SUPREME COURT OF THE UNITED STATES

No. 09–367

BRIAN RUSSELL DOLAN, PETITIONER *v.*
UNITED STATES

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

[June 14, 2010]

CHIEF JUSTICE ROBERTS, with whom JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The statute at issue in this case provides that "[i]f the victim's losses are not ascertainable [at least] 10 days prior to sentencing, . . . the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U. S. C. §3664(d)(5). Under the Court's view, failing to meet the 90-day deadline has no consequence whatever. The Court reads the statute as if it said "the court shall set a date for the final determination of the victim's losses, *at any time* after sentencing." I respectfully dissent.

I

In the absence of §3664(d)(5), any order of restitution must be imposed at sentencing, if it is to be imposed at all. Restitution "may be imposed in addition to [a] sentence" of probation, fine, or imprisonment only if it is authorized under §3556. See §§3551(b)–(c). Section 3556, in turn, authorizes courts to order restitution "*in imposing a sentence* on a defendant" (emphasis added), pursuant to yet other provisions requiring such orders to be made "*when sentencing* a defendant," §§3663(a)(1)(A), (c)(1), 3663A(a)(1) (emphasis added). The mandatory restitution provisions of §3663A "apply in all *sentencing proceedings* for

convictions of" certain crimes. §3663A(c)(1) (emphasis added). And the court "at the time of sentencing" must "state in open court the reasons for its imposition of the particular sentence"—including its reasons for "not order[ing] restitution" if it fails to do so. §3553(c).

These provisions authorize restitution orders *at* sentencing. They confer no authority to order restitution *after* sentencing has concluded. When Congress permits courts to impose criminal penalties at some time *other* than sentencing, it does so explicitly. See, *e.g.,* §3552(b) (provisional sentence during a study period); §3582(d) (authorizing certain penalties "in imposing a sentence . . . or at any time thereafter"); §3583(e) (permitting extension of supervised release); §§4244(d)–(e) (provisional sentencing for the mentally ill); see also Fed. Rules Crim. Proc. 32.2(b)(2)(B), (4)(A) (presentencing forfeiture orders); cf. *Corey* v. *United States*, 375 U. S. 169 (1963) (appeals from provisional and final sentences authorized by law).

Once a sentence has been imposed, moreover, it is final, and the trial judge's authority to modify it is narrowly circumscribed. We have stated that "the trial courts had no such authority" prior to the adoption of Rule 35, *United States* v. *Addonizio*, 442 U. S. 178, 189, and n. 16 (1979), and Congress has since revoked the broad authority to correct illegal sentences originally set forth in that Rule. See Sentencing Reform Act of 1984, Pub. L. 98–473, §215(b), 98 Stat. 2015–2016; see also Historical Notes on 1984 Amendments to Rule 35, 18 U. S. C. A., p. 605 (2008). Today, an error may be corrected by the trial court only if it is "clear," and only within 14 days after the sentence is announced. Rules 35(a), (c). The Rule of Criminal Procedure allowing extensions of time expressly provides that "[t]he court may not extend the time to take any action under Rule 35, except as stated in that rule." Rule 45(b)(2). This Court has reiterated that time limits made binding under Rule 35 "may not be extended," *Addonizio*,

supra, at 189, and that Rule 45(b)(2) creates "inflexible" "claim-processing rules," *Eberhart* v. *United States*, 546 U. S. 12, 19 (2005) (*per curiam*).

Thus, if the trial court fails to impose a mandatory term of imprisonment, see, *e.g.,* §924(c)(1)(A), or a mandatory fine, see, *e.g.,* 21 U. S. C. §844(a), or a mandatory order of restitution, see 18 U. S. C. §3663A, the Government cannot simply ask it to impose the correct sentence later. If the error is clear, and raised within 14 days, it might be corrected under Rule 35. Otherwise, the Government must appeal, and seek resentencing on remand. §§3742(b)(1), (g).

Section 3664(d)(5) is a limited exception to these bedrock rules. It permits a trial court to go forward with sentencing while delaying any restitution order for up to 90 days. This provision is meaningful precisely because restitution must otherwise be ordered at sentencing, and because sentences are otherwise final unless properly corrected. If trial courts had power to amend their sentences at any time, §3664(d)(5) would be unnecessary.

Here, however, the District Court failed to make use of its limited authority under §3664(d)(5). Dolan was sentenced on July 30, 2007. The court declined to order restitution at that time or to set a date for a future restitution order. App. 35, 39–40; see also *id.,* at 49.[1] The 90-day period elapsed on October 28. At no time did the Government seek timely relief, whether under Rule 35 or by appeal. Cf. *Corey*, *supra,* at 174; *Berman* v. *United States*, 302 U. S. 211, 212 (1937). Nor did it assert any claim that the deadline had been lawfully extended or equitably tolled, an issue that I agree is not before us, see *ante,* at 3, 11. But on April 24, 2008—269 days after sentencing, and

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[1] Whether that date must itself be set at sentencing is not before us. The order setting the date plainly cannot be entered 182 days after sentencing, as happened here. See App. 3–4.

after Dolan had already been released from prison—the District Court nonetheless ordered $104,649.78 in restitution. App. to Pet. for Cert. 32a, 47a.

