

06-4196-cr

To Be Argued By:
CHRISTINE L. 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

BRIEF FOR THE UNITED STATES OF AMERICA

KEVIN J. O'CONNOR
*United States Attorney
District of Connecticut*

CHRISTINE SCIARRINO
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	viii
Statement of Issues Presented for Review.....	x
Preliminary Statement.....	1
Statement of the Case.....	2
Statement of Facts and Proceedings Relevant to this Appeal.....	3
Summary of Argument.....	6
Argument.....	7
I. The district court’s 2006 orders amending the restitution judgment should be vacated.....	7
A. Governing law and standard of review.....	7
B. Discussion.....	10

II. On remand, the defendant’s restitution obligation
is governed by the law in effect at time of his
original sentencing. 17

Conclusion. 19

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Bender v. Williamsport Area Sch. Dist.</i> , 475 U.S. 534 (1986).....	7
<i>Bowles v. Russell</i> , 127 S. Ct. 2360 (2007).....	13, 14
<i>Coco v. Incorporated Village of Belle Terre</i> , 448 F.3d 490 (2d Cir. 2006) (per curiam).	15
<i>Eberhart v. United States</i> , 546 U.S. 12 (2005) (per curiam).	13, 14
<i>In re Johns-Manville Corp.</i> , 476 F.3d 118 (2d Cir. 2007).....	15
<i>Kontrick v. Ryan</i> , 540 U.S. 443 (2004).....	13
<i>Reiter v. MTA New York City Transit Auth.</i> , 457 F.3d 224 (2d Cir. 2006), <i>cert. denied</i> , 127 S. Ct. 1331 (2007).....	10
<i>United States v. Abreu-Cabrera</i> , 64 F.3d 67 (2d Cir. 1996).....	9, 13

<i>United States v. Camacho</i> , 370 F.3d 303 (2d Cir. 2004).....	10
<i>United States v. De la Torre</i> , 327 F.3d 605 (7th Cir. 2003).	10
<i>United States v. Green</i> , 405 F.3d 1180 (10th Cir. 2005).	13
<i>United States v. Higgs</i> , 504 F.3d 456 (3rd Cir. 2007).	9, 14
<i>United States v. Khan</i> , 55 F.3d 507 (2d Cir. 1995).....	17
<i>United States v. Kyles</i> , 40 F.3d 519 (2d Cir. 1994), <i>cert. denied</i> , 514 U.S. 1044 (1995).	viii, 4
<i>United States v. Lucien</i> , 347 F.3d 45 (2d Cir. 2003).....	10, 12
<i>United States v. Machado</i> , 465 F.3d 1301 (11th Cir. 2006).	16
<i>United States v. Moreno-Rivera</i> , 472 F.3d 49 (2d Cir. 2006)	15, 16
<i>United States v. Penna</i> , 319 F.3d 509 (9th Cir. 2003).	13

<i>United States v. Porter</i> , 41 F.3d 68 (2d Cir. 1994)	7, 11, 16
<i>United States v. Reifler</i> , 446 F.3d 65 (2d Cir. 2006).	10
<i>United States v. Ridgeway</i> , 489 F.3d 732 (5th Cir. 2007).	12, 18
<i>United States v. Smith</i> , 438 F.3d 796 (7th Cir. 2006).	14
<i>United States v. Spallone</i> , 399 F.3d 415 (2d Cir. 2005)	9
<i>United States v. Stevens</i> , 211 F.3d 1 (2d Cir. 2000).	12
<i>United States v. Thompson</i> , 113 F.3d 13 (2d Cir. 1997).	12, 18
<i>United States v. Waters</i> , 84 F.3d 86 (2d Cir. 1996) (per curiam).	9
<i>United States v. Werber</i> , 51 F.3d 342 (2d Cir. 1995).	8, 13

