



On September 2, 1993, as his probation was about to end, petitioner entered into a Stipulation to Enter Consent Judgment with the Probation Office for \$8,025 of the restitution which remained unpaid. There is no indication, however, that following the Stipulation any judgment was actually entered and on September 22, 1993 the Probation Office characterized the agreement to pay the balance of restitution owed as "a moral obligation."

As was subsequently made clear, a court may not delegate to the Probation Office determination of the amount or scheduling of restitution payments. See United States v. Graham, 72 F.3d 352 (3d Cir.), cert. denied, 116 S. Ct. 1186 (1995). Petitioner contends that his original restitution order was illegal because the court failed to set the amount and schedule of restitution payments. He contends that the \$5,375 he paid thus "should be returned to him with simple interest." In the alternative, petitioner asks the court to remit the unpaid portion of restitution under 18 U.S.C. § 3573.<sup>1</sup>

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<sup>1</sup> Defendant also suggests that the sentencing judge never ordered restitution at the sentencing proceedings but simply inserted that condition in the Judgment and Commitment Order. The court has been unable to locate a tape or transcript of defendant's sentencing proceeding in 1987. It appears from contemporaneous correspondence, however, that defendant made the same suggestion in 1989 to the Probation Office. A Probation Officer who "listened to a tape recording of the proceedings" then verified that the court had indeed ordered restitution during defendant's sentencing.

As to offenses committed prior to November 1, 1987, a court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence" which is 120 days. See Fed. R. Crim. P. 35(a), Rule Applicable to Offenses Committed Prior to Nov. 1, 1987, reprinted in, 18 U.S.C.A. (West Supp. 1998).<sup>2</sup> Under old Rule 35(a), however, a defendant does not automatically receive the benefit of subsequent changes in or interpretations of the law. See United States v. Woods, 986 F.2d 669, 674 (3d Cir.), cert. denied, 510 U.S. 826 (1993). Substantial justification is required. Id.

It is not altogether clear that the sentencing judge violated the dictates of Graham. In the particular circumstances and context, the term "fair share" can reasonably be viewed as the colloquial equivalent of one-half. While the Probation Office apparently allowed defendant to make restitution in partial periodic payments, the sentencing judge did not expressly delegate to the Probation Office the authority to do so. The court was silent as to any payment schedule. When a court orders a payment and does not otherwise provide, the order may reasonably be read to require immediate payment in full.

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<sup>2</sup> The court will assume that if petitioner's contentions are correct, his sentence was an "illegal sentence" rather than a "sentence imposed in an illegal manner" and thus the motion would be timely.

Even assuming that the restitution order violates Graham, defendant still bears the burden of demonstrating that the failure to adhere to Graham in his case resulted in a "miscarriage of justice." Id. at 678. On the record presented, petitioner fails to meet his burden.

Restitution is not a fine paid to the government. The Probation Office merely serves as a conduit for repayment by a criminal to the victim of his crime. To grant defendant's motion, the court effectively would have to direct his victim to return to defendant the \$5,375 in restitution he has made. Even assuming the court could do so, this would result in an injustice far greater than any petitioner could claim. Moreover, as noted, petitioner agreed to pay without challenge the amount of restitution owed in a stipulation executed near the end of his probation. See United States v. Motto, 1997 WL 408450, \*9 (E.D. Pa. July 16, 1997) (while court's delegation of authority to probation office to determine appropriate fine installment payments was contrary to subsequent holding in Graham, it did not relieve defendant of obligation to pay fine in full where he never applied to amend the terms of his probation).

Relief under § 3573 is also unavailable. Section 3573 by its terms applies only to unpaid fines and special assessments. The statute makes no accommodation for the remission of restitution payments. Additionally, courts are

authorized to act under § 3573 only upon a motion by the government. See United States v. Schilling, 808 F. Supp. 1214, 1219 (E.D. Pa. 1992); United States v. Heimbach, 808 F. Supp. 413, 416 (E.D. Pa. 1992). The government has submitted no such motion in this case.

Petitioner also cites 28 U.S.C. § 1651 but identifies no writ which the court appropriately could issue to provide the relief he seeks.

The court, however, does not suggest that in the absence of a civil judgment defendant may be compelled to pay the \$4,625 he still owed at the expiration of his probation. While he undertook to pay this amount, this was apparently accepted by all concerned as a "moral obligation" and not a legally enforceable one.

**ACCORDINGLY**, this                    day of August, 1998, upon consideration of petitioner's Old Law F.R. Cr. P. 35 Motion, or as an Alternative, a 28 U.S.C. Section 1651 Motion, or Remission of the Restitution Order Under [18] U.S.C. Section 3573 (Doc. #23), and the government's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**