No._____

IN THE

Supreme Court of the United States

DEONTE CURRY,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Dolan v. United States*, 560 U.S. 605 (2010), the Court held that compliance with the statutory deadline for determining restitution was unnecessary, effectively allowing district courts to order restitution "at any time after sentencing[,]" 560 U.S. at 621 (Roberts, C.J., dissenting) (emphasis omitted). When restitution is ordered under *Dolan*, is due process satisfied when the government relies solely on the district court's electronic case filing system to notify defendant's counsel of a restitution request, even when circumstances suggest that counsel of record is not actively representing the defendant?

2. Under the Federal Rules of Criminal Procedure, may a court of appeals find a defendant forfeited claimed sentencing errors without first finding that the defendant had a meaningful opportunity to object to the error in the district court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Deonte Curry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reprinted at in the Appendix to the Petition ("Pet. App."), A1-24. The Fourth Circuit's order denying en banc review is reprinted at Pet. App. A42-43. The relevant proceedings in the district court are unpublished. The Appendix to the Petition includes the original judgment (Pet. App. A25-31), the district court's order granting the motion for restitution (Pet. App. A32-33), and the amended judgment (Pet. App. A34-41).

JURISDICTION

The Court of Appeals entered judgment on September 11, 2023, and denied Curry's petition for en banc rehearing on October 10, 2023. Pet. App. A42-43. On December 22, 2023, the Chief Justice extended the time in which to file a petition for writ of certiorari through February 7, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The full text of 18 U.S.C. §§ 3663A and 3664 is set out in Appendix at pages A44-51. 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), in relevant part, 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.

Rule 51 of the Federal Rules of Criminal Procedure, titled "Preserving Claimed Error," provides, in relevant part:

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.
(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought -of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Rule 52(b) of the Federal Rules of Criminal Procedure, titled "Plain Error," provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

Petitioner Deonte Curry pled guilty to two offenses under the Hobbs Act, 18 U.S.C. § 1951. Pet. App. 4. The offenses arose from an attempted armed robbery in March of 2020, during which a victim sustained serious injuries from gunshot wounds. *Id.* Curry was sentenced to 10 years in prison for his crimes. Pet. App. 7.

During these district court proceedings, Curry was represented by Counselor Kevin A. Tate. *See* Dist. Ct. Dkt.

Prior to sentencing, the probation office prepared a Presentence Investigation Report stating that a victim injured during the offense was "in the process of completing a victim impact statement as well as gathering restitution information." Dist. Ct. Dkt. 61 at ¶ 35. At sentencing, the government requested, and the district court agreed, to defer a restitution determination, so the government could collect and verify information from the victims. Pet. App. 7.

On August 25, 2021, the district court issued its written judgment. Pet. App. 7. The judgment said: "The determination of restitution is deferred until 11/9/2021[,]" which was 90 days after the sentencing hearing, and "[f]ailing such a determination by 11/9/2021, restitution amount becomes $0.00 without further order from the Court." Pet. App. 7.

After sentencing, the government never asked for additional time to address restitution, it did not ask the district court to reconsider its order that the restitution amount defaults to $0.00 default restitution as soon as the 90-day post-sentencing period expires, and it did not appeal the August written judgment containing the defaulted restitution order. *See generally* Dist. Ct. Dkt.

Curry timely appealed the August judgment and was represented by Counselors Joshua B. Carpenter and Melissa S. Baldwin in the U.S. Court of Appeals for the Fourth Circuit. Dkt. Nos. 1, 4, 13.

Meanwhile, on November 9, 2021, the government filed a motion requesting the district court determine that Victim 1 was owed $324,890.71 for medical bills, lost wages, and ongoing therapy, Victim 2 was owed $3,369.25 for medical bills, and Victim 3 was owed $17,653.94 for medical bills. Dist. Ct. Dkt. 88. The motion did not identify the victims or provide any details about the medical bills, instead stating that supporting documents would be filed after the court ruled on a motion to seal that, was filed contemporaneously with the restitution motion. *Id.* at 2 & n.1. Because local rules provide a 7-day window to file a response to any motion, L. Cr. R 47.1(e), the electronic case filing system automatically calculated the deadline to respond when docketing the government's motion. Dist. Ct. Dkt. Entry for 86.

On November 10, 2021, after the Magistrate Judge granted the government's motion to file exhibits under seal, the government filed documentation identifying the victims seeking restitution and identified the basis for each victim's requested amounts. Dist. Ct. Dkt. #88.