STATUTES

18 U.S.C. § 2113.	3
18 U.S.C. § 3231.	viii
18 U.S.C. § 3582.	14
18 U.S.C. § 3663 (1993).	7, 8, 11
18 U.S.C. § 3663A	12, 18
18 U.S.C. § 3664 (1993).	7
18 U.S.C. § 3664	7, 11, 12
18 U.S.C. § 3742.	ix
28 U.S.C. § 1291.	ix
28 U.S.C. § 2107.	14
Victim and Witness Protection Act of 1982	7, 12
Mandatory Victims Restitution Act of 1996.	<i>passim</i>

RULES

Fed. R. App. P. 4.	viii, 14, 16
Fed. R. Civ. P. 23.	15

Fed. R. Crim. P. 33. 10, 14
Fed. R. Crim. P. 35. *passim*
Fed. R. Crim. P. 36. 8

OTHER AUTHORITIES

28 C.F.R. § 545.11.. . . . 5, 17
28 C.F.R. § 545.12.. . . . 5

Statement of Jurisdiction

The district court (Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally imposed sentence on September 9, 1993, Defendant's Appendix ("DA") 1; judgment entered September 15, 1993, Government's Appendix ("GA") 5. The defendant's conviction 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. DA 2; GA 9 (docket entry). A second Order Amending Judgment, dated June 5, 2006, was then entered on June 7, 2006. DA 3; GA 14. The defendant filed a notice of appeal on June 26, 2006, GA 14, GA 16, and that appeal was assigned docket number 06-3392-pr in this Court. On July 14, 2006, the district court entered an order staying enforcement of its June order. GA 14.

On September 1, 2006, the district court entered an "Order on Increase in Restitution Payments," in which it vacated its June 5, 2006 order and decreed that the defendant's restitution payments "shall be increased in accordance with the guidelines of the Inmate Financial Responsibility Program." DA 4-6; GA 15. The defendant filed a timely notice of appeal from this judgment on September 11, 2006. GA 15, GA 20. *See* Fed. R. App. P. 4(b). This appeal was assigned docket number 06-4196-cr in this Court.

On March 5, 2007, this Court dismissed the defendant's appeal in 06-4196-cr for failure to pay the filing fee. On June 26, 2007, this Court consolidated the defendant's two appeals, reinstated his appeal in 06-4196-cr, and dismissed his appeal in 06-3392-pr as moot. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

- I. Whether the district court, in 2006, properly entered two judgments amending the defendant's restitution obligation thirteen years after entry of the original judgment.

- II. In any proceedings on remand, whether the Mandatory Victims Restitution Act applies to the defendant's case.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In this appeal, the defendant challenges the district court's most recent orders modifying the restitution obligation of his criminal sentence. In 1993, the district court sentenced the defendant to 262 months in prison and 5 years of supervised release for his conviction after trial for armed bank robbery. In addition, the district court ordered, as a special condition of supervised release, that

the defendant make restitution to the victim bank “in the amount of \$4,133 on a schedule to be determined by the United States Probation Office.” The district court amended the defendant’s restitution obligation through three subsequent orders, the last two of which, entered in 2006, the defendant challenges in this appeal.

Applying the law in effect when the restitution order was first entered in 1993, the district court lacked authority to enter the 2006 orders amending the defendant’s criminal judgment, and thus those orders should be vacated. After vacatur of those orders, the original judgment, as amended by an order in 1998, controls the defendant’s restitution obligation. Furthermore, even though Congress amended the law governing restitution when it enacted the Mandatory Victims Restitution Act of 1996, in any proceedings on remand, the defendant’s restitution obligation is governed by the law existing at the time of his original sentencing in 1993.

Statement of the Case

The defendant was convicted of armed bank robbery and on September 9, 1993, was sentenced to serve 262 months in prison and 5 years of supervised release. DA 1; GA 5. On October 19, 1998, the district court (Alfred V. Covello, J.) signed an Order Amending Judgment. DA 2; GA 9. A second Order Amending Judgment, dated June 5, 2006, was then entered on June 7, 2006. DA 3; GA 14. The defendant appealed, GA 14, GA 16, and that appeal was assigned docket number 06-3392-pr in this Court.

