No. ____________

**IN THE SUPREME COURT OF THE UNITED STATES**

**Term,**

LEONARD HERRINGTON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Can the government waive its request to impose restitution on a defendant under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A where the government fails to comply with the time limitations governing objections to the presentence report (PSR) and waits until day of sentencing to request restitution?

## LIST OF PARTIES

In addition to the United States, LEONARD HERRINGTON was a party in these proceedings in the United States Court of Appeals for the Third Circuit in his capacity as appellant in 16-1198.

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UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

The Petitioner LEONARD HERRINGTON respectfully prays that a writ of certiorari issue to review the non-precedential Opinion and judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled proceedings on December 22, 2017.

## OPINIONS BELOW

The December 22, 2017 non-precedential opinion of the United States Court of Appeals for the Third Circuit is reported at United States v. Leonard Herrington, Appellant, No. 16-1198, 2017 WL 6546919 (3d Cir. Dec. 22, 2017) and is attached as Appendix A, *infra*.

## UNITED STATES STATUTORY PROVISION INVOLVED

The Mandatory Victims Restitution Act ("MVRA") provides, in relevant part:

> Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection ©, the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

18 U.S.C. § 3663A (a)(1).

## A. PROCEDURAL HISTORY

A jury found Leonard Herrington of conspiracy, bank fraud and aggravated identity theft. The initial draft of the Presentence Report ("PSR") concluded that Herrington was not responsible for any portion of the restitution, ultimately calculated at $269,312.93, "as he was charged only with attempted conduct not constituting an actual loss;" a conclusion ultimately memorialized in the final draft of the PSR. The government did not object this conclusion.

At 12:27 p.m. on the day of sentencing[1], the government emailed the District Court a letter requesting, for the first time, that restitution in the amount of $24,921.62 be imposed on Herrington pursuant to the MVRA. This restitution request was based on incident involving two of Herrington's co-defendants. Herrington objected to the imposition of restitution given the untimely nature of the government's request and its failure to raise the issue with the probation officer in connection with the preparation of the PSR. The District Court proceeded to take evidence and hear argument on various other sentencing objections Herrington had raised to the PSR. Sentencing was continued until January 20th at which time the District Court overruled Herrington's objection to the imposition of restitution. The District Court concluded that it was

[1]Scheduled at 4:00 P.M.

"bound" to impose restitution based on the "mandatory nature" of MVRA notwithstanding the government's untimely request. The District Court then sentenced Herrington, *inter alia*, to a total of 75 months' incarceration and the challenged restitution in the amount of $24,921.62.

Herrington filed a timely notice of appeal and raised two issues in the Court of Appeals, one of which challenged the imposition of the $24,921.62 restitution. In a December 22, 2017 non-precedential opinion, the Court of Appeals for the Third Circuit affirmed the judgement of sentence.

**B. BASIS FOR FEDERAL JURISDICTION**

This litigation began as a criminal prosecution against Herrington for an alleged violation of the laws of the United States. The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this prosecution. 18 U.S.C. § 3231.

The Court of Appeals for the Third Circuit had appellate jurisdiction to review the final judgment of the District Court in accordance with 18 U.S.C. § 3742(a)(1) and 28 U.S.C. § 1291.

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

**C. FACTS**

The Court of Appeals succinctly summarized the following relevant facts of this case in its non-precedential opinion:

"Leonard Herrington was a member of a criminal group that defrauded banks by cashing counterfeit checks and obtaining loans through fraudulent applications. The group was led by Herrington's cousin, Adolphus William Cato. According to the testimony of Sean Finn, another member of the group, Cato would apply for bank loans online using 'somebody's Social Security number, somebody's name, birthdate and all that'—information which Cato received from his wife. Eventually, Cato would follow up with the bank by phone to check on the status of the loan. When the loan was approved, Cato would send a 'runner' to the bank to sign the forms and collect the money. These runners were provided with fake identification—produced by Cato—matching the identity under which the loan application had been filed, and Cato would instruct the runners on how to answer questions posed by bank officials.

"Herrington's role in the organization was to, among other things, recruit runners to carry out Cato's loan scam. . . .

. . . .

"Herrington's presentence report ('PSR') was prepared on or about October 21, 2015. No restitution was assessed because Herrington's conviction was limited to a single attempted offense, and the Government filed no timely objection. On January 5, 2016, the day of Herrington's sentencing, the Government sent a letter to the District Court requesting restitution in the amount of $24,921.62. The Government's position was that, because Herrington had been convicted of conspiracy to commit bank fraud between October 2013 and May 2014, and because another bank fraud committed by Cato's organization had occurred on March 11, 2014 and had yielded a loss of $24,921.62, Herrington was eligible for consideration for joint and several restitution regarding the March 11th fraud.

