No. 24-482

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ATTICUS W. DEPROSPO
ROHIT P. ASIRVATHAM
R. SHANE ROBERTS, JR.
BRETT V. RIES
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

Whether criminal restitution under the Mandatory Victims Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Constitution, Statutes, and Rules:

Page

Statutes and Rules—continued:

Page

Statutes and Rules—continued:

Page

Statutes and Rules—continued:

Page

Rules—continued:

Other Authorities:

Page

Other Authorities—continued:

Page

Other Authorities—continued:

In the Supreme Court of the United States

No. 24-482

HOLSEY ELLINGBURG, JR.
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion (Pet.App.2a-9a) is reported at 113 F.4th 839. The court of appeals' order denying rehearing en banc (Pet.App.1a) is unreported but available at 2024 WL 4349610. The district court's order denying the motion to show cause (Pet.App.12a-16a) is unreported.

JURISDICTION

The court of appeals entered judgment on August 23, 2024, and denied rehearing en banc on September 30,

2024. Pet.App.1a, 10a-11a. The petition for a writ of certiorari was filed on October 25, 2024, and granted on April 7, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3556 provides:

> The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.

18 U.S.C. § 3663A(a)(1) provides:

> 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 or, if the victim is deceased, to the victim's estate.

Other pertinent provisions are reproduced *infra*, App.1a-32a.

STATEMENT

From Hammurabi to the Founding to today, societies have punished criminal offenders by making them pay restitution to their victims. The Mandatory Victims Restitution Act (MVRA) is part of that tradition. Restitution under the MVRA—a monetary penalty imposed on criminal offenders as part of their criminal sentence—is a paradigmatic form of criminal punishment. The Ex Post Facto Clause therefore applies when the government seeks to enforce the MVRA retroactively.

The Eighth Circuit held otherwise on the view that the MVRA imposes a civil remedy, not criminal punishment. That conclusion is indefensible. The United States agrees. Letter from D. John Sauer, Solicitor General, Office of the Solicitor General, to Scott S. Harris, Clerk, Supreme Court of the United States (May 12, 2025).

The government was right to confess error: restitution under the MVRA is plainly criminal punishment. Restitution is imposed only for a criminal conviction and is part of the criminal sentence, like imprisonment and fines. That is enough to call the case.

But a laundry list of other textual signs points in the same direction. Criminal procedures govern restitution from start to finish. Nonpayment can result in imprisonment without any new indictment, prosecution, or conviction. Congress expressly linked restitution to the traditional penal goals of "punishment and deterrence." 18 U.S.C. § 3614(b)(2). Congress placed the MVRA in Title 18 alongside myriad other criminal provisions. Restitution must be imposed "in addition to" or, in some cases, "in lieu of" "any other penalty," including incarceration or fines. *Id.* § 3663A(a)(1). Congress also attempted to avoid ex post facto problems by making the MVRA applicable to sentencings for convictions that postdated the MVRA's enactment—and even then, only "to the extent constitutionally permissible." *Id.* § 2248 note.

This Court's cases resolve any doubt. Outside the ex post facto context, this Court has said that "[t]he purpose of awarding restitution" under the MVRA is "to mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). And in analyzing other restitution regimes, this Court has described restitution as a "criminal sanction," *Kelly v. Robinson*, 479 U.S. 36, 50-52 (1986) (citation omitted), that "implicates

the prosecutorial powers of government" and serves "punitive" and "penological purposes," *Paroline v. United States*, 572 U.S. 434, 456-57 (2014) (cleaned up).

For all these reasons, the MVRA imposes criminal punishment that is subject to the Ex Post Facto Clause. The Court should vacate the decision below.

A. Statutory Background

In 1982, Congress enacted the first generally applicable federal criminal restitution scheme, the Victim and Witness Protection Act (VWPA). Pub. L. No. 97-291, 96 Stat. 1248 (1982). The VWPA gave courts discretion to order offenders to pay restitution as part of their criminal sentences. VWPA § 5, 96 Stat. at 1253-54. When it enacted the VWPA, Congress understood it was implementing a method of "punish[ing] … wrongdoers" that has been an "integral part of virtually every formal system of criminal justice." S. Rep. No. 97-532, at 30 (1982). A later amendment made VWPA restitution obligations expire twenty years from the entry of judgment. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7042, 102 Stat. 4181, 4399 (making VWPA restitution orders enforceable under "subchapter B of chapter 229 of" Title 18, which included 18 U.S.C. § 3613(b) (1988)).

In 1996, Congress passed the MVRA as part of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* MVRA, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1214, 1227-41 (1996). The MVRA amended the VWPA's restitution regime and made restitution *mandatory* for specific offenses, like certain crimes of violence and offenses against property where "an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(c)(1). For other offenses, the MVRA preserved courts' ability to order discretionary restitution. *See id.* §§ 3556, 3663(a)(1)(A).

The MVRA extended an offender's obligation to pay restitution to "the later of 20 years from entry of judgment *or 20 years after the release from imprisonment*." 18 U.S.C. § 3613(b) (emphasis added). But Congress clarified that the MVRA would only apply in "sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act" "to the extent constitutionally permissible." *See* MVRA § 211, 110 Stat. at 1241.

Housed within Title 18, the MVRA makes restitution part and parcel of an offender's criminal sentence. *See* MVRA §§ 202-206, 110 Stat. at 1227-36. It states: "The court, *in imposing a sentence* on a defendant who has been guilty of an offense … shall order restitution" for offenses enumerated in § 3663A. 18 U.S.C. § 3556 (emphasis added). When imposing a sentence, the court must order restitution "in addition to" (or in cases of misdemeanors "in addition to or in lieu of") "any *other penalty*," including incarceration and criminal fines. *Id.* § 3663A(a)(1) (emphasis added).

The MVRA tethers restitution amounts to the "victim's losses," *id.* § 3664(f)(1)(A), that are "directly and proximately" caused by the offense of conviction, *id.* § 3663A(a)(2). *See also Hughey v. United States*, 495 U.S. 411, 418 (1990) (VWPA). In cases involving property harm, the measure of loss includes "the value of the property." 18 U.S.C. § 3663A(b)(1)(B). In cases involving personal injury, it includes medical expenses, therapy and rehabilitation expenses, and lost income. *Id.* § 3663A(b)(2). In all cases, restitution "losses" include "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id.* § 3663A(b)(4).

Yet the MVRA does not put the victim in charge of the restitution process. Restitution obligations remain fixed even if the identified victim disclaims her interest in restitution payments. *Id.* § 3664(g)(2). And in some cases, courts can impose restitution even for crimes for which there is "no identifiable victim." *Id.* § 3663(c)(1).