On July 14, 2006, the district court entered an order staying enforcement of its June 5 order. GA 14.

On September 1, 2006, the district court entered an “Order on Increase in Restitution Payments,” in which it vacated its June 5, 2006 order and decreed that the defendant’s restitution payments “shall be increased in accordance with the guidelines of the Inmate Financial Responsibility Program.” DA 4-6; GA 15. The defendant again appealed, GA 15, GA 20, and this appeal was assigned docket number 06-4196-cr in this Court.

On March 5, 2007, this Court dismissed the defendant’s appeal in 06-4196-cr for failure to pay the filing fee. On June 26, 2007, this Court consolidated the defendant’s two appeals, reinstated his appeal in 06-4196-cr, and dismissed his appeal in 06-3392-pr as moot.

The defendant is currently serving his sentence of imprisonment.

Statement of Facts and Proceedings Relevant to this Appeal

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. The judgment further outlined several “Special Conditions of Supervised Release,” including, as relevant here, the following:

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

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

Nearly eight years later, on June 5, 2006, the district court signed another “Order Amending Judgment.” This Order provided as follows;

Based on information furnished from the Bureau of Prisons on May 26, 2006, the 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 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.

On August 27, 2007, the Government filed a motion to vacate and remand this case for further proceedings in the district court. On November 15, 2007, this Court entered

an order denying the motion to vacate without prejudice to the Government's proposing remand in a responsive brief. The Court ordered, however, that should the Government propose remand, it should address (1) the applicability on remand of laws effective after the defendant's sentencing date, and (2) the *Ex Post Facto* implications, if any, of such application.

Summary of Argument

I. The district court's 2006 orders amending the defendant's restitution obligation should be vacated. The defendant's restitution obligation was originally imposed in 1993 as part of his criminal sentence. When the district court modified that obligation in 2006, it cited no authority that allowed it to modify a criminal judgment nearly thirteen years after entry of that judgment. Moreover, Federal Rule of Criminal Procedure 35(a) expressly precludes the modification of a criminal judgment more than seven days after imposition of sentence. After vacatur of the 2006 orders, the defendant's restitution obligation is governed by the original 1993 judgment, as modified by the district court in 1998.

II. On remand, the law governing the defendant's ongoing restitution obligation should be the law in effect at the time of his sentencing in 1993. The Mandatory Victims Restitution Act of 1996 ("MVRA"), Pub. L. No. 104-132, 110 Stat. 1214, 1227, is inapplicable to the defendant's case because the MVRA, by its own terms, only applies to sentencing proceedings for convictions after its effective date of April 24, 1996.

Argument

I. The district court's 2006 orders amending the restitution judgment should be vacated.

A. Governing law and standard of review

Federal courts are courts of limited jurisdiction and may not act beyond the authority granted by Article III of the Constitution or statutes enacted by Congress. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

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) (1993); *United States v. Porter*, 41 F.3d 68, 70 (2d Cir. 1994) ("Section 3663 provides, in short, that the order of restitution is part of the sentencing process.").

Since enactment of the MVRA in 1996, a district court may modify a restitution order under certain specific conditions, *see* 18 U.S.C. §§ 3664(d)(5) & (k) (2006), but the law in effect in 1993 contained no such express provision, *compare* 18 U.S.C. § 3664 (1993); *see also Porter*, 41 F.3d at 70-71 (in dicta, casting doubt on cases holding that the Government could ask a sentencing court to modify a restitution order). In 1993, the only provision authorizing modification of a restitution judgment was found in 18 U.S.C. § 3663(g), and that provision only

authorized modifications in a restitution order to the extent that it was a condition of supervised release. Specifically, § 3663(g) provided that if a defendant was sentenced to a term of supervised release, any restitution ordered “shall be a condition of such . . . supervised release.” It further provided that if a defendant failed to comply with that order, the district court could, *inter alia*, modify a term of supervised release. 18 U.S.C. § 3663(g) (1993).

