Challenging Restitution Orders After Supreme Court Decision

By **Mark Allenbaugh and Doug Passon** (January 27, 2026)

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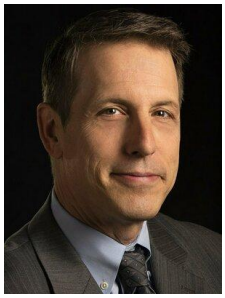

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Restitution awards are a significant component of the federal criminal justice system. According to the U.S. Sentencing Commission's 2024 annual report, more than one out of every five sentences involved an order of restitution, with nearly $13.5 billion imposed in total that year[1] — greater than the gross domestic product of many countries.[2]

Nearly all of that was imposed on those convicted of some form of fraud ($9 billion in total, with an average award of $2.2 million and a median of $155,415); money laundering ($1.9 billion in total, with an average award of $5 million and a median of $862,871); or tax offenses ($1.6 billion in total, with an average award of $4.1 million and a median of $473,483).[3]

Once imposed, the restitution amount remains collectible by the government for 20 years,[4] which does not begin until the defendant is released from prison.[5] And no award is dischargeable in bankruptcy.[6]

Yet, despite restitution's significance, defendants have had very little in the way of due process protections because the Mandatory Victims Restitution Act seemingly left little recourse to challenge the imposition of restitution. Generally, the government simply provides the probation officer with victim impact statements that assert alleged damages, often with little proof backing up those claims.[7] Those then get incorporated into a presentence investigation report.

As most defendants are more concerned about how much time they may serve in prison, the amount of restitution they may be ordered to pay is often of less concern. Accordingly, most plea agreements simply defer to the judge to determine whatever amount the judge deems appropriate. Often, the amount is not even contested.

But for those who do wish to contest the amount of restitution, it's often an uphill battle, because the Federal Rules of Evidence do not apply when a court determines the amount owed. To make matters worse, the evidentiary standard is a preponderance of the evidence.[8] While a judge may order a separate hearing on restitution, a defendant does not have a due process right to such a separate hearing.[9]

Thus, the amount of restitution imposed is often based on the allegations set forth in written statements of victims, with no opportunity to cross-examine the witnesses or require them to prove up their damages.

All that may now change because of a seemingly simple recharacterization of restitution. On Jan. 20, the U.S. Supreme Court issued a unanimous opinion in Ellingburg v. U.S.,[10] a case that originated out of the U.S. Court of Appeals for the Eighth Circuit.[11] The Supreme Court held that "[r]estitution under the MVRA is plainly criminal punishment for purposes of the Ex Post Facto Clause."[12]

Understanding the Ex Post Facto Clause

As Justice Clarence Thomas explained in his concurrence in Ellingburg, a "law is ex post facto — meaning 'after the fact' — when it applies retroactively to conduct that occurred before the law was enacted."[13]

Such laws, he continues, "lack legitimacy because laws must precede the actions they govern,"[14] for only then can one be provided with "notice and fair warning" of what the law prohibits. To retroactively criminalize innocent conduct, therefore, is considered "an affront to man's 'reason and free will.'"[15]

Accordingly, any criminal penalty may only be applied prospectively, i.e., to conduct that occurs after the enactment of such penalty.

Ellingburg: Procedural Background

In Ellingburg, the matter to resolve was rather straightforward. The petitioner had been sentenced in 1996 for bank robbery, at a time when the 20-year limit for collecting on orders of restitution continued from the time the judgment was initially entered, which ran while the petitioner was serving his sentence, although there still remained a balance owed when he was released.

Also, during his incarceration, Congress changed the triggering date for the 20-year time limit from the date of the original judgment to the date the defendant was released from prison, if their release date came later.

Once the petitioner was released, the government sought to collect on the balance owed under this new, extended time limit. The petitioner filed a motion to show cause, objecting on ex post facto grounds. The Eighth Circuit affirmed the U.S. District Court for the Western District of Missouri's denial of the show cause motion, reasoning that restitution was a civil penalty and so, by its very nature, the ex post facto clause did not apply. The petitioner then sought review by the Supreme Court.

Notably, the government changed its position, agreeing with the petitioner that restitution was not a civil penalty but was, in fact, a criminal punishment. As a result, the Supreme Court appointed John F. Bash as amicus curiae to argue that restitution was civil in nature.