"A separate hearing was scheduled for January 20, 2016, to address the availability of restitution in light of Herrington's claim that the Government had waived mandatory restitution by failing to object to the PSR within the time required by Federal Rule of Criminal Procedure 32(f)(1) and Eastern District of Pennsylvania Local Rule 32.3(4). After argument, the District Court determined that the mandatory nature of restitution under the Mandatory Victims

Restitution Act ("MVRA"), 18 U.S.C. § 3663A, overrides the federal and local rules. The District Court then ordered restitution in the amount requested by the Government." Appendix A at 1-2.

## D. <u>REASONS FOR GRANTING THE WRIT</u>

**The government can waive its request to impose restitution on a defendant under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A where the government fails to comply with the time limitations governing objections to the presentence report (PSR) and waits until day of sentencing to request restitution.**

The Government never objected to the probation officer's restitution assessment as it was required to do under Fed. R. Crim. P. 32 and L.C.R. 32.3.4, which governs the time limits in the filing of objections to the presentence report in the Eastern District of Pennsylvania. In the context of lodging objections to the findings contained in the presentence report, Fed. R. Crim. P. 32 provides, in relevant part:

> (f) Objecting to the Report.(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

Fed. R. Crim. P. 32(f)(1). If a party fails to lodge an objection within the 14-day limitation period, the district court "may, for good cause, allow a party to make a new objection at any time before sentence is imposed." Fed. R. Crim. P. 32(i)(1)(D). The strictures of Rule 32 are implemented in the Eastern District of Pennsylvania pursuant to L.C.R. 32.3 which provides, in relevant part "[a]ny objection to the [PSR] not filed [within 14 days of the party receiving it] will be deemed waived unless the Court finds good cause for allowing it to be raised." L.C.R. 32.3. 4.

A party's failure to raise an objection to the PSR prior to sentencing within the time limitations of a local rule implementing Fed. R. Crim. P. 32(f) can result in waiver. See United States v. Morsley, 64 F.3d 907, 915 (4th Cir. 1995) (defendant waived right to challenge PSR on day of sentencing because he failed to comply with local rule's 15–day time limit in which to file objections); United States v. Michalek, 819 F. Supp. 250, 260–61 (W.D.N.Y. 1993) (local ten-day period for filing objections to PSR satisfies due process and failure to file timely objections amounts to valid waiver of objections), *aff'd*, 9 F.3d 1536 (2d Cir.1993). The court in Michalek noted that the Western District of New York's local rule governing the filing of timely objections to presentence reports ensured the "efficient resolution and disposition of objections to the PSR such that defendants can be sentenced in a timely manner." Id. at 260.

The Mandatory Victims Restitution Act provides, in relevant part:

> Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection ( c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .

18 U.S.C. § 3663A(a)(1).

The MVRA, which was enacted by Congress in 1996, mandates that defendants who are convicted of or plead guilty to certain crimes pay restitution to their victims. The purpose of the statute is, "to the extent possible, to make victims whole, to fully compensate victims for their losses, and to restore victims to their original state of well-being." United States v. Quillen, 335 F.3d 219, 222 (3d Cir. 2003) (citation omitted).

The MVRA provides that "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). In Dolan v. United States, 560 U.S. 605 (2010), this Court addressed whether restitution could be imposed where the "final determination of the victim's losses" took place more than 90 days after the defendant's sentencing. In Dolan, the defendant plead guilty to an offense that triggered application of the MVRA. The plea agreement stated that "restitution ... may be ordered by the Court." Id. at 608. The presentence report noted that restitution was required but, lacking precise information, did not specify an amount. At sentencing, the district court referenced the mandatory nature of restitution but left the amount open pending receipt of additional information. The judgement referenced the application of the MVRA but noted that insufficient information had been supplied to set an amount. The probation officer, 67 days after sentencing, prepared an addendum to the PSR and calculated restitution at $105,000. The addendum also alerted the parties that the 90-day deadline would expire within 23 days. Notwithstanding this notice, the district court set the final restitution hearing more than three months after the 90 day deadline. Neither the government nor the defendant objected to this hearing date. At the final restitution hearing, the defendant noted, for the first time, the passage of the 90-day deadline and objected to the imposition of restitution. The district court overruled the objection and imposed the restitution.

The issue before this Court was whether the passage of the 90-day limitation period from the date of sentencing to finalize the restitution amount divested the district court of jurisdiction to impose restitution. To resolve this issue, the Supreme Court noted that it had to "look[] to statutory language, to the relevant context, and to what they reveal about the purposes that a time limit is designed to serve." Id. at 610. The Court identified three reasons for time limitations in statutes:

> Sometimes we have found that the statute in question imposes a "jurisdictional" condition upon, for example, a court's authority to hear a case, to consider pleadings, or to act upon motions that a party seeks to file. . . . The expiration of a "jurisdictional" deadline prevents the court from permitting or taking the action to which the statute attached the

> deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons.
>
> . . .
>
> In other instances, we have found that certain deadlines are more ordinary "claims-processing rules," rules that do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court. Unless a party points out to the court that another litigant has missed such a deadline, the party forfeits the deadline's protection.
>
> . . .
>
> In still other instances, we have found that a deadline seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed.