On December 7, 2021, 118 days after sentencing and 27 days after the judgment setting a $0.00 restitution amount entered, the district court ordered that Curry's judgment be amended to include a $366,913.90 restitution amount payable in the amounts shown in the government's November 10, 2021 filing. Pet. App. 8; Dist. Ct. Dkt. 76. A written amended judgment entered the following day, December 8, 2021, obliging Curry to pay $366,913.90 in restitution. Pet. App. 8.

Thirteen days after the district court issued Curry's Amended Judgment, Curry's appellate counsel entered a notice of appearance in the U.S. District Court to file a notice of appeal from that judgment. Dist. Ct. Dkt. 94-95.

On appeal, Curry challenged the $366,913.90 restitution order, arguing he received improper notice in violation of his due process rights and that the district court lacked statutory authority to amend its $0.00 defaulted restitution amount. Dkt. No. 26 at 18-31. Curry relied on Federal Rule of Criminal Procedure 51(b) to argue that he lacked a meaningful opportunity to object to the amended restitution order in the district court, so plain error review did not apply. Dkt. 26 at 19-20; Dkt. 41 at 8-11.

The U.S. Court of Appeals for the Fourth Circuit affirmed the $366,913.90 restitution order after finding it was reviewable only for plain error "[b]ecause Curry raised no objections below," Pet. App. 9-18. The Court's analysis applying plain error review did not consider whether Curry had an opportunity to object and, if so, whether that opportunity was meaningful. Pet. App. 9.

According to the Fourth Circuit there was no Due Process Clause violation because Curry received notice of the government's restitution motion "through the district court's electronic filing system" and "he chose not to take advantage of the opportunity to respond to that motion[,]" Pet. App. 16.

Curry petitioned the U.S. Court of Appeals to rehear the case en banc because the panel's approach to forfeiture under the federal rules conflicted with

the approach taken by other courts of appeals. Dkt. No. 3 at 7-9. The petition was denied. Pet. App. 43.

REASONS FOR GRANTING THE WRIT

This case presents two important recurring questions in federal sentencing that warrant this Court's review.

First, what notice is due to defendants in deferred restitution cases. Four of the federal courts of appeals have encountered challenges to the notice, or lack thereof, provided to defendants in deferred restitution cases. Pet. App. 16 (C.A.4); *United States v. Harris*, 813 F. App'x 710, 713-15 (2d Cir. 2020); *United States v. Adejumo*, 777 F.3d 1017, 1018-19 (8th Cir. 2015); *United States v. Cheal*, 389 F.3d 35, 50-51 (1st Cir. 2004). This includes a clear circuit split between the Fourth Circuit's holding in this case that the government complied with due process by relying on the electronic case filing system to send notice of a restitution motion to counsel of record in the district court and the Eighth Circuit's decision that such a process violated due process. *Compare* Pet. App. 16 *with Adejumo*, 777 F.3d at 1018-19.

Second, this case implicates a longstanding controversy over the preservation standards for sentencing errors[1] by asking if a defendant must have a meaningful opportunity to object, consistent with due process principles, before a federal court of appeals, may find he forfeited a claimed error in his sentence. There are at least

[1] Just a few terms ago, the United States asked this Court to provide guidance on how a defendant must preserve claims of procedural errors in his sentence. *Holguin-Hernandez v. United States*, 589 U.S. ---, 140 S. Ct. 762, 767 (2020).

four approaches endorsed by the courts of appeals, including the Fourth Circuit's mechanistic no-objection-equals-forfeiture standard, two other bright-line rules precluding finding forfeiture, and a flexible totality-of-the-circumstances inquiry into whether the defendant was afforded a meaningful opportunity to object.

A. The Fourth Circuit's holding that the government complied with due process in obtaining the $366,913.90 restitution order conflicts with another Court of Appeals and is incorrect.

Courts are required to order certain defendants, as part of sentencing, make restitution to the victims of their offense. 18 U.S.C. § 3663A(a)(1). These restitution orders must be issued in accordance with 18 U.S.C. § 3664, 18 U.S.C.§ 3663A(d), which includes a provision allowing a court to determine a victim's losses up to 90 days after sentencing, 18 U.S.C. § 3664(d)(5). In *Dolan*, this Court found that compliance with the 90-day statutory deadline was unnecessary for a district court to order restitution, 560 U.S. at 611, and instead permitted district courts to determine a defendant's restitutionary obligations "at any time after sentencing[,]" 560 U.S. at 621 (Roberts, C.J., dissenting) (emphasis omitted).