Bash argued in his brief that if restitution is a criminal penalty, then the Sixth Amendment applies to it, such that the amount of restitution is an element of the offense, and therefore would have to be charged in the indictment and either admitted by the defendant or found by a jury.

According to the amicus in Ellingburg,

> the "Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence." … The Court has applied that rule "to criminal fines," and thus juries must "find beyond a reasonable doubt facts that determine [a] fine's maximum amount." ... If MVRA restitution were also deemed criminal punishment, the same rule would presumably apply. And because the MVRA requires judges to find by a preponderance of the evidence facts that increase the maximum amount of restitution, … MVRA restitution would violate the Sixth Amendment were it criminal punishment.[16]

Earlier Case Law

Indeed, as Justice Thomas observed in his concurrence in the Supreme Court's seminal 2000 sentencing case, Apprendi v. New Jersey, "[c]ases from the founding to roughly the end of the Civil War establish ... the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element [of an offense]."[17] Accordingly, "[v]alue was an element because punishment varied with value."[18]

Moreover, in his 2019 opinion dissenting from the court's denial of certiorari in Hester v. U.S., Justice Neil Gorsuch — joined by Justice Sonia Sotomayor — argued directly in favor of applying the Sixth Amendment to determinations of restitution. As he explained, since "the time of Henry VIII, ... the jury usually had to find the value of the stolen property before restitution to the victim could be ordered."[19]

Thus, as U.S. Circuit Judge Kermit Bye of the Eighth Circuit observed in his 2005 dissenting opinion in U.S. v. Carruth, "[o]nce we recognize restitution as being a 'criminal penalty' the proverbial Apprendi dominoes begin to fall."[20]

The Sixth Amendment requires the amount of restitution to be alleged in the indictment, and juries — not judges — to determine the amount to be imposed, or for the defendant to agree to the amount of restitution.

The Supreme Court's Ellingburg Decision

In light of the government's concession that restitution under the MVRA was a criminal penalty, it was not surprising that the court unanimously held in a rather brief opinion that restitution was "plainly criminal punishment for purposes of the Ex Post Facto clause."[21] According to the court, a straightforward statutory analysis entailed this result.[22]

The court cited to "[n]umerous features of the MVRA" in reaching this conclusion, not the least of which is that the statute itself labels restitution as a penalty for a criminal offense.[23]

Additionally, restitution is imposed during a criminal defendant's sentencing where the government is the adversarial party — not any victim, as would be the case in a private civil matter.

Likewise, failure to make restitution can result in further sanctions by the sentencing court, from extending any term of supervised release or probation up to imprisonment. Obviously, victims do not have at their disposal such enforcement mechanisms.

So, as the court held, "[w]hen viewed as a whole, the MVRA makes abundantly clear that restitution is a criminal punishment."[24]

Takeaways and Implications of Ellingburg

Any question regarding whether restitution is civil or criminal in nature has now been definitively resolved. In light of Ellingburg, therefore, the current manner in which restitution is imposed is almost certainly unconstitutional.

Since restitution is a criminal penalty for purposes of the ex post facto clause, it must be for all purposes, and so Sixth Amendment protections apply. This then requires the amount of

restitution to be alleged in the indictment, and the defendant must either admit to the amount as part of a plea agreement, or the amount must be put to a jury for unanimous determination — consistent with the Federal Rules of Evidence — beyond a reasonable doubt.

Some may object that Apprendi held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[25] As there is no statutory maximum to restitution, then Apprendi and the Sixth Amendment cannot apply — or so the objection goes.

But as Justice Gorsuch pointed out in Hester, rebutting precisely that argument,

> the statutory maximum for restitution is usually zero, because a court can't award any restitution without finding additional facts about the victim's loss. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.[26]

And, as Justice Gorsuch reiterated last February, dissenting from the court's denial of certiorari in Rimlawi v. U.S., if restitution is criminal in nature, "it is difficult to see how a judge's factual findings might suffice to increase a criminal defendant's exposure to a restitution award."[27]

Although the court issued a seminal opinion in Ellingburg regarding restitution, it offered no real-world guidance. Nonetheless, the implications of the opinion are clear: The restitution amount must be alleged in the indictment just like any other element of the offense, and a client must either admit to the restitution amount as part of a plea agreement or a jury must make that finding. Without that, any and all challenges to restitution are now fair game.

