

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA	:	<b>JUDGE DONALD C. NUGENT</b>
	:	
	:	
	:	
v.	:	CASE NO. 1:08 cr 506-006
	:	
	:	
ANTHONY VIOLA	:	<b><u>MOTION TO VACATE</u></b>
Respondent.	:	<b><u>POST SENTENCE</u></b>
	:	<b><u>“RESTITUTION ORDER”</u></b>

Now comes defendant, Anthony Viola by and through undersigned counsel and moves this Court to vacate the Restitution order entered by this Court on July 11, 2013. The reasons in support of this motion are more fully set forth in the Memorandum of Law attached hereto as if incorporated herein.

Respectfully submitted,

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**Memorandum of Law**

**A. Relevant Background**

Following a jury trial, Defendant, Anthony Viola was found guilty on counts 1, 2, 3-20, and 22-36. This Court sentenced Defendant Anthony Viola to a term of prison, supervised release, and restitution on January 5, 2012 (See Doc #: 363 Filed: 05/30/13 PageID #: 4867). Preceding Defendant Viola's sentencing, each party was afforded due process, including notice and the right to be heard in advance of this Court's January 5, 2012 sentencing order. Specifically, the Government filed a sentencing memorandum which identified specific loss amounts in a detailed spreadsheet. (See Doc #: 335-1 Filed: 05/30/13 PageID #: 3892). The government did not argue that it is unable to ascertain loss amounts related to Viola at the time of Viola's Sentencing.

In the sentencing judgment, this Court ordered Viola to pay a total amount of \$1,256,528.49 payable to three named bank-victims. (See Doc #: 363 Filed: 01/13/12 PageID #: 4871). Defendant Viola's sentencing judgment does not state that restitution is to be determined in a separate order. Though it does state that the restitution amount may be *supplemented* in a separate order. This Court's January 5, 2012 sentencing judgment constituted a final appealable order, upon which Defendant, Anthony Viola timely appealed both his conviction and sentence.<sup>1</sup>

On May 30, 2013, approximately sixteen months after Defendant Viola's Conviction Sentencing Judgment was filed by this Court the Government filed a Notice of Finalization of Restitution. (See Case: Doc #: 427 Filed: 05/30/13 PageID #: 9086). The Government's Notice specifically states that it "files its notice as to the final calculation of restitution for the defendants in this case, pursuant to this Court's previous order." (See Doc #: 427 Filed: 05/30/13 PageID #: 9086). It is noteworthy that there appears to be no previous order in defendant Viola's case which defers the determination of restitution. Further, the

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<sup>1</sup> Notice of Appeal was filed 1/31/12, Defendant's Appellate Brief and Assignment of Errors was filed 3/25/2013, The Government's Reply was filed May 1, 2013.

Government's Notice offers neither supplemental loss amounts nor supplemental information which differs at all from the figures provided by the Government at the time of sentencing.

Defendant Viola was not served with the Government's Notice of Finalization of Restitution. The certificate of service does not indicate that Defendant Anthony Viola was served with the government's notice. (See Doc #: 427 Filed: 05/30/13 PageID #: 9092). As Viola was incarcerated at the time of the Government's Notice, he did not have access to Pacer and/or electronic service.

On July 11, 2013<sup>2</sup> this Court filed a Restitution Order which increased Viola's restitution amount from \$1,256,528.49 to \$2,649,865. (See Doc #: 428 Filed: 07/11/13 PageID #: 9086). The order provides no "supplemental information" relevant to Anthony Viola which was not presented by the government at the time of sentencing. Viola, likewise, was not served with this Court's July, 2013 Restitution Order.