A district court’s authority to modify a criminal judgment is constrained by the Federal Rules of Criminal Procedure.¹ As relevant here, the current version of Rule 35 provides as follows:

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

¹ Fed. R. Crim. P. 36 authorizes correction “at any time” of a “clerical error in a judgment, order, or other part of the record, or [to] correct an error in the record arising from oversight or omission.” Rule 36 does not authorize a court to change a sentence itself; it only permits amendment of a written judgment to conform with an already-imposed sentence. *See United States v. Werber*, 51 F.3d 342, 343 (2d Cir. 1995) (“We hold that Rule 36 authorizes a court to correct only clerical errors in the transcription of judgments, not to effectuate its unexpressed intentions at the time of sentencing.”) (internal footnote omitted); *id.* at 347 (further noting that “Rule 36 covers only minor, uncontroversial errors”).

A substantively identical provision has been in effect since before the defendant's sentencing in 1993. *See* Fed. R. Crim. P. 35(c) (1993) ("The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."); *United States v. Higgs*, 504 F.3d 456, 460 n.5, 462 (3rd Cir. 2007) (noting that substance of Rule 35(c) under prior law moved to Rule 35(a) as part of general restyling of criminal rules in 2002).

As this Court has explained, "[a] district court's concededly narrow authority to correct a sentence imposed as a result of 'clear error' is limited to 'cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court'" if determined on appeal to have been imposed in violation of law. *United States v. Waters*, 84 F.3d 86, 89 (2d Cir. 1996) (per curiam) (quoting *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1996) (quoting, in turn, Fed. R. Crim. P. 35, 1991 advisory committee's note)); *see also United States v. Spallone*, 399 F.3d 415, 421 n.5 (2d Cir. 2005) ("Rule 35(a) permits courts to 'correct a sentence that resulted from arithmetical, technical, or other clear error,' but only '[w]ithin 7 days after sentencing.'"). Under Rule 35(a), a sentencing court must correct a sentence within seven days of its oral pronouncement. Fed. R. Crim. P. 35(a); *Abreu-Cabrera*, 64 F.3d at 73-74 (holding that seven-day period runs from oral imposition because "[a] contrary rule, interpreting the phrase to refer to the written judgment, would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a

change of heart, and alter the sentence – a sequence of events we believe to be beyond what the rule was meant to allow”).

This Court reviews a district court’s restitution order for abuse of discretion. *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006) (citing *United States v. Lucien*, 347 F.3d 45, 52-53 (2d Cir. 2003)). If the review involves an interpretation of law, then the review is *de novo*, but where a district court’s findings of fact are at issue, the review is for clear error. *Id.* A district court’s application of Rule 35 is reviewed *de novo*. *See, e.g., United States v. De la Torre*, 327 F.3d 605, 608 (7th Cir. 2003); *cf. Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 229 (2d Cir. 2006) (holding that district court’s interpretation of Federal Civil Rules is reviewed *de novo*), *cert. denied*, 127 S. Ct. 1331 (2007); *United States v. Camacho*, 370 F.3d 303, 305 (2d Cir. 2004) (reviewing *de novo* district court’s construction of what constitutes “final judgment” for purposes of Fed. R. Crim. P. 33).

B. Discussion

Here, the district court originally entered judgment on September 15, 1993, directing the defendant to pay restitution to the victim bank as a condition of supervised release. DA 1; GA 5. In 1998, the court modified this judgment to require the defendant to pay \$2 per month while incarcerated. DA 2; GA 9. In 2006, the court again modified the restitution order to increase the defendant’s payment obligation to \$25 per month, DA 3, but later vacated that judgment, directing that the defendant’s

restitution obligation would be “increased in accordance with the guidelines of the Inmate Financial Responsibility Program,” DA 6.

The defendant appealed the orders entered in 2006, GA 14, GA 15, GA 16, GA 20, and in his brief, argues that the court lacked authority to enter those orders modifying his restitution judgment.² The Government agrees.