Moving forward, counsel should object to the imposition of any restitution amount not alleged in the indictment. Where applicable, counsel should consider moving to withdraw from plea agreements that have stipulated amounts of restitution or seek to renegotiate that portion of the agreement.

And for those who already have been sentenced and ordered to pay restitution, counsel should certainly consider appealing the order if possible, or at least collaterally attacking the order as the petitioner did in Ellingburg.

All this is to say that the court has undoubtedly opened a floodgate of litigation on these issues.

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[1] See U.S. Sentencing Comm'n, 2024 Sourcebook of Federal Sentencing Statistics tbl. 17, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Table17.pdf.

[2] See Wikipedia, "List of Countries by GDP (nominal)," https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal).

[3] See supra note 2.

[4] See Dep't of Justice, Restitution Process (updated Oct. 10, 2023), https://www.justice.gov/criminal/criminal-vns/restitution-process.

[5] 18 U.S.C. § 3613(b).

[6] 18 U.S.C. § 3613(e).

[7] "All that is required in the restitution context is a 'modicum of reliable evidence.'" United States v. Lopez, 503 Fed. App'x 147, 149 (3d Cir. 2012) (quoting United States v. Salas-Fernandez, 620 F.3d 45, 48 (1st Cir. 2010)). At least two circuits have held that a signed, sworn "victim impact statement can be sufficient to establish the amount of a loss." Id.(holding that a signed, unsworn letter, as "the equivalent of a victim impact statement," was sufficient). Indeed, a number of circuits have upheld restitution awards based on much less. United States v. Hamad, 300 Fed. App'x 401, 408 (6th Cir. 2008) (reliance on mere letter and victim oral statement sufficient); United States v. Pickett, 387 Fed. App'x 32, 36 (2d Cir. 2010) (rejecting defendant's argument that the Government was required to offer proof of loss amounts for each victim through affidavits and holding that trial testimony of a case agent and a loss spreadsheet were sufficient to establish the amount of loss by a preponderance); United States v. Bales, 813 F.2d 1289, 1298 (4th Cir. 1987) (upholding restitution award based on bank official's statements regarding total loss as quoted in the PSR).

[8] 18 U.S.C. § 3664(e).

[9] See United States v. Vandenberg, 201 F.3d 805, 813 (6th Cir. 2000) ("While it is no doubt true that in many cases, a sentencing court will want to conduct a hearing to obtain relevant evidence and afford the parties an opportunity to present oral argument, § 3664(d)(5) does not mandate that such an evidentiary hearing must be conducted.").

[10] Ellingburg v. United States, No. 24-482, 2026 U.S. LEXIS 504, *4 (Jan. 20, 2026).

[11] United States v. Ellingburg, 113 F.4th 839 (8th Cir. 2024).

[12] Ellingburg, 2026 U.S. LEXIS 504 at *4 (footnote omitted).

[13] Id. at *10 (Thomas, J., concurring; Gorsuch, J., joining).

[14] Id. at *11.

[15] Id. (quoting Peugh v. United States, 569 U. S. 530, 561 (2013)(Thomas, J., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 39 (1765) (Blackstone)).

[16] Brief of Amicus Curiae ISO Judgment Below, Ellingburg v. United States, No. 24-482, Aug. 22, 2025, at 30-31, https://www.supremecourt.gov/DocketPDF/24/24-482/370519/20250822142119142_Brief%20of%20court-appointed%20amicus%20ISO%20of%20judgment%20below.pdf. Internal citations omitted.

[17] Apprendi v. New Jersey, 530 U.S. 466, 501-502 (2000) (Thomas, J., concurring).

[18] Id.at 503.

[19] Hester v. United States, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari)(citations omitted).

[20] United States v. Carruth, 418 F.3d 900, 906 (8th Cir. 2005) (Bye, J., dissenting).

[21] Ellingburg, 2026 U.S. LEXIS 504 at *4.

[22] Id.

[23] Id. (citing 18 U.S.C. § 3663A(a)(1)).

[24] Id. at *6.

[25] Apprendi, 530 U.S. at 490.

[26] Hester v. United States, 586 U.S. 1104, 1106 (2019) (Gorsuch, J., dissenting from denial of certiorari; Sotomayor, J., joining).

[27] Rimlawi v. United States, _ U.S. _, 145 S. Ct. 518, 518 (2025) (Gorsuch, J., dissenting from denial of certiorari) (citations omitted).