Dolan-authorized restitution cases thus operate outside the ordinary statutory framework. There is no determinable timeframe for their resolution in the district court. The government has frequently requested restitution determinations long after original judgments are entered and the 90-day statutory deadline has run. *See e.g., United States v. Harder*, 552 F.Supp.3d 1144 (D. Or. Aug. 2, 2021) (five-plus-year delay); *United States v. Lewis*, No. 6:14-CR-19, 2020 WL 5412965 (E.D. Ky. Sept. 9, 2020) (five-year delay); *United States v. Takai*, No. 2:11-CR-542,

2018 WL 262833 (D. Utah. Jan. 2, 2018) (three-plus-year delay); *United States v. Mathis*, No. 11-CR-383-2, 2017 WL 4325686 (D. Minn. Sept. 27, 2017) (nearly four years later). And because a criminal defendant cannot wait to appeal the non-restitutionary aspects of his sentence, Fed. R. App. P. 4(b)(1)(A), a federal court of appeals and a federal district court will simultaneously exercise jurisdiction over his sentence. *See Manrique v. United States*, 581 U.S. 116, 118 (2017) ("deferred restitution cases involve two appealable judgments").

The indeterminate timing and simultaneous jurisdiction has created problems in the courts of appeals and district courts. For example, the First Circuit found "regrettable problems" in the notice afforded a defendant in a deferred restitution case where there "uncertainty among everyone involved—former trial counsel, new appellate counsel, the government, and the district court and appellate courts—over the question of [the defendant's] legal representation in the still incomplete restitution proceedings[,]" *id.* at 50. The Second Circuit found a district court failed to comply with minimal due process requirements by ordering restitution when the defendant lacked district court representation and his appellate counsel only received an electronic case filing notification referencing a hearing as to a co-defendant. *Harris*, 813 F. App'x at 714-15.

1. The Fourth Circuit's decision creates a conflict with the U.S. Court of Appeals for the Eighth Circuit over the process due to defendants in deferred restitution cases. The Fourth Circuit held that the government fulfills its constitutional obligations under the Due Process Clause solely by relying on the electronic case

filing system to send notice of a restitution motion to counsel of record in the district court. Pet. App. 16. The Eighth Circuit, by contrast, has held that such an electronic case filing notification is insufficient to comply with due process before the government may obtain a restitution order outside the 90-day statutory timeframe. *United States v. Adejumo*, 777 F.3d 1017 (8th Cir. 2015).

In *Adejumo*, the Eighth Circuit held that the government did not comply with due process in obtaining a seven-figure restitution order a year after sentencing. 777 F.3d at 1018-19. There, the probation office, through the Presentence Report, informed the court that "the victims' losses remain[ed] pending." *Id.* at 1020. The defendant subsequently filed a pro se notice of appeal and the Eighth Circuit appointed a new attorney. *Id.* at 1018. Meanwhile, in the district court, original trial counsel filed a motion to withdraw and then withdrew it because he believed the Eighth Circuit had jurisdiction over the case and the defendant was represented by substitute counsel. *Id.*

A year after sentencing, while Adejumo's appeal from his original judgment was pending, the government moved to amend that judgment and add a $1,106,931 restitution order. *Id.* Fourteen days after the government's motion was filed, and without any response from the defendant, the district court granted the government's motion and issued the Amended Judgment. *Id.*

Adejumo's trial counsel received electronic notice of the government's motion. *Id.* As appellate counsel appointed by the Eighth Circuit would later learn, however, trial counsel believed he no longer represented the defendant and deleted any

notices of electronic filings in the case without reading them. *Id.* The defendant first learned that the government obtained a seven-figure restitution order when his Bureau of Prisons counselor told him he needed to start making payments while serving his 10-year sentence. *United States v. Adejumo*, Appellant Br., 2014 WL 2445195 (C.A.8), 7.