The traditional criminal sentencing apparatus guides the imposition of restitution. Following prosecution and conviction, probation officers prepare "a complete accounting of the losses to each victim" in the presentence report, in accordance with Rule 32(c) of the Federal Rules of Criminal Procedure. *Id.* § 3664(a), (c). If the amount of restitution is in dispute, the prosecutor bears the burden to prove the amount by a preponderance of the evidence. 18 U.S.C. § 3664(e). Victims are not required to participate in this process. *Id.* § 3664(g)(1).

The offender makes the required payments to the clerk of court, who distributes them to victims.[1] If an offender does not pay, the government and the court have several enforcement mechanisms at their disposal. For instance, "the court may … revoke probation or a term of supervised release," 18 U.S.C. § 3613A(a)(1), and in certain circumstances even "resentence" the defendant to "any sentence which might originally have been imposed," including "imprisonment," *id.* § 3614(a), (b).

B. Factual and Procedural Background

1. In December 1995, before the MVRA's enactment, petitioner Holsey Ellingburg, Jr. robbed a bank. *See* Pet.App.13a. Upon conviction, and after the MVRA's enactment, the district court sentenced Mr. Ellingburg to

---

[1] *See* U.S. Dep't of Just., The Restitution Process for Victims of Federal Crimes 4 (Nov. 2014), https://www.justice.gov/file/405236/dl.

322 months' imprisonment and 5 years' supervised release. Pet.App.13a. The court ordered Mr. Ellingburg to pay two "criminal monetary penalties": a $100 special assessment and $7,567 in restitution. Pet.App.23a-24a. While incarcerated, Mr. Ellingburg paid $2,154 toward his restitution obligation. D. Ct. Dkt. 12-3, at 4.

Mr. Ellingburg was released from custody in June 2022 and sought to build a normal life in Missouri with his fiancée. *See* Pet.App.3a; D. Ct. Dkt. 6, at 10. As with many recently released offenders, Mr. Ellingburg's earnings from his minimum wage warehouse job cover little more than his monthly bills. *See* D. Ct. Dkt. 6, at 3.

Under the VWPA provisions in effect at the time of Mr. Ellingburg's offense, his restitution obligation ended in November 2016—twenty years after entry of judgment. *See* 18 U.S.C. § 3613(b) (1994). But in January and February 2023, Mr. Ellingburg received text messages from his probation officer demanding monthly $100 restitution payments, citing the MVRA. *See* C.A. Appellant's Add.20; D. Ct. Dkt. 6, at 3. As of March 2023, the government claimed that Mr. Ellingburg owed $13,476 in restitution—almost double the originally ordered amount, due to the MVRA's mandatory interest and extended liability period provisions. D. Ct. Dkt. 12, at 2; D. Ct. Dkt. 12-3, at 5; *see* 18 U.S.C. §§ 3612(f)(1), 3613(b).

2. In March 2023, Mr. Ellingburg filed a pro se motion to show cause in the U.S. District Court for the Western District of Missouri, challenging the government's efforts to collect restitution. Pet.App.12a. Mr. Ellingburg argued that his restitution obligation expired in November 2016 and that applying the MVRA to his pre-MVRA conduct would violate the Ex Post Facto Clause. Pet.App.12a-13a.

The district court denied Mr. Ellingburg's motion. Pet.App.16a. The court never addressed whether restitution is criminal punishment covered by the Ex Post Facto Clause. It instead held that retroactive application of the MVRA's extended liability period did not "increase the punishment for criminal acts." Pet.App.15a (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995)).

3. The Eighth Circuit affirmed on the alternative ground that restitution is not criminal punishment.[2] Pet.App.4a-7a. The court based its reasoning on prior Eighth Circuit precedent that treated restitution as a civil remedy for purposes of the Sixth Amendment's jury-trial right. Pet.App.5a-7a. The court thus held that retroactively applying the MVRA does not implicate the Ex Post Facto Clause. Pet.App.7a.

Judge Melloy, joined by Judge Kelly, concurred. Pet.App.7a. He criticized the Eighth Circuit's prior cases for "not address[ing]" this Court's decision in *Paroline* recognizing criminal restitution's "punitive" and "penological purposes." Pet.App.7a-8a (quoting 572 U.S. at 456-57). But he concluded that "stare decisis" "bound" him to concur. Pet.App.7a.

Judge Gruender separately concurred in the judgment. Pet.App.8a. He agreed with Judge Melloy that Eighth Circuit precedent dictated affirmance but rejected

---

[2] The Eighth Circuit did not address the district court's holding that the MVRA's extended liability period did not increase petitioner's punishment. As the government acknowledges, therefore, "the question presented … is limited to whether restitution under the MVRA is criminal punishment for purposes of the Ex Post Facto Clause." Letter from D. John Sauer, Solicitor General, Office of the Solicitor General, to Scott S. Harris, Clerk, Supreme Court of the United States (May 12, 2025).

the suggestion that those cases were inconsistent with Supreme Court precedent. Pet.App.8a-9a.

The Eighth Circuit denied rehearing en banc. Pet.App.1a.

SUMMARY OF ARGUMENT

Restitution under the MVRA is criminal punishment subject to the Ex Post Facto Clause. That conclusion holds at either step of this Court's well-established framework for assessing whether the Ex Post Facto Clause applies. At step one, Congress intended MVRA restitution to be criminal punishment. That alone is enough to end the ex post facto inquiry. But even were this Court to reach step two, restitution operates as criminal punishment in purpose and effect.

I.A. Congress intended to impose criminal punishment.

1. Congress directed courts to impose restitution together with "any other penalty" available for a criminal conviction. 18 U.S.C. § 3663A(a)(1). The MVRA makes restitution part and parcel of an offender's criminal sentence, like other criminal punishments such as incarceration and fines. Property deprivations imposed as a direct consequence of a criminal conviction have long been considered punishment. In more recent times too, this Court has analyzed whether a penalty constitutes punishment under the Double Jeopardy and Excessive Fines Clauses by considering whether the penalty is imposed by reason of criminal conviction.

2. The MVRA uses classic criminal procedures to impose restitution—another indicator of Congress' intent. *See United States v. Ursery*, 518 U.S. 267, 289 (1996). Probation officers prepare the relevant information. Prosecutors prove the amount of restitution. And as is

normal for criminal punishments (but foreign to traditional civil compensatory damages awards) the sentencing judge determines the amount of restitution. The Federal Rules of *Criminal* Procedure, the U.S. Sentencing Guidelines, and Title 18's sentencing provisions govern this entire process. And Congress instructed sentencing courts to consider restitution when imposing other criminal punishments.