The district court cited no statutory authority for its orders in 2006 – nearly thirteen years after the original judgment – purporting to amend the restitution portion of the criminal judgment, and the Government has been unable to find any. Three provisions warrant specific discussion: 18 U.S.C. § 3663(g) (1993) and 18 U.S.C. §§ 3664(d)(5) & (k) (2006).

First, in 1993, § 3663(g) authorized modification of a restitution order, but that authorization only applied when the restitution order was a condition of the defendant’s supervised release *and* the defendant “fail[ed] to comply” with the order. 18 U.S.C. § 3663(g) (1993). Thus, it is inapplicable here because while the defendant’s restitution obligation is a condition of his supervised release, the defendant is still incarcerated and so has not yet failed to comply with that condition. *See also Porter*, 41 F.3d at 70-71 (in dicta, casting doubt on cases holding that the

² The defendant also argues that the district court was without authority to amend the restitution judgment in 1998, but the validity of that order is not before the Court because he did not appeal it. *See infra* at 15-16.

Government could ask a sentencing court to modify a restitution order).

The current version of § 3664 is also inapplicable. As currently in force, § 3664 authorizes modification of a restitution judgment based on changes in a defendant's ability to pay the judgment, § 3664(k), or on a victim's subsequent discovery of additional losses, § 3664(d)(5). These sections are inapplicable because they were enacted as part of the MVRA in 1996, and by its own terms, the MVRA only applies to sentencing proceedings for cases in which the defendant is convicted after April 24, 1996. *See* 18 U.S.C. § 3664 (historical and statutory notes); *see also United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (noting effective date provision of MVRA); *Lucien*, 347 F.3d at 53 (noting that for offenses committed after effective date of MVRA, "sentencing proceedings are governed by the MVRA, including 18 U.S.C. § 3663A and the post-1996 version of 18 U.S.C. § 3664"); *United States v. Ridgeway*, 489 F.3d 732, 734 n.3 (5th Cir. 2007) (noting that MVRA limits its applicability to convictions after its effective date).³ Thus, because the defendant was convicted in 1993, before enactment of the MVRA, the current version of § 3664 is inapplicable to his case.

³ In *United States v. Stevens*, 211 F.3d 1 (2d Cir. 2000), this Court applied the post-MVRA version of § 3664 to a restitution order that appeared to be governed by the VWPA. The Court never discussed or cited the effective date provision, however, and the parties and Court appear to have assumed that the post-MVRA § 3664 applied.

In the absence of an express statutory provision authorizing the district court to modify the restitution judgment, Rule 35(a) precludes modification of the judgment more than 7 days after it was entered in 1993. The 2006 orders, entered nearly thirteen years after entry of judgment, plainly do not qualify under this Rule.

This Court has described the seven-day period established by Rule 35 as “jurisdictional.” *United States v. Werber*, 51 F.3d 342, 348 (2d Cir. 1995) (“Because the district court modified the defendants’ original sentences more than seven days after they were imposed, the court had no jurisdiction to enter the corrected judgments under Rule 35(c).”). *Accord*, e.g., *Abreu-Cabrera*, 64 F.3d at 73; *United States v. Green*, 405 F.3d 1180, 1184-85 (10th Cir. 2005); *United States v. Penna*, 319 F.3d 509, 512 (9th Cir. 2003). If the district court’s jurisdiction extends no further than seven days following imposition of sentence, then by definition the district court had no authority to modify the judgment nearly thirteen years later.