The Eighth Circuit held that the government's notice of its restitution motion to counsel of record in the district court did not comport with due process. *Id.* at 1019. Under the "unique circumstances" of the deferred restitution case, the electronic notice of filing "was not reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (quotations and citation omitted). Those circumstances included the defendant being appointed new appellate counsel in the Eighth Circuit, original trial counsel's statement "that he anticipated future action by substitute counsel," and the one-year delay between the sentencing hearing and the request for restitution. *Id.*

Here, too, "the district court's electronic filing system" was the only notice to the defendant, Pet. App. 16, and the circumstances presented to the Fourth Circuit were on par with those presented to the Eighth Circuit. For example, Curry also had a pending appeal with a different counselor representing him than his counselor in the district court (albeit, both were from the same organization). More importantly, Curry's trial counsel had more reason to believe his representation had terminated because the district court entered a final $0.00 restitution order hours

after the government filed its motion requesting restitution, only to *sua sponte* reverse course by granting the motion weeks later.

2. When the government is aware of circumstances suggesting that original trial counsel may not be actively representing the defendant in the district court, it must do more than simply rely on that counselor receiving notice from the electronic case filing system that the government filed a motion for restitution to provide constitutionally adequate notice and an opportunity to be heard. This standard emanates from the Eighth Circuit's approach in *Adejumo*, which is also faithful to the Court's due process jurisprudence. *See e.g., Robinson v. Hanrahan*, 409 U.S. 38 (1972 (per curiam) (sending notice of forfeiture to owner's home address was not reasonably calculated to apprise the owner when the government was aware the owner was in jail); *Jones v. Flowers*, 547 U.S. 220 (2006) (if government was aware its notice of a tax sale was returned undelivered, it had to take additional reasonable steps to provide notice before taking the owner's property).

The Fourth Circuit rejected this approach, finding due process satisfied merely by Curry's trial counsel receiving a notice of an electronic filing without any consideration of the circumstances suggesting trial counsel was no longer actively representing Curry, such as a new counselor appointed by the Fourth Circuit or the district court's $0.00 default restitution order.

B. The Fourth Circuit's decision that plain error review applies absent a meaningful opportunity to object is incorrect and conflicts with the decisions of other Courts of Appeals.

The Courts of Appeals are divided about how forfeiture principles apply generally, and how Rule 51 applies specifically when an error claimed on appeal arose in a final sentencing decision. The Fourth Circuit's decision is an outlier in finding forfeiture without consideration of whether the defendant was provided a meaningful opportunity to object to the claimed error in the district court. It is also incorrect because it authorizes deprivations absent minimally adequate procedural protections, contravening 28 U.S.C. § 2072(b), which prohibits rules adopted by the federal judiciary from abridging any substantive right, and creating a conflict between the Federal Rules of Criminal Procedure and the Constitution.

1. There are at least four approaches endorsed by the U.S. Courts of Appeals on how forfeiture operates when an appellant failed to object in the district court to a claimed error in a sentencing decision. This tally includes the Fourth Circuit's mechanical no-objection-equals-forfeiture approach in this case, as well as two bright-line rules and a flexible totality of the circumstances standard.

The Fourth Circuit applied a mechanistic approach to forfeiture in this case, finding the lack of an objection in the district court triggered plain-error review on appeal. Pet. App. at 9. The Fourth Circuit's forfeiture analysis did not discuss Rule 51(b), did not analyze what, if any opportunity, was afforded to the defendant to make an objection, and did not otherwise engage with the circumstances in which the claimed error arose.

In contrast, at least three other courts of appeals do not find the absence of an objection sufficient to trigger forfeiture and instead examine whether the defendant was ever given a meaningful opportunity to object to the claimed error in the district court. *United States v. Doby*, 928 F.3d 1199 (10th Cir. 2019), *United States v. Cortes-Claudio*, 312 F.3d 17 (1st Cir. 2002), *United States v. Blueford*, 312 F.3d 962, 973-76 (9th Cir. 2002) (announcing a "meaningful opportunity to object" test that was subsequently applied to a sentencing error in *United States v. Montoya*, 82 F.4th 640 (9th Cir. 2023) (en banc)).[2]

For example, the Tenth Circuit refused to find the defendant forfeited a claimed error in the district court's reliance on Rule 59(a)'s deadlines to deny a motion to vacate pretrial release conditions, even though the government's response in opposition included a single sentence summarily asserting the motion was untimely without citing any time limit or law. *Doby*, 928 F.3d at 1203-04. Because "[the defendant] first got notice that Rule 59(a) and its fourteen-day time limit were to be used against him when the district court entered its order denying his motion[,]" he "had no meaningful opportunity to make before the district court" the argument he pressed on appeal (that Rule 59(a) did not apply to this type of motion). *Id.* at 1203. Similarly, the Ninth Circuit has found no forfeiture where the