3. Congress backed restitution orders, like fines, with further criminal punishments. If an offender fails to pay, the court can revoke or modify the terms of probation or supervised release, and in some circumstances can resentence the offender to the statutory maximum term of imprisonment for his crime of conviction. Congress authorized these undoubtedly criminal sanctions without requiring any new indictment, prosecution, or conviction. These "enforcement procedures" are likewise "probative of the legislature's intent." *See Smith v. Doe*, 538 U.S. 84, 94 (2003).

4. Congress wrote restitution's penal goals directly into the MVRA. Courts can resentence nonpaying offenders to imprisonment for the underlying offense if "alternatives to imprisonment are not adequate to serve the purposes of *punishment and deterrence.*" 18 U.S.C. § 3614(b)(2) (emphasis added).

This Court has repeatedly recognized the punitive purposes of restitution in other contexts. The Court characterized "[t]he purpose of awarding restitution" under the MVRA as "met[ing] out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). The Court recognized the "punitive purposes" served by mandatory restitution ordered under a related child-pornography restitution provision. *Paroline v. United States*, 572 U.S. 434, 456 (2014). And before the

MVRA, this Court deemed a state-ordered restitution obligation a "criminal sanction" that furthers "the penal goals of the State." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (citation omitted).

5. Other textual and structural choices confirm Congress' intent. Congress housed the MVRA in Title 18. Congress crafted the MVRA's effective date provision with the Ex Post Facto Clause in mind, instructing that the MVRA would apply to convictions after its effective date only "to the extent constitutionally permissible." 18 U.S.C. § 2248 note. Congress distinguished between restitution and "compensatory damages" in a "civil proceeding." *Id.* § 3664(j)(2). And Congress referred to restitution in the MVRA as a "penalty"—a word Congress typically reserves for criminal punishments, especially in Title 18. *See id.* § 3663A(a)(1).

6. Congress enacted the MVRA against a broad understanding that restitution imposed at sentencing is criminal punishment. By the time of the MVRA's enactment, this Court, the Department of Justice, and Congress all had recognized restitution as criminal punishment. Before the MVRA's enactment, this Court called state-ordered restitution a "criminal sanction," *Kelly*, 479 U.S. at 50-51 (citation omitted), and employed the longstanding rule of resolving "ambiguities in criminal statutes in favor of the defendant" when construing the VWPA, *Hughey v. United States*, 495 U.S. 411, 422 (1990). Congress also enacted the VWPA—the MVRA's predecessor—on the understanding that "[t]he principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time." S. Rep. No. 97-532, at 30 (1982).

This same understanding persisted after the MVRA's enactment. Shortly after the MVRA was passed, the Solicitor General "directed United States Attorney's Offices

nationwide" not to apply the MVRA retroactively on the theory that doing so "would retroactively increase punishment for the crime in violation of the Ex Post Facto Clause." U.S. Br. 6, *Edwards v. United States*, 162 F.3d 87 (No. 98-1055), 1998 WL 34084073. And Congress, in later-enacted legislation, called MVRA restitution "criminal restitution." *See, e.g.*, 26 U.S.C. § 6201(a)(4).

B. The Eighth Circuit's contrary conclusion—that restitution is a civil remedy because it can compensate victims—is incorrect.

The Eighth Circuit overlooked the context in which courts impose restitution: as part of the sentence for a criminal conviction. That fact renders restitution criminal punishment, even if compensatory payments might be civil in other contexts. Many punishments imposed as part of a criminal sentence are civil in other contexts. Fines imposed for civil infractions are civil. Likewise, confinement imposed before trial or as part of a civil commitment is not criminal punishment. But fines and confinement imposed as a consequence of conviction undoubtedly are. Restitution is no different.

Congress would have written a different statute had it intended to create a civil compensatory remedy. Prosecutors, not plaintiffs, drive this process. Victims cannot settle with the offender. Even when the victim refuses restitution, the court must still impose it. And Congress authorized restitution even in cases where there is no identifiable victim.

In addition, criminal punishments have involved payments from offenders to victims for thousands of years. Founding-era state and federal statutes also required restitutionary payments to victims as criminal punishments. The MVRA's compensatory features do not diminish its criminal nature.

II. Were this Court to conclude that Congress intended restitution to be a civil remedy, restitution under the MVRA is nonetheless subject to ex post facto scrutiny because it operates as criminal punishment in purpose and effect. The MVRA jeopardizes offenders' freedom by threatening reincarceration for the original offense and the revocation of probation or supervised release. Restitution imposed because of a conviction has historically been viewed as criminal punishment and does not resemble the equitable remedy of civil restitution. The MVRA almost always applies upon a finding of scienter. And the MVRA's restitution regime implicates traditional penal goals, including retribution and deterrence.

ARGUMENT

"No … ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. From the Founding, this prohibition on after-the-fact laws has been understood to extend "to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). The Ex Post Facto Clause thus prohibits retroactive application of "[e]very law that … inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.).

Hewing to these fundamental principles, the ex post facto analysis involves three inquiries. The first, threshold question is whether the at-issue law is "a criminal or penal law," *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Collins*, 497 U.S. at 41, that is, whether it imposes "criminal punishment[]," *Johannessen v. United States*, 225 U.S. 227, 242 (1912). Second, the law "must be retrospective, that is, it must apply to events occurring before its enactment." *Weaver*, 450 U.S. at 29. And, third, the law "must disadvantage the offender affected by it." *Id.*

Only the initial question of whether the MVRA imposes criminal punishment is presented here. In analyzing that question, this Court applies a two-step framework. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). First, the Court asks whether the legislature intended to create "punishment" or "civil proceedings." *Id.* (citation omitted). If Congress intended criminal punishment, "that ends the inquiry"; the Ex Post Facto Clause applies. *Id.* If, however, Congress intended to create "a regulatory scheme that is civil and nonpunitive," the Court goes on to ask whether the law is "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Id.* (cleaned up).

This case is open and shut at step one. Congress plainly intended restitution under the MVRA to be criminal punishment. But even at step two, the MVRA's punitive purpose and effect are criminal.

I. Congress Intended Restitution Under the MVRA To Be Criminal Punishment

A. Every Indicator of Legislative Intent Demonstrates That Congress Intended To Create Criminal Punishment

Restitution under the MVRA is criminal because it is imposed at sentencing, alongside classic criminal punishments like incarceration and fines, as a consequence of a criminal conviction. Were that not enough, Congress applied criminal procedures to restitution orders, enforced restitution obligations with the threat of additional criminal punishment, and expressly articulated its penal purposes. And the backdrop against which Congress legislated confirms that Congress intended each of these choices: at the time of the MVRA's enactment, the courts, the government, and Congress all understood that restitution is criminal punishment.

