply, the Tenth Circuit held that there was no error in the first place.

As the petition points out, the Seventh and Eleventh Circuits have squarely held that a district court "exceed[s] its authority in ordering restitution" outside the time limits set by Section 3664(d)(5). *United States v. Farr*, 419 F.3d 621, 623 (7th Cir. 2005);[3] *see also United States v. Maung*, 267 F.3d 1113 (11th Cir. 2001); Pet. 11-14. The Eighth Circuit similarly observed, in *United States v. Balentine*, 569 F.3d 801, 805 (8th Cir.), *pet. for cert. pending*, No. 09-6760 (filed Sept. 28, 2009), that "Section 3664(d)(5) unambiguously imposes a 90-day time limit on restitution orders." *See* Pet. 26 (discussing *Balentine*). And the Sixth Circuit, although its cases point in several directions, has held that once the "statutory deadline" has expired, a district court that has failed to enter any restitution order cannot, "consistent with the terms of the statute, set an

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[3] The Government tries to exclude the Seventh Circuit from the mix by emphasizing that *Farr* "declined to address whether the harmless-error standard should be applied to Section 3664(d)(5)." BIO 11. True, but entirely beside the point with respect to the question whether the MVRA authorizes district courts to enter untimely orders. As to that question, *Farr* is unambiguous: district courts lack that power.

amount of restitution." *United States v. Jolivette*, 257 F.3d 581, 583-84 (6th Cir. 2001); *see also United States v. Bogart*, 576 F.3d 565, 573 (6th Cir. 2009) (referring to the district court's "error in failing to comply with § 3664(d)(5)"). *See* Pet. 17-20 (discussing the Sixth Circuit cases).

The Second, Third, and Ninth Circuits have not explicitly held that district courts lack the power to impose restitution orders once the ninety-day time limit of Section 3664(d)(5) has expired. But that conclusion is implicit in their holdings regarding tolling and harmless error review. *See* Pet. 14-17 (discussing these courts' decisions). It makes little sense to devote substantial attention, as each of these circuits has done, to whether a time limit should be tolled if the time limit is not binding in the first place. Nor would it be necessary to determine whether a district court's failure to comply with the ninety-day time limit was *harmless* error unless it was error in the first place.

The key point is this: in each of the other circuits, the rule that a *district court* should apply is clear. In those circuits, once the ninety-day time limit set by Section 3664(d)(5) has expired,[4] the district court loses its statutory authorization to order restitution

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[4] To be clear, in at least some circuits, the ninety-day limit can be tolled. *See* Pet. 14-16 (describing the Second and Third Circuits' divergent tolling rules); *see also* BIO 11 (suggesting the Eleventh Circuit might be amenable to tolling in appropriate cases). But tolling principles go solely to the question of how to calculate the ninety-day period, and not to whether the MVRA sets a time limit on the district court's power.

and commits legal error by imposing an untimely restitution order. *See also* Pet. 25-32 (explaining why district courts lack the power to order restitution outside of the time limits set by the MVRA). By contrast, the Tenth Circuit's rule holds exactly the opposite: district courts must impose restitution even when the time limit has run.

b. Rather than contesting, or even addressing, that point, the Government looks instead only at the subsequent issue: *If* a district court has acted in violation of Section 3664(d)(5), what should the court of appeals do?[5]

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[5] Only this latter issue was even presented by the petition in *Dupre v. United States*, 129 S. Ct. 2158 (2009) (No. 08-8080), on which the Government relies here, BIO 5. *See* Pet. for Cert. i, *Dupre*. And *Dupre* suffered from procedural complications not present in this case. The restitution order there was concededly issued within ninety days after the defendant's resentencing following a successful appeal on another issue. *See* Br. in Opp. 6-7, *Dupre*. The defendant there agreed that she owed $967,374.82, in restitution, Pet. for Cert. 4, *Dupre*, because she had initially agreed to that amount years earlier, and the question before this Court was only whether harmless error analysis should apply to the district court's imposition of a higher amount. *See* Br. in Opp. 15, *Dupre* (noting that, unlike petitioner in this case, Dupre "has never argued that no restitution award can be entered against her at all"). Even as to that question, in light of *Dupre*'s tangled procedural history, the Government noted that it was arguable that "the question of harmless-error review is not presented here at all, because the district court did not err." *Id.* at 14. By contrast, the Government never contests in this case that the district court erred.

But the courts of appeals are divided over that issue too. They range from courts that refuse to import a prejudice requirement to courts that apply harmless error analysis to the Tenth Circuit in this case, which suggested that Section 3664(d)(5) errors should *never* be reversed.

Indeed, the Government acknowledges the presence of this split and the continuing uncertainty over how to apply the MVRA. As it concedes, the Eleventh Circuit has squarely refused to apply harmless-error analysis to Section 3664(d)(5) violations. *See* Pet. 16. The Government responds with a vague suggestion that the Eleventh Circuit might change its mind "[i]n an appropriate case." BIO 11. What the Government leaves unsaid is that such cases are not likely to arise. *Maung* has been adhered to repeatedly in the Eleventh Circuit. *See* Pet. 14. If district courts follow *Maung*, then they will not impose untimely restitution orders, and defendants will have no occasion for appeal.