This Court has not yet decided whether the time limits found in Rule 35(a) are jurisdictional in light of the Supreme Court’s recent decisions distinguishing between time limits that are “jurisdictional” as opposed to “claim-processing rules.” *See Bowles v. Russell*, 127 S. Ct. 2360 (2007); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam); *Kontrick v. Ryan*, 540 U.S. 443 (2004). As most recently explained in *Bowles*, statutory time limits generally constitute jurisdictional limitations, whereas time limits derived from court rules do not. 127 S. Ct. at 2364. That is because Congress has authority to establish the

jurisdiction of federal courts, and the courts are not free to expand their own jurisdiction. *See id.* at 2365. Thus, in *Bowles*, the Court held that the time limits set forth in Fed. R. App. P. 4(a) are jurisdictional because they are derived from 28 U.S.C. § 2107. By contrast, the deadline for filing a motion for new trial in a criminal case, established by Fed. R. Crim. P. 33, is a non-jurisdictional, albeit mandatory, claim-processing rule because it has no source of authority apart from court-promulgated rules. *Eberhart*, 546 U.S. at 16-19.

The two circuits to consider this issue have agreed that the time limits of Rule 35 are “jurisdictional” in light of the Supreme Court’s latest analysis. *See Higgs*, 504 F.3d at 464; *United States v. Smith*, 438 F.3d 796, 799 (7th Cir. 2006). These courts have concluded that the time limit found in Rule 35 is jurisdictional because it is mandated by statute, specifically 18 U.S.C. § 3582(c). *See Higgs*, 504 F.3d at 464; *Smith*, 438 F.3d at 799. It is unclear how these cases would apply in this context, however, because § 3582(c) addresses only a court’s authority to modify “an imposed term of *imprisonment*.” 18 U.S.C. § 3582(c).

This Court need not resolve whether Rule 35 is a jurisdictional rule, because even if it were not jurisdictional, it would still remain a mandatory rule that precludes amendment of an order over the defendant’s objection. The main functional difference between claim-processing and jurisdictional rules is that the former may be forfeited if not preserved in the district court, whereas the latter may not. *See Eberhart*, 546 U.S. at 18-19. In the present case, the defendant promptly argued before Judge

Covello that he was without authority to amend the restitution judgment. *See* DA 5 (describing defendant’s argument). Because the defendant’s objection to any action outside that seven-day window was preserved, that limitations period is mandatory and enforceable. *See In re Johns-Manville Corp.*, 476 F.3d 118, 123-24 (2d Cir. 2007) (holding that time limit for filing civil cross-appeal, even if not jurisdictional, must be enforced “strictly, once it is properly invoked”); *United States v. Moreno-Rivera*, 472 F.3d 49, 50 n.2 (2d Cir. 2006) (holding that court need not decide whether time limits for filing criminal appeal are jurisdictional, because government properly objected to untimeliness); *Coco v. Incorporated Village of Belle Terre*, 448 F.3d 490, 492 (2d Cir. 2006) (per curiam) (avoiding question of whether time limit of Fed. R. Civ. P. 23(f) for appealing class certification order is jurisdictional, because party objected to untimely filing and time limit is “inflexible”).

Accordingly, because Judge Covello entered orders in 2006 amending the judgment outside the seven-day period mandated by Rule 35(a), those orders were entered without authority. Thus, this Court should vacate the district court’s 2006 orders and remand to the district court.

On remand, after vacatur of the 2006 orders, the original judgment, as modified by the October 1998 order, is the controlling restitution judgment in this case. Although the defendant argues that the district court was without authority to enter the 1998 order (as well as the 2006 orders), he never appealed that decision. Because any challenge to that order is now untimely, this Court

lacks authority to review it. As the Eleventh Circuit recently explained, if the requirements for appellate court jurisdiction are not met (i.e., a proper and timely filed notice of appeal), an appellate court “cannot review whether a judgment is defective, not even where the asserted defect is that the district court lacked jurisdiction.” *United States v. Machado*, 465 F.3d 1301, 1306 (11th Cir. 2006). Although this Court has not yet decided whether the time limits in Fed. R. App. P. 4(b) for filing a notice of appeal in a criminal case are jurisdictional or inflexible claim-processing rules, there is no need to resolve that question here. Through this brief, the Government has promptly raised the issue of the untimeliness of the defendant’s challenge to the 1998 order, and thus this Court should not review that order. *See Moreno-Rivera*, 472 F.3d at 50 n.2.