1. Congress Imposed Restitution as a Penalty for Criminal Conviction

That Congress imposed restitution as part of the criminal sentence for a criminal conviction is proof positive of its intent. As with incarceration and criminal fines, courts can order restitution only when someone has been criminally charged, criminally prosecuted, and criminally convicted. In particular, Congress directed courts to order restitution "in imposing a sentence on a defendant who has been found guilty of an offense." 18 U.S.C. § 3556; *see also id.* §§ 3663(a)(1)(A), 3663A(a)(1). Restitution is therefore inseparable from the criminal conviction. Congress indeed tied the *amount* of restitution to "the loss caused by the offense of conviction," not to any and all injurious conduct. *See Hughey v. United States*, 495 U.S. 411, 418 (1990) (construing nearly identical language in the VWPA).

The MVRA also expressly links restitution to other classic criminal "penalt[ies]" imposed as part of the criminal sentence, like incarceration and criminal fines. 18 U.S.C. § 3663A(a)(1). The statute instructs courts to impose restitution "in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law." *Id.* Notably, because the MVRA allows the court to impose restitution "in lieu of" "other penalt[ies]" for misdemeanors, restitution may sometimes be the *only* penalty imposed for certain crimes. *Id.* Congress thus unmistakably treated restitution as criminal punishment.

Congress could have provided for restitution after a conviction through a separate, noncriminal proceeding.[3]

---

[3] *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (separate civil commitment proceeding deemed not to implicate the Ex Post Facto

Instead, Congress specified that "[s]entencing courts are required to impose restitution as part of the sentence for specified crimes" together with other "aspects of [the] defendant's sentence, such as a term of imprisonment." *Manrique v. United States*, 581 U.S. 116, 118 (2017). This Court has never deemed civil a sanction that is "part of the sentence," *see id.*, due to a criminal conviction.

That a penalty is imposed "by reason of the commission of a criminal offense" indicates that the penalty is criminal punishment. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 236 n.6 (1972). When Justice Chase in 1798 explained that the ex post facto prohibition covers laws that increase "punishment," *Calder*, 3 U.S. at 390, it was understood that "punishment" meant the "thing imposed for a crime." William Perry, The Royal Standard English Dictionary 428 (1793).[4] This Court has always understood criminal punishment to include monetary deprivations. *See Cummings v. Missouri*, 71 U.S. 277, 321-22 (1866) (deprivation of "property"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) ("pecuniary penalties"); *Ogden v. Saunders*, 25 U.S. 213, 266 (1827) (opinion of Washington, J.) ("loss of … property"). Thus, Congress "inflicts … punishment," *Calder*, 3 U.S. at 390, when it deprives an offender of property as part of the sentence for his criminal conviction.

Clause); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (same for separate in rem forfeiture proceeding).

[4] *See also* 2 John Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("The pain or penalty inflicted for a crime."); 2 Giles Jacob, The Law-Dictionary (11th ed. 1797) ("The penalty for transgressing the Law"); Samuel Johnson, Dictionary of the English Language (10th ed. 1792) ("Any infliction imposed in vengeance of a crime.").

Today too, in determining whether a penalty is punishment, the Court assesses whether a criminal conviction triggers the penalty. In the Excessive Fines Clause context, this Court has deemed a fine "punishment" when it is "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (criminal forfeiture). For that reason, this Court in *Paroline* analogized restitution to criminal fines and invoked the Excessive Fines Clause as a reason to construe a related restitution statute (governing child-pornography cases) narrowly, observing that restitution "mete[s] out … criminal punishment." *Paroline v. United States*, 572 U.S. 434, 456 (2014) (citations omitted).

Similarly in the double-jeopardy context, this Court has called a tax "punishment" because the tax was "conditioned on the commission of a crime," which is "significant of penal and prohibitory intent." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (1994) (citation omitted). On the flipside, this Court has declined to deem an in rem forfeiture penalty "criminal punishment" because no criminal conviction was required and the forfeiture penalty swept "broader in scope than the criminal provisions." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363-64 (1984).[5]

In sum, just like criminal fines, imprisonment, and "other forms of punishment," restitution is a "penalt[y] inflicted by the sovereign for the commission of offenses." *See S. Union Co. v. United States*, 567 U.S. 343, 349 (2012) (discussing criminal fines). For that reason alone, restitution is criminal punishment.

---

[5] This Court applies the same two-step test under the Double Jeopardy and Ex Post Facto Clauses. *See Hendricks*, 521 U.S. at 360-69; *Smith*, 538 U.S. at 92.

2. Congress Used Criminal Procedures To Impose Restitution as Part of the Criminal Sentence

The procedures for imposing a sanction further illuminate whether the sanction is criminal or civil. For instance, Congress's decision to grant an administrative agency the power to issue a sanction is strong evidence "that Congress intended to provide for a civil sanction." *Hudson v. United States*, 522 U.S. 93, 103 (1997) (holding that monetary penalties and debarment imposed by Office of the Comptroller of the Currency are not criminal punishment). Likewise, "distinctly civil procedures" indicate "a civil, not a criminal sanction." *United States v. Ursery*, 518 U.S. 267, 289 (1996) (quoting *89 Firearms*, 465 U.S. at 363) (holding that in rem civil forfeiture is not "punishment" for purposes of the Double Jeopardy Clause).

But here, the "manifest procedural differences between criminal sentencing and civil tort lawsuits" demonstrate that restitution serves criminal ends. *See Paroline*, 572 U.S. at 453. As with fines and incarceration, the MVRA uses classic criminal sentencing procedures to impose restitution. Congress specified in the MVRA that the "only rules applicable to" restitution proceedings are "Rule 32(c) of the Federal Rules of Criminal Procedure" and two subchapters in Title 18, both of which concern criminal sentencing. *See* 18 U.S.C. § 3664(c). The MVRA directly amended Rule 32 to account for restitution. *See* MVRA § 207(a), 110 Stat. at 1236; *see also* Fed. R. Crim. P. 32(c)(1)(B). And the MVRA instructed the Sentencing Commission—whose "purpose[]" is to "establish sentencing policies and practices for the Federal *criminal* justice system," 28 U.S.C § 991(b) (emphasis added)—to promulgate guidance for imposing restitution. MVRA § 208, 110 Stat. at 1240; *see* U.S.S.G. § 5E1.1.

These criminal sentencing procedures kick in right after conviction, when a probation officer prepares a report supplying "information sufficient for the court to … fashion[] a restitution order." 18 U.S.C. § 3664(a). That report is an integral part of the sentencing process: restitution information is usually included in the presentence report, *see id.*, which is the same document that calculates the defendant's Sentencing Guidelines range. *Id.* § 3552(a); Fed. R. Crim. P. 32(d). And when the amount of restitution is in dispute, prosecutors bear the burden to prove the correct amount by a preponderance of the evidence. 18 U.S.C. § 3664(e).