[2] The Eighth Circuit has a case that suggests it agrees with the flexible, totality approach. *See United States v. Smith*, 771 F.3d 1060 (8th Cir. 2014) (defendant did not forfeit a claimed Sixth Amendment error in the district court replaying a video exhibit to the jury without defense counsel present, even though the district court told the parties before the jury began deliberations that it would replay any videos for the jury if requested to do so).

defendant was given "no real opportunity" to make the prosecutorial misconduct claim pressed on appeal, where the government misled and sandbagged defense counsel with tapes mid-trial. *Blueford*, 312 F.3d 962, 973-76. And the First Circuit held that a meaningful opportunity to object can only occur "prior to the trial court's entry of judgment" and did not occur where a district court ruled that a defendant violated his conditions of supervised release in part on surprise reliance sprung on its personal knowledge of firearms. *United States v. Teixeira*, 62 F.4th 10, 17-18 (1st Cir. 2023).

The Sixth Circuit, on the other hand, employs a bright-line rule that a defendant does not forfeit claimed procedural sentencing errors unless the district court, after announcing its sentence, explicitly and expressly invites the defendant to make objections. *United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc). This bright line rule was adopted because of the "difficulty" of determining, in the sentencing context, whether "a party had a meaningful opportunity to object" and thus to "ensure" the consequences attendant with forfeiture "applied only when the parties fairly were given a chance to object to the sentencing procedure," *id.*

Similarly, the Seventh Circuit employs a bright-line rule that the failure to object will not result in forfeiture if a sentencing ruling creates a new ground for appeal. *United States v. Wood*, 31 F.4th 593, 598-99 (7th Cir. 2022). The Seventh Circuit explained that its rule flows from the fact that a litigant in such a situation "is taken by surprise and lacks the notice or opportunity to advance a pre-ruling position," and Rule 51(a) dictates that "a litigant need not take exception to

preserve his appellate options." *Id.* at 598. So, for example, despite the absence of an objection, the Seventh Circuit rejected that plain error review applied to a claim that a district court committed procedural error by relying on a comparison to a fraudster in a separate case in its sentencing explanation. *Id.* at 598-99. This other fraudster was not mentioned in the case until the district court's ruling itself and the defendant "was not obligated to take exception with the district court's ruling to preserve his argument on appeal[,]" *id.* The Seventh Circuit recognized that a "litigant may elect to express his concern with the district court's [ruling,]" but "the rules do not obligate him to do so." *Id.* at 598.

2. Under Rule 51(b), a criminal defendant's right to appeal a claimed error cannot be curtailed if the defendant never received constitutionally adequate notice and an opportunity to be heard in the district court. Generally, a failure to object to a claimed error "strictly circumscribe[s]" an appellate court's authority to correct an error by requiring the error satisfy a demanding plain-error standard of review. *Puckett v. United States*, 556 U.S. 129, 134-35 (2009). But "[i]f a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Fed. R. Crim. P. 51(b). Rule 51's preservation standard cannot authorize less process than a criminal defendant is constitutionally entitled to.

A federal rule of criminal procedure cannot abridge or modify a litigant's rights under the Due Process Clause. Congress delegated to the Supreme Court the authority to "prescribe general rules of practice and procedure" in the federal court

system. 28 U.S.C. § 2072(a). But this delegation is subject to the limitation that: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Any proposed interpretation violating this "pellucid" instruction will not be accepted. *E.g., Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454-55 (2016).

A defendant is entitled to due process before a district court imposes a sentence depriving him of liberty or property. Before a deprivation may occur, the Due Process Clause requires "constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). At a minimum, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections[,]" *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962). The notice should "clearly inform[ ] the individual of the proposed action and the grounds for it[,]" Henry J. Friendly, *Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267, 1281 (1975) (cited in *Cleveland Bd. of Educ.*, 470 U.S. at 546), because, absent this information, an individual cannot know whether to challenge the proposed action or formulate an effective challenge to it. *See generally Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) ("Part of the function of notice is to give the charged party a chance to marshal facts in his defense"). And the notice and opportunity to be heard must occur before the deprivation. *Cleveland Bd. of Educ.*, 470 U.S. at 542.