Nor does the Government provide any reason to believe that it will appeal. To the contrary, the Government has apparently declined to challenge *Maung*. *See* Amended Response of the United States to this Court's Jurisdictional Question at 3, *United States v. Kapelushnik*, 306 F.3d 1090 (11th Cir. 2002) (No. 01-14114-EE/01-14115-EE) (Oct. 4, 2001) (conceding that no restitution order could be imposed in that case in light of *Maung*'s holding that Section 3664(d)(5) "required that restitution orders be included in judgments within 90 days of the entry of judgment, failing which that provision of the sentence will have been deemed waived"). And because the Government declines to argue that

district courts can order restitution beyond the time limit prescribed in Section 3664(d)(5), it is hard to imagine on what grounds it would appeal a district court's refusal to impose an untimely order. It would be bizarre, to say the least, for the Government to file an appeal that acknowledges that the district court committed no error in refusing to require restitution, but asks the court of appeals nonetheless to direct the district court to err by issuing an untimely order and, once the district court errs, to hold that the error will be subject to harmless-error review.

Nor, despite a decade's worth of litigation, have the other circuits adopted a consistent standard for reviewing district court errors. The Eighth Circuit, for example, has rejected the requirement that a defendant prove prejudice, *see Balentine*, 569 F.3d at 805, although it apparently will uphold untimely restitution orders under its own novel theory. *See* Pet. 20. Several circuits have declined to address the question or have only addressed the distinct question of what to do in cases where the defendant has failed to object properly to the order. *See* Pet. 22. And the Tenth Circuit in this case suggested that, far from Section 3664(d)(5) errors being subject to harmless-error review, as the Government suggests here, *see* BIO 7-9, such errors (if they even exist, *see supra* at 5-8, describing the conflict between the Tenth Circuit and other circuits on this issue) should be affirmed without respect to prejudice. *See* Pet. 22-23; Pet. App. 20a-21a. The fact that the Tenth and Eighth Circuits have adopted novel positions this year shows that the circuit conflict will not resolve itself without this Court's intervention.

3. On the merits, the Eleventh Circuit has correctly concluded that Section 3664(d)(5) contains no prejudice requirement. *See Maung*, 267 F.3d 1121-22. Beyond pointing to the fact that three courts have applied harmless-error analysis to Section 3664(d)(5) violations,[6] the Government cites not a single example of a statutory time limit governing *criminal* trials or sentencing that has been subjected to harmless-error analysis. That is hardly surprising, given the longstanding treatment of such provisions. As this Court explained in *United States v. Marion*, 404 U.S. 307, 322 (1971), statutes of limitations "specif[y] a limit beyond which there is an irrebuttable presumption" of prejudice. The same is true for Speedy Trial Act violations. For example, in *Zedner v. United States*, 547 U.S. 489, 509 (2006), this Court stated that "harmless error review is not appropriate" in such cases.[7] If a defendant properly

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[6] None of those decisions cited Fed. R. Crim. 52(a), on which the Government relies here. The Government also inaccurately includes in its list cases where courts of appeals have affirmed on other grounds, such as *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004) (employing plain-error review in a case where the defendant did not properly object), have found remedies categorically unavailable regardless of prejudice, *Balentine*, or have spoken only in dicta, *United States v. Johnson*, 400 F.3d 187 (4th Cir.) (interpreting a different aspect of Section 3664(d)(5)), *cert. denied*, 546 U.S. 856 (2005).

[7] To be sure, if the reversal of the defendant's conviction nonetheless permits dismissal of the indictment without prejudice, the Government will have the option of seeking a new indictment. But that ability is distinct from the question whether the conviction obtained after an erroneous refusal to dismiss on Speedy Trial Act grounds must be reversed.

objects to an untimely prosecution, his conviction will be reversed without regard to whether he can show prejudice.

The same rule should apply to an untimely sentencing that violates a clear statutory command. "[T]he fact that a time limitation is set forth in a statute" matters. *Bowles v. Russell*, 551 U.S. 205, 210 (2007). Where a court could not properly have imposed a sentence at all, a defendant's "substantial rights" *have* been "affected" by the error. Fed. R. Crim. P. 52(a). The assumption underlying Rule 52(a) is that reviewing courts will determine whether the defendant would have been convicted or would have received the same sentence even if the district court had not erred. With respect to trial errors, that inquiry is relatively straightforward, and can often be answered in the affirmative. But in cases involving violations of straightforward statutory time limits, the answer is inherently negative. At the time the district court in this case issued its restitution order, it lacked statutory authority under Section 3664(d)(5) because the ninety-day period had expired. *Only* its error permitted imposition of an obligation that petitioner pay $104,649.78 as part of his sentence.[8] The district court's error in this case thus affected petitioner's substantial rights. *Cf. United States v. Keigue*, 318 U.S. 437, 445 (2d Cir. 2003) (stating that, even in plain-error cases, "a defendant's substantial

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[8] It is irrelevant that the court could properly have ordered restitution earlier just as it would be irrelevant once a statute of limitations had run that the government could have prosecuted the defendant during the limitations period.

rights have been affected" when it is shown that he "*would* have received a different," less onerous sentence "absent the . . . error").

CONCLUSION

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

Respectfully submitted,

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