The MVRA also directs sentencing courts to consider restitution when imposing *other* criminal punishments. If the sentence includes probation or supervised release, payment of restitution must be a mandatory "explicit condition." *Id.* §§ 3563(a)(6)(A), 3583(d). Congress directed that the district court "impose a fine … only to the extent that such fine … will not impair the ability of the defendant to make restitution." *Id.* § 3572(b). In short, restitution "is a significant factor" in "the judge's calculation of the sentence to be imposed." *See Weaver*, 450 U.S. at 32; *Lynce v. Mathis*, 519 U.S. 433, 445-46 (1997).

After the court imposes the sentence and orders restitution, the court may correct or modify "an order of restitution" using the normal mechanisms for correcting and modifying criminal sentences, including Federal Rule of Criminal Procedure 35. 18 U.S.C. § 3664(o). And once a restitution order is in place, probation officers continually monitor a defendant's "compliance," "report[ing]" any missed payments to the sentencing court. *See id.* § 3603(7).

This judge- and prosecutor-driven process for imposing restitution is distinctly criminal when compared to typical civil damages awards. For civil money damages,

"[i]t has long been recognized that 'by the law the jury are judges of the damages.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (quoting *Lord Townshend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677)). In the civil context, juries award money damages that "serve purposes traditionally associated with legal relief, such as compensation and punishment." *Id.* at 352. By making judges the arbiter of restitution in the MVRA, Congress viewed restitution as criminal: serious Seventh Amendment concerns would attend jury-free civil damages awards, given that "[t]he right to a jury trial includes the right to have a jury determine the *amount* of … damages." *Id.* at 353.

3. Congress Enforced Restitution with the Threat of Other Criminal Punishments

Classic criminal punishments await an offender who does not pay restitution under the MVRA. In the ex post facto inquiry, "the enforcement procedures" attached to a penalty "are probative of the legislature's intent." *Smith*, 538 U.S. at 94.

The MVRA authorizes sentencing courts to enforce restitution orders like criminal fines, by summarily imposing other criminal punishments, without any need for a separate indictment, prosecution, and conviction. The MVRA enforces restitution orders "in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229" of Title 18 or by "all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A). These two subchapters govern criminal fines. And the Attorney General has authority to "collect[] … an unpaid fine or restitution." *Id.* § 3612(c).

The enforcement mechanisms in chapter 229 include criminal consequences for nonpayment of fines and restitution. A court may revoke probation or supervised

release or modify the terms thereof in cases of nonpayment. *Id.* § 3613A(a)(1). A court also may resentence the defendant up to the statutory maximum term of imprisonment if (1) the defendant "willfully refused to pay," (2) the defendant "failed to make sufficient bona fide efforts to pay," or (3) "alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence." *Id.* § 3614(a)-(b); *see Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). In practice, courts find those vague criteria readily met. *See* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 128 (2014). The resulting additional prison time can be imposed with minimal process; for incarcerated individuals, a telephonic hearing before a magistrate judge suffices. 18 U.S.C. § 3613A(b).

Those liberty-impinging sanctions—which can be imposed without a new criminal proceeding—show that restitution amounts to criminal punishment. Laws that have "any effect on any prisoner's actual term of confinement" implicate the Ex Post Facto Clause. *See Lynce*, 519 U.S. at 443-44 (citation omitted). As this Court has recognized, restitution obligations "enforceable by the substantial threat of revocation of probation and incarceration" are meaningfully different from "ordinary civil obligation[s]" because they are "secured by the debtor's freedom rather than his property." *Cf. Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559-60 (1990). A failure to pay a civil damages award does not typically result in jail time. *See* Wright & Miller, 12 Fed. Prac. & Proc. Civ. § 3011 & n.9 (3d ed.) (citation omitted).

The freedom-threatening nature of restitution orders is not mitigated by the fact that Congress also provided for some civil enforcement mechanisms. *See* 18 U.S.C. § 3664(m)(1)(B) (permitting victims to use an MVRA restitution order to obtain "a lien on the [offender's]

property"); *id.* § 3613(a) (permitting the United States to enforce MVRA restitution like "a civil judgment"). The MVRA provides these civil enforcement mechanisms *in addition to*, not in place of, the statute's onerous criminal enforcement mechanisms.

4. Congress Imposed Restitution To Serve Penal Purposes

Congress literally wrote its penal goals into the statute. In determining whether to resentence an individual for failing to pay restitution, the MVRA specifies that courts may sentence the offender to imprisonment for the underlying offense when even "bona fide efforts to pay" restitution fall short if "alternatives to imprisonment are not adequate to serve *the purposes of punishment and deterrence.*" 18 U.S.C. § 3614(b) (emphasis added). Congress thus viewed restitution as serving punitive and deterrent purposes.

Unsurprisingly, then, this Court has repeatedly recognized that restitution serves penal purposes. In *Pasquantino*, the Court squarely identified restitution under the MVRA as "criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). There, defendants who smuggled liquor into Canada to avoid Canadian excise taxes contended that the common-law revenue rule—which "generally barred courts from enforcing the tax laws of foreign sovereigns"—foreclosed their federal fraud prosecution. *Id.* at 352-53. As relevant here, they argued that, because the MVRA would require paying restitution (*i.e.*, the lost taxes) to Canada, the federal court would be imposing Canada's tax laws. *Id.* at 365. This Court disagreed, explaining that "[t]he purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct." *Id.*

Likewise, in *Paroline*, this Court observed the "penological purposes" of restitution under 18 U.S.C. § 2259, which imposes mandatory restitution in child-pornography cases. 572 U.S. at 457. Restitution under that statute is "issued and enforced in accordance with" the MVRA's procedural and enforcement provisions and "in the same manner as an order" under the MVRA's mandatory restitution provisions. 18 U.S.C. § 2259(b)(3).

Paroline explained that mandatory restitution "impress[es] upon offenders that their conduct produces concrete and devasting harms for real, identifiable victims" and ensures that offenders are "held to account" for the unique "consequences and gravity of their own conduct." 572 U.S. at 457, 462. In other words, criminal restitution "serves punitive purposes" in addition to "remedial or compensatory" goals and is thus "criminal punishment." *Id.* at 456 (citation omitted). On that point, the dissenters agreed: Restitution is "criminal punishment" implicating the rights of "criminal defendant[s]." *Id.* at 471 (Roberts, C.J., dissenting).

