

CRIMINAL LAW

SCOTUS to Decide if Restitution is Criminal or Civil

By Evan T. Barr

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On April 7, 2025, the Supreme Court granted cert in *Ellingburg v. United States* to resolve a circuit split as to whether restitution is a criminal punishment and therefore subject to the requirements of the Ex Post Facto Clause.

On the one hand, restitution is imposed by a court as part of sentencing and adds to a defendant's post-conviction obligations, which certainly sounds punitive. But the primary purpose of restitution is to compensate victims for their losses, which operates more like a civil remedy.

Regardless of the outcome, the court's ruling will only directly affect a small number of defendants who were adversely impacted by a 1996 statute that retroactively extended the time for the government to collect on outstanding restitution judgments.

But the way in which the court may characterize restitution, as being criminal or civil, may have broader implications on sentencing procedure in federal cases.

Federal Statutes Governing Restitution

Restitution was designed to restore a victim to the status quo prior to the commission of the offense in question.

In the early 20th century, federal courts recognized the ability to incorporate a payment obligation for actual damage or loss caused by the

defendant's acts into the terms of a probationary sentence, but courts only invoked this power on limited occasions and even then, did little to enforce collection.

In the Victim and Witness Protection Act of 1982 (VWPA) Congress vested courts with discretion to order restitution for losses in any Title 18 criminal case so long as the sentencing court also considered 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." Title 18, United States Code, Section 3663(a)(1)(B)(i).

In practice, given those considerations, courts only rarely imposed substantial restitution orders.

In 1996, Congress dramatically enhanced the law by enacting the Mandatory Victim Restitution Act (MVRA). Under the MVRA (which went into effect on April 24, 1996), the sentencing court was now required to impose restitution in the full amount of each victim's losses and without regard to the defendant's economic circumstances.

Relevant to the split at issue in *Ellingburg*, the VWPA and MVRA also differed regarding



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Courtesy photo

enforceability. Under both laws a restitution order operates as a lien in favor of the government against a defendant's personal property.

But while that lien expires twenty years after the entry of judgment pursuant to the VWPA, under the MVRA, the liability period was extended to be twenty years after the entry of judgment or twenty years after the defendant's release from prison, whichever is later.

The Ex Post Facto Clause of the Constitution states that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, §9, cl. 3. A law only violates the Ex Post Facto Clause if it (1) applies retroactively (i.e., to events occurring before its enactment) and (2) disadvantages the affected offender by altering the definition of criminal conduct or increasing the punishment for the crime.

The extended liability period created under the MVRA would only implicate the Ex Post Facto Clause if (as a threshold matter) restitution were deemed to be punitive in nature.

The Ellingburg Case

In Dec. 1995, Holsey Ellingburg, Jr. committed a bank robbery. He was convicted and sentenced, on Nov. 20, 1996, to 322 months' imprisonment, five years' supervised release, and ordered to pay \$7,5657 in restitution. While incarcerated, Ellingburg paid down \$2,054 towards his restitution obligation.

Nov. 20, 2016 marked twenty years after entry of judgment, after which Ellingburg assumed he would no longer be liable for unpaid restitution under the VWPA. The government, however, continued to withdraw money from his Bureau of Prisons inmate trust account.

Ellingburg was released from prison in June 2022. In early 2023 his probation officer told him he would need to make a payment of \$100 per month, citing the MVRA rules. The government also claimed that he now owed \$13,476 in restitution – more than double the amount outstanding when the VWPA's twenty-year liability period expired.

In March 2023, Ellingburg filed a motion to show cause, arguing that his liability had expired in November 2016, and that applying the MVRA's

extended liability period would violate the Ex Post Facto Clause. The district court denied the motion, holding that the retroactive application of the law did not increase his punishment.

In a brief majority opinion, the Eighth Circuit affirmed, but on other grounds. *United States v. Ellingburg*, 113 F.4th 839 (8th Cir. 2024). Citing an earlier decision that it viewed as controlling, the Eighth Circuit held that restitution under the MVRA was "designed to make victims whole, not to punish perpetrators" and therefore was "essentially a civil remedy created by Congress" and had only been "incorporated into criminal proceedings for reasons of economy and practicality."