In sum, the district court cited no authority for its 2006 orders purporting to amend the original 1993 judgment, and Rule 35(a) precludes modifications to a judgment more than 7 days after sentencing. The 2006 orders should be vacated, and on remand, the defendant’s restitution obligation should be governed by the 1993 judgment, as modified by the 1998 order.⁴

⁴ The Government notes that the original judgment directed the defendant to pay restitution on a schedule to be determined by the Probation Office. DA 1. This portion of the judgment appears inconsistent with this Court’s precedents, *see Porter*, 41 F.3d at 71 (“We hold that a sentencing court cannot . . . authoriz[e] a probation officer to make post-sentencing (continued...)”).

II. On remand, the defendant's restitution obligation is governed by the law in effect at the time of his original sentencing.

If the Court agrees with the Government's argument as presented above, then it should vacate the district court's 2006 orders. After vacatur of those orders, the 1993 judgment, as amended by the 1998 order, governs the defendant's ongoing restitution obligation. Under this analysis, there is no need for further proceedings on remand.

In the interest of completeness, however, and in response to this Court's order of November 15, 2007, the Government notes that if this case is remanded for further proceedings, the district court should apply the law in effect at the time of the defendant's original sentencing in

⁴ (...continued)

decisions as to either the amount of the restitution, or the scheduling of installment payments.") (internal citations omitted); *United States v. Khan*, 53 F.3d 507, 519 (2d Cir. 1995) (same), but the defendant has never challenged this portion of the judgment.

The Government further notes that the Bureau of Prisons will not automatically collect the defendant's \$2 per month restitution obligation from his prison account. According to regulation, ordinarily, the BOP will not collect amounts under \$25. 28 C.F.R. § 545.11(b)(1). Of course, the fact that BOP will not *automatically deduct* the required payment from the defendant's account does not relieve the defendant of the obligation to make the payment.

1993. After the defendant was sentenced in 1993, Congress enacted the MVRA in 1996. That statute made sweeping changes to the substance and procedure of restitution law, but by its own terms it is inapplicable to the defendant's case. Specifically, the MVRA provides that it only applies to sentencing proceedings for convictions *on or after* the effective date of the Act, April 24, 1996. See 18 U.S.C. § 3663A (historical and statutory notes; § 3664 (historical and statutory notes)). The defendant, however, was convicted in 1993. Because the MVRA does not apply to the defendant's case, the *Ex Post Facto* clause is not implicated in this matter. See *Ridgeway*, 489 F.3d at 734 n.3 (“Whether it violates the Ex Post Facto Clause is irrelevant . . . where the statute itself explicitly limits its application to sentencing proceedings initiated after its effective date.”); *Thompson*, 113 F.3d at 15 n.1 (declining to apply MVRA to case involving criminal conduct that pre-dated effective date of MVRA because of *Ex Post Facto* concerns).

Conclusion

For the foregoing reasons, the district court's 2006 orders amending the restitution judgment should be vacated.

Dated: January 4, 2008

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Christine Sciarrino". The signature is written in a cursive style with a large, sweeping initial "C".

CHRISTINE SCIARRINO
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

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.

18 U.S.C. § 3664 (2006) (selected portions)

§ 3664. Procedure for issuance and enforcement of order of restitution

(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified

victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable--

(A) provide notice to all identified victims of--

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) 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.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

* * *

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic

circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

Fed. R. Crim. P. 35 (1993)

Rule 35. Correction of Sentence

(a) Correction of a Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court--

- (1) for imposition of a sentence in accord with the findings of the court of appeals; or
- (2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

(b) Reduction of Sentence for Changed Circumstances. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another

person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Fed. R. Crim. P. 35. (2006)

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

- (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and
 - (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.
- (2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
- (A) information not known to the defendant until one year or more after sentencing;
 - (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
 - (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.
- (3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.
- (4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.