Interpreting Rule 51(b) to excuse government noncompliance with the Due Process Clause based on a defendant's failure to capitalize on a constitutionally inadequate notice-and-opportunity-to-be-heard abridges a defendant's due process

rights. "[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to comply with the Due Process Clause. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983). And this Court has repeatedly rejected arguments that constitutionally deficient notice can be excused based on a property owner not capitalizing on actions that could have protected their property. *E.g., City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 294-97 (1953), *Jones v. Flowers*, 547 U.S. 220, 229-39 (2006).

Rule 51(b) should, in accord with 28 U.S.C. 7206(b), be interpreted to comply with the Due Process Clause by excusing a defendant's failure to object to a district court error that occurred without constitutionally adequate procedural protections. This interpretation is consistent with the approach taken by the four courts of appeals that have refused to find a claimed error forfeited under Rule 51 when circumstances did not provide notice and an opportunity for the defendant to be heard consistent.

C. This case presents an excellent vehicle to resolve the questions presented.

This case presents an excellent vehicle to resolve the circuit split on adequate notice in a deferred restitution case and to evaluate the boundaries for the contemporaneous-objection exception in Rule 51.

There are no factual issues that would preclude this court from reaching and resolving the issues. It is undisputed that the district court amended Petitioner's judgment to add restitution after the 90-day statutory deadline lapsed and that the

only notice provided to the Petitioner was an electronic case filing notification of the government's November 9th restitution motion to counsel of record in the district court, Dkt. No. 38 at 38. Similarly, there is no dispute that, when the government electronic case notification was sent, Petitioner's sentence was on appeal where he was represented by different counselors and the district court entered a written judgment that provided "restitution amount becomes $0.00 without further order from the Court[,]" if restitution was not determined by November 9th. And if a defendant cannot, under the federal rules, forfeit a claimed error over which he was never afforded a constitutionally adequate notice-and-opportunity-to-be-heard, then the Fourth Circuit would not have constrained its review to plain errors and would have reversed and vacated the illegal amended judgment.

D. The questions presented in this case have recurring importance to the administration of the criminal justice system.

Both questions represent important and recurring issues in the federal criminal justice system that warrant this Court's review.

1. Each year, hundreds of federal sentences are modified because of restitution orders.[3] The adequacy of the notice preceding these modifications is thus a frequently recurring issue.

The issue is important to ensure coherent administration of federal sentencing and to protect fundamental rights. The conflict between the Eighth and

[3] *E.g.,* USSC, *Sourcebook of Federal Sentencing Statistics* (FY 2022), Table R, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/TableR.pdf>.

Fourth Circuits over what constitutes adequate notice sews confusion in deferred-restitution cases—prosecutors, defense attorneys, defendants, and courts are unsure of their respective obligations. For example, does a defense attorney's representational duty continue indefinitely until the government decides to seek restitution? Must the government first attempt to meet and confer with defense counsel of record before moving for restitution? Should the court require a hearing or a statement from the defendant before ordering restitution?

The confusion over what constitutionally adequate notice-and-opportunity-to-be-heard looks like after *Dolan* is particularly intolerable because it implicates two fundamental rights—due process and the right to counsel. Criminal defendants and innocents alike are entitled to fair procedures before the government may take their property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993). A restitution order obligates the defendant to make payments for decades, including while he is incarcerated; indeed, payment noncompliance may lead to sanctions by the Bureau of Prisons, 28 C.F.R. § 545.11(d), or a resentencing that adds prison time, 18 U.S.C. § 3614(b). It is also part of a defendant's sentence, and a defendant enjoys the right to counsel during sentencing. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). These rights cannot be vindicated where the only notice provided before ordering restitution beyond the 90-day statutory deadline is an electronic filing notification sent to a counselor who may no longer be actively representing the defendant.

2. The application of the forfeiture standard codified in the Federal Rules of Criminal Procedure is frequently an outcome-determinative issue in thousands of appeals. Every year nearly 10,000 criminal appeals are filed in the U.S. Courts of Appeals.[4] An appellate court's determination that a party forfeited a claimed error triggers plain error review, which is a "nearly insurmountable" standard of review. *United States v. Irby*, 558 F.3d 651, 653 (7th Cir. 2009). Different standards for finding forfeiture will thus lead defendants in some circuits to be denied relief for a sentencing error, while other circuits would grant relief on materially indistinguishable facts. This undermines the purpose of the Federal Rules, which is "to bring about uniformity in the federal courts[,]"*Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

[4] U.S. Courts, Federal Court Management Statistics (Dec. 2022), <https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile1231.2022.pdf>.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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