Even before the MVRA, this Court recognized that restitution serves penal goals when ordered as part of an offender's criminal sentence. In *Kelly v. Robinson*, this Court held that a state restitution obligation was a "penal sanction[]," making it non-dischargeable in bankruptcy. 479 U.S. 36, 50-52 (1986). The Court reasoned that restitution was "a criminal sanction" "rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender." *Id.* at 52 (citation omitted). It made no difference that criminal restitution "is forwarded to the victim" and is based on "the amount of harm the offender has caused." *Id.* (citation omitted). Despite the "benefit" to victims, the Court concluded that criminal restitution is ultimately a "penal

sanction[]" that furthers "the penal goals of the State." *Id.* at 51-52.

5. Other Textual and Structural Choices Confirm the MVRA's Criminal Nature

Other aspects of the MVRA confirm that Congress understood it created a criminal punishment.

1. Congress placed the MVRA in Title 18, which is titled "Crimes and Criminal Procedure." Although "not dispositive," that choice about "the manner of … codification" suggests that Congress viewed the MVRA as imposing criminal punishment. *See Smith*, 538 U.S. at 94. In *Kansas v. Hendricks*, for instance, this Court concluded that a law's "placement … within the [State's] probate code, instead of the criminal code," evidenced the legislature's intent "to create a civil proceeding." 521 U.S. U.S. 346, 361 (1997). Congress did the opposite here.

More generally, this Court typically views Congress' decisions about where to house a provision "as relevant in determining whether its content is civil or criminal in nature." *See Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 659-60 (2015); *see also Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 274 (2023). Congress' choice to house the MVRA in Title 18 is particularly instructive given its contemporaneous decisions in the same legislation. Congress enacted the MVRA as part of AEDPA. *Supra* p. 4. While Congress codified the MVRA in Title 18, Congress placed AEDPA's criminal-law-adjacent habeas provisions in Title 28, "which mostly concerns civil procedure." *Turkiye Halk Bankasi*, 598 U.S. at 274; *see, e.g.*, AEDPA §§ 104, 105, 110 Stat. at 1218-20 (codified at 28 U.S.C. §§ 2254, 2255).

2. The MVRA's effective date provision expresses Congress' apparent understanding that restitution is

criminal punishment for ex post facto purposes. Congress applied the MVRA to sentencings for convictions occurring after the Act's enactment only "to the extent constitutionally permissible." MVRA § 211, 110 Stat. at 1241 (codified at 18 U.S.C. § 2248 note). The obvious constitutional objection to applying the MVRA to pending cases is the Ex Post Facto Clause. Had Congress understood the MVRA to create civil remedies only, it presumably would have had no need to include this caveat. In that scenario, Congress would have imposed mandatory restitution in all cases effective immediately.

3. The MVRA further distinguishes restitution from "compensatory damages" awarded in a "civil proceeding." 18 U.S.C. § 3664(j)(2). A victim's "later" recovery of "compensatory damages" in a "civil proceeding" reduces "[a]ny amount paid to a victim under an order of restitution." *Id.* The MVRA further provides that "[a] conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any *subsequent* Federal *civil* proceeding or State *civil* proceeding, to the extent consistent with State law, brought by the victim." *Id.* § 3664(*l*) (emphases added).

4. Congress' choice to label restitution a "penalty" also indicates the MVRA's criminal nature. The MVRA directs courts to order restitution in addition to or (in some cases) in lieu of "any other penalty authorized by law," which would include obviously criminal penalties such as incarceration and criminal fines. *Id.* § 3663A(a)(1); *see supra* p. 15. And in specifying the timing for making payments, Congress similarly labelled restitution, alongside criminal fines, as a "monetary penalty." 18 U.S.C. § 3572(d)(1) ("[a] person sentenced to pay a fine or other monetary penalty, *including restitution*" (emphasis added)).

The word "penalty" most often connotes criminal punishment, especially within Title 18. A "penalty" is "[a] punishment established by law or authority for a crime or an offense." *American Heritage Dictionary of the English Language* 1337 (1992); *accord Webster's Third New International Dictionary* 1668 (1993) ("[T]he suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense.").

In Title 18, Congress used the unmodified word "penalty" or "penalties" dozens of times to refer to the death penalty, imprisonment, and criminal fines[6]—prototypical criminal punishments. *Cf. Cummings v. Missouri*, 71 U.S. 277, 328 (1866); *Kring v. Missouri*, 107 U.S. 221, 230 (1883), *overruled on other grounds by Collins*, 497 U.S. at 50. When Congress wanted to deviate from that usage in Title 18, Congress did so expressly by labeling certain sanctions "civil penalt[ies]."[7] In only a handful of provisions did Congress lump the two together, using "penalties" in a section title to cover both criminal penalties and in rem civil forfeiture. *See 89 Firearms*, 465 U.S. at 364 n.6 (discussing 18 U.S.C. § 924 (title), (d)). But in the main, Title 18 uses the unmodified word "penalty" to refer to distinctly criminal punishments.

---

[6] *E.g.*, 18 U.S.C. §§ 25(b), 34, 36(b), 38(b), 43(b), 48(d), 111(b), 248(b), 351, 506(b), 510(c), 521(b), 521(c)(1), 521(c)(3)(B), 607(a)(2), 700, 704(c)-(d), 844(o), 844(p)(2), 1037(b), 1039(d)-(e), 1120(b), 1122(c), 1159(b), 1388(b), 1429, 1466A(a)-(b), 1581(b), 1584(b), 1590(b), 1592(c), 1751, 2260(c), 2260A, 2261(b), 2262(b), 2291(c)-(d), 2319(a), 2320(b), 2326, 2332b(c), 2332f(c), 2339C(d), 2441(c), 2442(b), 3121(d), 3147, 4101(b), 4101(g), 4101(h).

[7] *E.g.*, 18 U.S.C. §§ 35(a), 216(b), 248(c)(2)(B), 924(p)(1)(A)(ii), 1034(a), 1083(b), 2292(a), 2339B(b), 2339C(f), 2343(c)(3), 2346(b)(2).

6. Congress Legislated Against a Broad Understanding That Criminal Restitution Is Criminal Punishment

When the MVRA was enacted in 1996, it was well understood that restitution imposed at sentencing is criminal punishment. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with" this backdrop. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (citation omitted).