The Majority View

The Eighth Circuit joined the Seventh Circuit which many years earlier, in *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998), had also rejected an Ex Post Facto Clause challenge to the retroactive application of the MVRA on the grounds that restitution, as "an equitable device for restoring victims to the position they occupied prior to a wrongdoer's actions," was principally civil in nature.

On the other side of the ledger, however, the Third, Fifth, Sixth and Eleventh Circuits all have come to the opposite conclusion, finding that restitution is a form of punishment for Ex Post Facto purposes. Of these, the Third Circuit's ruling in *United States v. Edwards*, 162 F.3d 87 (3d Cir. 1998) best represents the majority view.

Edwards participated in a scheme in 1992-93 involving stolen checks. He pled guilty to conspiracy and bank fraud charges. At sentencing in December 1997, Edwards argued (invoking the VWPA) that he was presently unable to pay restitution.

The district court agreed but nevertheless held it was required to impose restitution for the full amount of victim loss (\$418,397) pursuant to the MVRA.

On appeal, the Third Circuit reversed, finding that the retrospective application of the MVRA to Edwards' case violated the Ex Post Facto Clause because restitution ordered as part of a defendant's sentence was a form of criminal punishment, not a civil sanction, and that the shift from

the discretionary to mandatory restitution regime acted to increase the punishment imposed on the defendant.

In reaching this outcome, the Third Circuit first noted that the MVRA's statutory scheme was designed to be "an integral and necessary part of sentencing, supervised release, and probation for the crimes it implicates" and thus linked to the rest of the criminal process for punishment.

The court further found that the legislative history reflected that "Congress intended mandatory restitution to be one means by which the criminal justice system could be reformed into a system that is more responsive to the needs of crime victims" forcing "an individual defendant to address the harm his crime has caused to the individual victims of his crime and to society."

The legislative history also evinced, the Third Circuit held, the intent to "make mandatory restitution under the MVRA a penalty separate from civil remedies available to victims of crime; and to caution that the administration of mandatory restitution should not take on the procedural complications of civil redress."

The *Edwards* court concluded that "while criminal restitution resembles a civil remedy and has compensatory as well as punitive aspects, neither these resemblances to civil judgments, nor the compensatory purposes of criminal restitution, detract from its status as a form of criminal penalty when imposed as an integral part of sentencing."

What's Next at The Supreme Court

Although the circuit split is well-established, it's somewhat surprising that the Supreme Court decided to take up the *Ellingburg* case in the first place.

As the Solicitor General noted in opposing cert, the question presented was of "diminishing significance" since it would at most only affect defendants who (1) committed their underlying offenses prior to April 24, 1996; (2) were convicted on or after that date; (3) failed to pay off their restitution in the first 20 years after judgment

was entered and (4) were released from imprisonment in the last 20 years (i.e. are thus still subject to the extended payment schedule).

That cannot be very many individuals, although in fairness, as Ellingburg notes in his petition, lingering restitution obligations place a heavy financial burden on formerly incarcerated individuals who are struggling to reintegrate into society and can in some cases result in serious collateral consequences.

Justice Gorsuch echoed that theme in a dissent from a denial of cert in another restitution case in 2019 and thus seems likely to have been one of the votes in favor of hearing *Ellingburg*.

Reading the tea leaves, it seems likely that the majority view will prevail. For one thing the Court in *Paroline v. United States*, 572 U.S. 434 (2014) has previously stated that restitution served "penological purposes" albeit in a different context.

More importantly, although restitution principally seeks to compensate victims, it is carefully integrated into the criminal sentencing process and cannot exist effectively outside of that system. And it undoubtedly feels punitive to the defendant who, already facing fines, forfeitures and jail time, has the added prospect of making monthly restitution payments for years to come. These themes are likely to resonate with justices on both the liberal and conservative wings of the court.

But removing the longstanding ambiguity as to the nature of restitution could also lead to some unforeseen consequences.

If restitution is deemed definitively punitive, look for creative defense lawyers to argue that other constitutional protections - such as the Sixth Amendment right to a jury trial or the Eighth Amendment's prohibition against excessive fines - should also apply in determining victim losses.

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