I cannot see where that court obtained authority to add additional terms to Dolan's sentence. That is the step the Court misses when it searches for the "remedy" for a violation of §3664(d)(5). *Ante,* at 1. The rule is that a trial court cannot alter a sentence after the time of sentencing. Section 3664(d)(5) is a limited exception to that rule. If the limits are exceeded the exception does not apply, and the general rule takes over—the sentence cannot be changed to add a restitution provision. Section 3664(d)(5) is self-executing: It grants authority subject to a deadline, and if the deadline is not met, the authority is no longer available.

The Court appears to reason that §3664(d)(5) confers the authority to add a restitution provision for at least 90 days, and that once the camel's nose of some permitted delay sneaks under the tent, any further delay is permissible. *Ante,* at 3, 5. But that is not what §3664(d)(5) says. It provides 90 days for a final determination of the victims' losses, not a free pass to impose restitution whenever the trial court gets around to it. The court had no more power to order restitution 269 days after sentencing than it did to order an additional term of imprisonment and send Dolan back to prison.

II

A

To avoid this conclusion, the Court runs through a series of irrelevancies that cannot trump the clear statutory text. It notes, for example, that §3663A provides that " '[*n*]*otwithstanding any other provision of law*, when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order . . . that the defendant make restitution to the victim of the offense.'" *Ante,* at 6 (quot-

ing §3663A(a)(1); emphasis in Court's opinion). But the issue before us is *when* restitution should be ordered, so the language the Court should underscore is "*when sentencing*." This provision plainly confers no power to act *after* sentencing. Any such power attaches only by virtue of §3663A(d), which incorporates the procedures of §3664, including the limited 90-day exception. See also §3556 ("The procedures under section 3664 shall apply to all orders of restitution under this section").

The Court puts greater emphasis on its reading of the statute's purpose, namely to provide restitution to victims of crime. Certainly that was a purpose Congress sought to promote. But "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*).

Congress had to balance against the interest in restitution the contrary interest in promptly determining the defendant's sentence. The balance struck was clearly set forth in the statute: determine the victim's losses by a date "not to exceed 90 days after sentencing." §3664(d)(5). Whether or not that limit was "*primarily* designed to help victims of crime," *ante*, at 7, it does not cease to be law when invoked by defendants.

Nor can the Court find any support in the second sentence of §3664(d)(5). See *ante,* at 14–15. That provision addresses a distinct issue—what to do about newly discovered losses—and sets a higher "good cause" standard. The fact that Congress struck the balance between restitution and finality differently in that context does not justify overriding the balance it struck here.

The Court also analogizes the 90-day limit to other provisions discussed in our precedents, most of which have nothing to do with the rights of criminal defendants (for whom procedural protections are of heightened impor-

tance), let alone the finality of criminal sentencing. The cited cases are said to establish that an official's "failure to meet [a] deadline" does not always deprive that official of "power to act beyond it." *Regions Hospital* v. *Shalala*, 522 U. S. 448, 459, n. 3 (1998). But the failure to comply with §3664(d)(5) does not deprive anyone of anything: The trial court never had the general authority to alter sentences once imposed, in the way that the administrative agencies in the cited cases were said to have general regulatory authority. The trial court's authority to add a restitution provision to an otherwise final sentence was conferred by the very provision that limited that authority. Section 3664(d)(5) did not take away anything that might persist in the absence of §3664(d)(5).[2]

Even more perplexing is the Court's suggestion that references to the authority of trial courts necessarily implicate questions of jurisdiction. *Ante,* at 14. To say that a court lacks authority to order belated restitution does not use "authority" in a jurisdictional sense, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 511 (2006), but only in the same sense in which a court lacks "authority" to impose a sentence above the statutory maximum. Such action is an error of law, reversible on appeal, but it is not jurisdictional. As in *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U. S. ___, ___ (2010) (slip op., at 9), compliance with §3664(d)(5) is "not a limitation on the . . . court's jurisdiction," but it is a statutory "precondition to obtaining a [particular] order." Here that condition was not satisfied.

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[2] *United States* v. *Montalvo-Murillo*, 495 U. S. 711 (1990), is equally inapposite: The statute in that case rested the lower court's authority on whether a bail hearing had been held at all (it had), whereas here the only statutory condition is whether the losses were determined within 90 days of sentencing (they were not).