#### **B. Legal Analysis**

This Court did not have jurisdiction to increase restitution nineteen months after issuing its final conviction and sentencing judgment on January 5, 2012. The Sixth Circuit to the United States Court of Appeals holds that;

When a court imposes a sentence, "it does not have the authority to change or modify that sentence unless such authority is expressly granted by statute." *United States v. Hammond*, 712 F.3d 333, 335 (6th Cir. 2013) (per curiam); see also *United States v. Curry*, 606 F.3d 323, 326 (6th Cir. 2010); see generally 18 U.S.C. § 3582. And a restitution order "is a part of one's sentence." *United States v. Winans*, 748 F.3d 268, 271 (6th Cir. 2014) (citation omitted). So if a court wants to change a restitution order, it must point to express statutory authorization to do so. See *Hammond*, 712 F.3d at 335; *United States v. Harvey*, 20 F.4th 71, 75 (1st Cir. 2021).

Where the Court issues a restitution order, as it did on January 5, 2012, the authority granted by statute is limited, and not applicable in this case. The Government's May 30, 2013 Notice of Finalization of

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<sup>2</sup> The imaging of this Court's dated signature appears to indicate that the order was issued July 11, 2012. However, the docket establishes that the order was filed July 11, 2013. Further, the Order references a May 30, 2013 filing by the government. Accordingly, this motion proceeds on reliance of the docket date July 11, 2013.

Restitution points to no statutory authority for a delayed “final” restitution amendment. Fatal to this Court’s Restitution July 11, 2013 order is the fact that it cites to no statutory authority in support of its order.

Without regard to the absence of citation to statutory authority, none exists. Statutory authority which permits amendment to a final sentencing judgment are limited. 18 U.S.C.S. 3664(o) holds that;

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 [18 USCS § 3742] of chapter 235 of this title;

(B) appealed and modified under section 3742 [18 USCS § 3742];

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A [18 USCS § 3664(k), 3572, or 3613A]; or

*18 U.S.C.S. 3664* (LexisNexis, Lexis Advance through Public Law 118-157, approved December 17, 2024).

Here, none of these exceptions apply. Further, the Court presented evidence of all loss calculations attributable to all co-defendants so there is no argument, pursuant to 18 USC 3664 apply. Further 18 USC 3664(D)(5) sets forth the time bar for addressing restitution:

(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.

*18 U.S.C.S. 3664 (D)(5)*

There was no assertion by the government that the victims losses were not ascertainable by the mandatory deadlines set forth by the legislature. Here, there were no additional loss discoveries by a victim, and neither a showing nor finding of good cause to justify any amended restitution order. (See Doc #: 428 Filed: 07/11/13 PageID #: 9086)

The United States Court of Appeals for the First Circuit addressed this issue when the District Court enter a final judgment of conviction and sentence in 2011. *United States v. Harvey*, 20 F.4<sup>th</sup> 71 (2021). The

District Court amended the judgment in 2020. *Id.* Harvey argued that the district court lacked jurisdiction to amend the criminal judgment, arguing that the Court only had authority to correct a clerical error and that the MVRA provides not basis for the court's order.

As we must, we start with whether the district court had subject-matter jurisdiction to amend the restitution portion of Harvey's criminal judgment. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 142 (1st Cir. 2007); see also *United States v. Mercado-Flores*, 872 F.3d 25, 28 (1st Cir. 2017) ("Even where, as here, no jurisdictional issue was broached in the district court, we have an affirmative obligation to examine jurisdictional concerns." (internal quotation marks omitted)). Harvey argues the district court lacked such jurisdiction because 18 U.S.C. § 3582(b) renders judgments of conviction final. Subject to the narrow exceptions set forth in 18 U.S.C. § 3582(b)—(c) and other statutes, Harvey contends a district court has no authority to amend any portion of the final criminal judgment after it has entered. Our understanding of 18 U.S.C. § 3582, case law interpreting it, and "the general rule of finality" of criminal convictions and sentences, see *Dillon*, 560 U.S. at 824, compel us to adopt Harvey's view