1. By the time of the MVRA's enactment, this Court, the Department of Justice, and Congress all had recognized restitution as criminal punishment.

a. As explained above, a decade before the MVRA, this Court in *Kelly* made clear that restitution imposed as part of a sentence is a "criminal sanction" that furthers "penal goals." 479 U.S. at 50-51 (citation omitted); *supra* pp. 23-24. Notably, *Kelly* drew support from circuit cases applying the VWPA. The Court observed that the state restitution regime at issue was "not the only context in which courts have been forced to evaluate" whether "restitution orders … are 'compensatory' or 'penal.'" 479 U.S. at 53 n.14. The Court noted that "[e]very Federal Court of Appeals that has considered the question has concluded that" VWPA restitution is not civil for purposes of the Seventh Amendment. *Id.*

Congress ratified *Kelly*'s conclusion. In 1994, two years before Congress enacted the MVRA, Congress made federal criminal restitution orders nondischargeable under 11 U.S.C. § 523(a)(13). *See In re Thompson*, 418 F.3d 362, 367 n.8 (3d Cir. 2005).

In *Hughey*, this Court applied "longstanding principles of lenity" in construing the VWPA to authorize restitution only for losses caused by the offense of conviction. 495 U.S. at 422. As the Court recognized, lenity

"demand[s] resolution of ambiguities in *criminal* statutes in favor of the defendant." *Id.* (emphasis added). The Department of Justice recognized in the same case that "[a]n order of restitution under the VWPA unquestionably is a criminal penalty." U.S. Br. 11, *Hughey*, 495 U.S. 411 (No. 89-5691), 1990 WL 505515.

b. Congress likewise understood the VWPA, the MVRA's progenitor, to impose criminal punishment. In the run-up to the VWPA's enactment, the Senate Judiciary Committee explained that "[t]he principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time." S. Rep. No. 97-532, at 30 (1982). It lauded the "principle of restitution" for its ability to channel "the sanctioning power of society … to restore the victim to his or her prior state of well-being." *Id.* And it lamented how "federal criminal courts" had "reduce[d] restitution from being an inevitable if not exclusive sanction to being an occasional afterthought." *Id.*

The VWPA's text reflects this criminal-centric view of restitution. Apparently recognizing that the VWPA's new restitution provisions would raise ex post facto problems if applied retroactively, Congress specified that the restitution obligations apply only to "offenses occurring on or after January 1, 1983," more than two months after the statute's enactment. VWPA § 9(b)(2), 96 Stat. at 1258.

The legislative process surrounding a subsequent sentencing bill two years after the VWPA's enactment confirms Congress' view of restitution as criminal punishment. In considering the House version of the Senate bill that became the Sentencing Reform Act, the House Judiciary Committee flatly declared that "the restitution provisions of the [VWPA] clearly and unambiguously create a criminal penalty." H.R. Rep. No. 98-1017, at 80 (1984). The Committee therefore rejected concerns that

the Seventh Amendment would attach to VWPA restitution orders. *Id.* In the Committee's view, the criminal "structure of the restitution provisions … contradicts the notion that they create a civil action." *Id.* That view was apparently widespread, given that the Sentencing Reform Act did not provide a jury trial right for restitution. *See* Pub. L. No. 98-473, 98 Stat. 1837, 1987-2040 (1984); *see generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 262-66 (1993).

2. When enacting the MVRA, Congress again articulated its understanding that restitution is criminal punishment. The Senate Judiciary Committee echoed its earlier sentiment that restitution has anchored "every formal system of criminal justice." S. Rep. No. 104-179, at 13 (1995) (quoting S. Rep. No. 97-532, at 30). Even though few defendants would be able "to make significant payments," the Committee still deemed restitution "an integral part of the criminal sentence that must be complied with." *Id.* at 21. As the Committee explained, restitution produces "penalogical [sic] benefits" by "requiring the offender to be accountable for the harm caused to the victim." *Id.* at 18. In short, the Committee's view of the MVRA fully accords with the statute's text: "restitution must be considered a part of the criminal sentence." *Id.* at 20; *see also* 18 U.S.C. § 3556.

3. The understanding that restitution is criminal punishment has continued to prevail since the MVRA's enactment.

a. As explained above, this Court's subsequent decisions confirm that understanding. *See supra* pp. 22-24. *Pasquantino* concluded that Congress sought to "mete out … criminal punishment" in the MVRA. 544 U.S. at

365. And *Paroline* noted the "penological purposes" of a materially identical restitution regime. 572 U.S. at 457.

b. The government's representations further cement that understanding. Soon after the MVRA's enactment, the Solicitor General "directed United States Attorney's offices nationwide" not to apply the MVRA retroactively. U.S. Br. 6, *Edwards v. United States*, 162 F.3d 87 (No. 98-1055), 1998 WL 34084073. The Solicitor General's position was "consistent" with the view "that restitution under the MVRA is a 'penalty' which, if applied to offenses occurring before the enactment of the Act, would retrospectively increase punishment for the crime in violation of the Ex Post Facto Clause." *Id.* (citation omitted). To petitioner's knowledge, the Department never retracted that guidance. The U.S. Attorney's Office in this case appears to have literally missed the memo. Indeed, the Solicitor General's Office has declined to defend the reasoning of the Eighth Circuit below.

The Department of Justice consistently reaffirmed its position in subsequent decades. In *Pasquantino*, the Solicitor General told this Court that restitution under the MVRA is "a criminal punishment that is imposed as part of the sentence for an offense." U.S. Br. 21, *Pasquantino*, 544 U.S. 349 (No. 03-725), 2004 WL 1743937. In *Paroline*, the Solicitor General described 18 U.S.C. § 2259 as "a criminal statute" under which "restitution is imposed as part of a criminal sentence." U.S. Reply Br. 18, *Paroline*, 572 U.S. 434 (No. 12-8561), 2013 WL 6699432. And the Department has repeatedly described restitution as "criminal punishment," citing with approval *Pasquantino*. U.S. Br. 40, *Robers v. United States*, 572 U.S. 639 (No. 12-9012), 2014 WL 251996; U.S. Br. in Opp. 27, *Dantone, Inc. v. United States*, 549 U.S. 1071 (Nos. 06-71, 06-79), 2006 WL 3016309.

c. And more recently, Congress has "expressly … label[ed]" MVRA restitution "criminal." *See Smith*, 538 U.S. at 93 (citation omitted). In legislation after the MVRA, Congress repeatedly called "restitution under an order pursuant to section 3556 of title 18"—which includes MVRA restitution—"criminal restitution." Firearms Excise Tax Improvement Act of 2010, Pub. L. No. 111-237, 124 Stat. 2497, 2497. The "criminal restitution" term appears in an amendment to the Internal Revenue Code that provides for tax assessment of certain "criminal restitution" orders, including MVRA restitution orders. *See id.* Congress explained in the header of the Act that the amendment applies to "criminal restitution." *Id.* Congress titled the relevant section "Assessment Of Certain Criminal Restitution." *Id.* And the substantively enacted provisions refer to restitution imposed under the MVRA as "orders of criminal restitution." 124 Stat. at 2497-98.