Dolan at 610-611.

This Court ruled that the 90-day limitation in MVRA was of the third variety and concluded that the district court retained jurisdiction to impose restitution.

In the instant case, the District Court stated that the "mandatory nature" of MVRA "requires me to impose restitution" notwithstanding the government's non-compliance with the time limitations of raising objections to the factual and legal conclusions contained in the PSR.

> . . . in this instance I have a local rule versus a federal statute and the local rule, although it is mandatory, the federal statute is mandatory. While I am not pleased that the Government did not raise this issue in the initial back-and-forth on the presentence report, and I admonish the Government that this is something that should not occur and should not have occurred and I hope will not occur in my courtroom again, I find that the mandatory nature of the Mandatory Victims Restitution Act requires me to impose restitution, and the restitution will be in the amount of $24,921.62.

The Court of Appeals echoed the reasoning of the District Court:

> The purpose of the MVRA is, 'to the extent possible, to make victims whole, to fully compensate victims for their losses, and to restore victims to their original state of well-being.' . . . To aid in effectuating this purpose, the MVRA states: 'Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense

> described in subsection ( c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim ....' Our sister circuits have held that the 'notwithstanding' language in § 3663A(a)(1) should be read as 'Congress's indication that the statute containing that language is intended to take precedence over any preexisting or subsequently-enacted legislation on the same subject.' . . . [A] finding that restitution was foreclosed by an untimely request under Federal Rule of Criminal Procedure 32(f)(1) or Eastern District of Pennsylvania Local Rule 32.3(4) would plainly conflict with the mandatory nature of restitution under the MVRA. . . .

Appendix A at 3-4 (citations omitted).

In ruling that the MVRA mandated the imposition of restitution, the District Court and Court of Appeals conflated the 90-day limitations period of the MVRA with the 14-day limitation period of Fed. R. Crim. P. 32 (f) & (i) and L.C.R. 32.3. 4 governing the time limitation to file objections to the PSR. The limitation period at issue in the instant case was not the 90-day MVRA period, concededly met here, but the 14-day limitation period set forth in Fed. R. Crim. P. 32 and L.C.R. 32.3. 4 which governs the time periods for objections to presentence reports. In Herrington's view the "mandatory nature" of the MVRA can be waived if the government fails, as it did in the instant case, to raise the implementation of its provisions within 14 days of the date it received the initial draft of the PSR. The 14-day limitation period is a "claims-processing rule," the second type referenced in Dolan, that regulates the timing of motions or claims brought before the court. Because Herrington lodged a timely objection to the government's eleventh-hour attempt to seek restitution under the MVRA, he should be entitled to the enforcement of the 14-day period unless the government can show "good cause" otherwise. Accordingly, the judgment of sentence should be vacated and the matter must be remanded to the District Court for a determination of whether the government showed "good cause" in not raising a timely objection the restitution issue.

Unless the government is required to show “good cause” for failing to file an objection to the PSR as required under the rules, the timely disposition of criminal sentencing will be adversely affected, and the instant case shows the effects. The government’s delay in filing its restitution objection resulted in the District Court holding two sentencing hearings rather than one. Additional resources were expended at the second hearing, including the temporal and financial expenditures by the Probation Office, government counsel, defense counsel and the U.S. Marshall Service, not to mention the expenditure of District Court’s finite time in handling its docket. To allow the government to flout the orderly disposition of objections to presentence reports without good cause will set a dangerous precedent and result in the unnecessary delay in the administration of justice. The instant case is the proof in the pudding.

**CONCLUSION**

WHEREFORE, Petitioner respectfully prays for the issuance of a writ of certiorari for the reasons stated herein.

Respectfully submitted,
/s/ Mark S. Greenberg

MARK S. GREENBERG, ESQUIRE
Attorney for Petitioner

**IN THE SUPREME COURT OF THE UNITED STATES**

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v. Term

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**CERTIFICATE OF SERVICE**

In accordance with the Supreme Court Rule 29.5(b), this is to certify that service has been made upon the following parties of the Petition for Writ of Certiorari by first class mail at the addresses noted below:

Solicitor General of the United States
Department of Justice
Washington, DC 20530

AUSA Paul Shapiro, Esquire,
Office of United States Attorney,
615 Chestnut Street
Philadelphia, PA 19106

on the date below.

/s/ Mark S. Greenberg

____________________________________
MARK S. GREENBERG, ESQUIRE
Attorney for Petitioner
LEONARD HERRINGTON

DATED: January 3, 2018