B

In the end, the Court does not appear to need §3664(d)(5) at all. It instead suggests that we abandon the bedrock rules that sentences once imposed are final, and that the only exceptions are ones *Congress* chooses to allow (and Congress has allowed various ones). The Court instead proposes a *judicial* power to alter sentences, apparently at any time. But if a trial court can "leave open, say, the amount of a fine," *ante,* at 12, why not, say, the number of years? Thus, after a defendant like Dolan has served his entire sentence—and who knows how long after?—a court might still order additional imprisonment, additional restitution, an additional fine, or an additional condition of supervised release. See *ante,* at 12–13.

The Court cites no authority in support of such "fill in th[e] blank" sentencing, other than two cases implicated in the Circuit split below. *Ante,* at 13. Prior to the enactment of §3664(d)(5), however, it was widely recognized that the requirement to impose restitution "when sentencing" meant that "[r]estitution must be determined *at the time* of sentencing," and could not be left open after sentencing had concluded. Federal Judicial Center, J. Wood, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues, p. 300 (Sept. 2002) (emphasis added; citing *United States* v. *Porter*, 41 F. 3d 68, 71 (CA2 1994); *United States* v. *Ramilo*, 986 F. 2d 333, 335–336 (CA9 1993); *United States* v. *Prendergast*, 979 F. 2d 1289, 1293 (CA8 1992); *United States* v. *Sasnett*, 925 F. 2d 392, 398–399 (CA11 1991)).

The Court finds Rule 35(a) inapplicable because the District Court was not "'correct[ing]'" a clear error in the sentence. *Ante,* at 14. True enough; but that is why the Government should *lose*. The limitation of Rule 35(a) to clear errors, corrected within 14 days of sentencing, does not leave trial courts free to make *other* changes to sentences whenever they choose. Rule 35(a) only makes sense

against a background rule that trial courts cannot change sentences at will.

The same is true of §3552(b), which empowers a court that does not wish to delay sentencing but "desires more information than is otherwise available to it" to impose a provisional sentence during a 120-day study period. That statute would be largely unnecessary if a trial court could do the same by order.

In *Addonizio*, 442 U. S., at 189, we thought it noncontroversial that a sentence once imposed is final, subject to such exceptions as Congress has allowed. Contrary to the Court's suggestion, *ante,* at 13, Dolan invoked that principle both here and below. See, *e.g.,* Brief for Petitioner 13, 15–18, 20, 29, 33, and n. 14, 36, 48, and n. 19; Reply Brief for Petitioner 1, 5–8; Appellant's Opening Brief in No. 08–2104 (CA10), pp. 12–13 (citing *United States* v. *Blackwell*, 81 F. 3d 945, 949 (CA10 1996), for the proposition that a "district court does not have inherent authority to modify a sentence"). That the Court finds it necessary to question that principle—indeed, to accuse this dissent of "creat[ing] th[e] rule," *ante,* at 13—highlights how misguided its decision is.

To counter the effects of its opinion and to restore some semblance of finality to sentencing, the Court advises defendants to seek mandamus—a remedy we have described as "drastic and extraordinary," "reserved for really extraordinary causes," and one of "the most potent weapons in the judicial arsenal." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 380 (2004) (internal quotation marks omitted). What an odd procedure the Court contemplates! A defendant, who should have received a harsher sentence, is to invoke the drastic and extraordinary remedy of mandamus, to make sure he gets it. That is not how sentencing errors are corrected: If the trial court fails to order the appropriate sentence, the Government must appeal to correct it. It did not do so here, and

that ends the case. *Greenlaw* v. *United States*, 554 U. S. ___, ___ (2008) (slip op., at 6).

Moreover, the Court's mandamus remedy only helps defendants who know they are in danger of an increased sentence. So the Court imposes another rule, namely that the trial court must explicitly "leave open" the precise sentence at the time of sentencing, *ante,* at 12, or must make clear, "prior to the deadline's expiration[,] that it *would* order restitution" at some indeterminate time, *ante,* at 1 (emphasis added). But what if the court does not make the crucial announcement at sentencing, or "prior to the deadline's expiration"? Are these judicially created deadlines to be taken more seriously than those imposed by Congress? Or are we just back at the beginning, asking what the "remedy" should be for failing to meet the relevant deadline?

The Court's suggestion to require notice of intent to augment the sentence at *some* future date may be a good idea. But an even better one might be to set a particular date—say, 90 days after sentencing—on which the parties could base their expectations. That was Congress's choice, and it should be good enough for us.

* * *

The District Court in this case failed to order mandatory restitution in sentencing Dolan. That was wrong. But two wrongs do not make a right, and that mistake gave the court no authority to amend Dolan's sentence later, beyond the 90 days allowed to add a sentencing term requiring restitution.

I am mindful of the fact that when a trial court blunders, the victims may suffer. Consequences like that are the unavoidable result of having a system of rules. If no one appeals a mistaken ruling on the amount of restitution (or whether restitution applies at all), finality will necessarily obstruct the victims' full recovery.

It is up to Congress to balance the competing interests in recovery and finality. Where—as here—it has done so clearly, the "judicial inquiry is complete." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002) (internal quotation marks omitted).