\* \* \*

Applying the same principles to this case, the district court was without inherent authority to modify **Harvey's** criminal sentence once the final judgment was imposed on September 30, 2011.<sup>5</sup> That lack of authority necessarily extended to the restitution portion of the judgment because restitution was made part of his criminal sentence. *United States v. Aguirre-González*, 597 F.3d 46, 52 (1st Cir. 2010) ("[T]he law in this circuit remains that restitution ordered as part of a criminal sentence is a criminal penalty." (internal quotation marks omitted)); see 18 U.S.C. § 3664(o) (referring to "[a] sentence that imposes an order of restitution"). And on the facts of this case, there was no statutory provision or rule that could provide the district court with authority to modify the restitution order.

*United States v. Harvey*, 20 F.4th 71, 75 and 76 (1st Cir.2021).

Further, the question is not waivable;

We note that subject-matter jurisdiction cannot be conferred by a party's "indolence, oversight, acquiescence, or consent." *United States v. Horn*, 29 F.3d 754, 768 (1st Cir. 1994). Although **Harvey** did not object to the district court's assertion of authority under Rule 36 until this appeal, plain error review does not apply, and our review of his challenge is de novo. See *United States v. George*, 841 F.3d 55, 70-71 (1st Cir. 2016).

*United States v. Harvey*, 20 F.4th 71, 77 (1st Cir.2021).

This position has been expressly adopted by the United States Court of Appeals for the Sixth Circuit in August of 2024. *United States v. O'Hara*, 114 F.4th 557, 561, 2024 (6th Cir.), 6, 2024 WL 3873437. Accordingly, it is controlling law here.

Very recently, this issue has also been addressed by New York's Southern District Court where a defendant sought a modification of restitution after the issuing of a sentencing judgment;

"[A] sentence that imposes a restitution order constitutes a final judgment that may be modified only in limited circumstances." *United States v. Lubrun*, No. 18 Crim. 339 (PAC), 2023 U.S. Dist. LEXIS 218231, 2023 WL 8478473, at \*2 (S.D.N.Y. Dec. 7, 2023) (citing 18 U.S.C. § 3664(o)). "Once a district court has sentenced a defendant, it may not resent a defendant unless so ordered by the Court of Appeals or the United States Supreme Court, *see* 28 U.S.C. § 2106, or pursuant to the narrow conditions established by Federal Rules of Criminal Procedure 35 or 36." *United States v. Kerzhner*, No. 00 Crim. 1197 (SJ), 2007 WL 29393, at \*1 (E.D.N.Y. Jan. 4, 2007) (citing *United States v. Spallone*, 399 F.3d 415, 421 (2d Cir. 2005)). None of these conditions are implicated here; therefore, this Court does not have authority to modify the judgment in order to relieve Defendant of her restitution obligation. *See Lubrun*, 2023 U.S. Dist. LEXIS 218231, 2023 WL 8478473, at \*2; *Kerzhner*, 2007 WL 29393, at \*2. Therefore, Defendant's motion must be DENIED.

*United States v. Dawson*, S.D.N.Y. , 2024 U.S. Dist. LEXIS 123173, at \*2 (July 11, 2024).

Here, the trial Court may not resentence Viola where there is no order from the Court of Appeals, from the United States Supreme Court or the narrow conditions of the Federal Rules of Criminal Procedure. Like *Dawson* this Court did not have the authority to modify restitution. Applying the same standard to the present motion, Defendant motion must be granted here.

### **C. Conclusion**

Here, this honorable Court lacked jurisdiction to enter its July 11, 2013 Restitution Order, increasing Defendant Anthony Viola's restitution by \$1,393, 336.51. Accordingly, this Court must vacate its July 11, 2013 Restitution Order as this Court lacked jurisdiction to enter any order amending a final conviction and sentencing judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The foregoing was served upon all parties via the court's electronic filing system on the 6<sup>th</sup> day of  
January, 2025.

Respectfully submitted,

*/s/ Kimberly Kendall*  
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