B. The Eighth Circuit's Contrary Conclusion Is Unpersuasive

The Eighth Circuit below did not inquire into congressional intent. Instead, the court held that restitution under the MVRA "is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality." Pet.App.5a (citation omitted). The court considered itself bound by prior Eighth Circuit precedent deeming restitution a civil remedy. Pet.App.5a-7a (citations omitted). In those prior cases, the Eighth Circuit summarily concluded that MVRA "[r]estitution is designed to make victims whole, not to punish perpetrators." *E.g.*, *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). That reasoning is wrong for several reasons.

1. The Eighth Circuit erred by fixating on restitution's compensatory aspects and ignoring more relevant evidence of Congress' intent. That restitution in some

ways "resemble[s] a judgment for the benefit of the victim" is irrelevant given "the context in which it is imposed." *Kelly*, 479 U.S. at 52 (cleaned up) (analyzing whether a state restitution obligation is dischargeable in bankruptcy). The MVRA requires restitution as part of the criminal sentence for a criminal conviction. That makes it criminal punishment. *See supra* pp. 15-18.

Other prototypical forms of criminal punishment illustrate the point: confinement and fines, while not inevitably criminal, are criminal punishment when imposed as part of the sentence for a criminal conviction. Post-conviction confinement imposed at sentencing is of course criminal punishment that triggers the Ex Post Facto Clause.[8] But civil confinement, where "prior criminal convictions [are] used as *evidence* in the commitment proceedings, but [are] not a *prerequisite* to confinement," does not impose criminal punishment. *Seling v. Young*, 531 U.S. 250, 261 (2001) (emphases added). Likewise, pretrial detention—which comes before conviction—"does not constitute punishment." *United States v. Salerno*, 481 U.S. 739, 746-48 (1987).

So too with fines. Fines imposed as part of the criminal sentence for a criminal conviction are undoubtedly criminal punishment. *Cf. S. Union*, 567 U.S. at 349. Yet even "fines" of hundreds of thousands of dollars are "civil penalties" when imposed for civil infractions. *See SEC v. Jarkesy*, 603 U.S. 109, 118 (2024).

---

[8] *Lindsey v. Washington*, 301 U.S. 397, 400-01 (1937) (mandatory term of incarceration implicates the Ex Post Facto Clause); *Weaver*, 450 U.S. at 31-33 (laws governing early release from incarceration implicate the Ex Post Facto Clause); *Lynce*, 519 U.S. at 445-46 (same).

Restitution is the same. Of course, compensatory payment can sometimes be a civil remedy. But here, Congress utilized restitution as criminal punishment by imposing it as a penalty for criminal conviction.

2. The Eighth Circuit also overread the MVRA's compensatory aims. To be sure, this Court said in *Paroline* that "[t]he primary goal of restitution is remedial or compensatory." *Paroline*, 572 U.S. at 456; *accord Dolan v. United States*, 560 U.S. 605, 612 (2010). But the Court made clear that restitution "also serves punitive purposes" and that its aims "differ from (though they overlap with) the purposes of tort law." *Paroline*, 572 U.S. at 453, 456; *see supra* pp. 22-23. If Congress thought it was creating a civil tort remedy, as opposed to a criminal punishment, the MVRA would look quite different.

Plaintiffs run the show in civil proceedings. Plaintiffs seeking civil compensatory damages must initiate the suit, amass evidence, and prove damages. Plaintiffs may settle defendants' obligations. And plaintiffs enforce civil judgments.

The MVRA, however, puts prosecutors, probation officers, and courts—not victims—in the driver's seat. Because Congress tied restitution to the offense of *conviction*, the availability of restitution for any given victim will depend on the plea bargaining process, which may deprive victims of MVRA restitution entirely: "The essence of a plea agreement is that both the prosecution and the defense make concessions to avoid potential losses. Nothing in the statute suggests that Congress intended to exempt victims of crime from the effects of such a bargaining process." *Hughey*, 495 U.S. at 421 (discussing the VWPA).

Moreover, restitution is mandatory, even when the victim does not want it. *See, e.g.*, *United States v.*

Hankins, 858 F.3d 1273, 1277 (9th Cir. 2017). Victims need not participate in restitution proceedings. 18 U.S.C. § 3664(g)(1). And victims may not settle a defendant's restitution obligation, either before or after sentencing. *E.g.*, *Hankins*, 858 F.3d at 1277; *see* U.S. Br. in Opp. 11, *Hankins v. United States*, 583 U.S. 1054 (No. 17-522), 2017 WL 7198796 (collecting cases). That is because "criminal restitution is punishment," and "[i]t would be improper to permit private parties to release criminal wrongdoers from punishment." *FDIC v. Dover*, 453 F.3d 710, 717 (6th Cir. 2006) (citation omitted) (VWPA); *accord United States v. Rizk*, 660 F.3d 1125, 1137 (9th Cir. 2011) (MVRA).

Finally on this point, restitution can be imposed even when no victim will benefit. The MVRA permits restitution for certain drug offenses "in which there is no identifiable victim." 18 U.S.C. § 3663(c) (as amended by MVRA § 205, 110 Stat. at 1230). The money in such cases goes to States. *Id.* In addition, even if the victim disclaims any interest in receiving restitution, courts must impose it. *Id.* § 3664(g)(2). Congress, in sum, mandated that defendants pay for their crimes, even when the crime has no identifiable victim to compensate or when the victim will receive no money. Congress was not focused solely on compensating victims.

3. The Eighth Circuit also ignored that restitutionary payment to victims has always been a core aspect of criminal punishment. As Justice (and founding father) James Wilson wrote, "a leading maxim in the doctrine of punishments" is that "[i]n the punishment of every crime, reparation for the included injury ought to be involved." 2 James Wilson, Collected Works of James Wilson 1105 (Kermit L. Hall & Mark David Hall, eds., Liberty Fund 2007). "[R]estitution has been employed as a punitive

sanction throughout history," even though it entails payments from offenders to victims. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933 (1984). Restitution "was used as a means of punishing crime and obtaining indemnification for the victim among the ancient Babylonians (under the Code of Hammurabi); the Hebrews (under Mosaic law); the ancient Greeks; the Romans; and the ancient Germans." Bruce R. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim*, 61 J. Crim. L., Criminology & Pol. Sci. 152, 154-55 (1970).

Restitution was a prominent feature of criminal proceedings at common law. In 1529, "King Henry VIII and Parliament authorized a writ of restitution in successful larceny indictments," which entitled victims "to retake" their stolen goods. James Barta, *Guarding the Rights of the Accused and the Accuser: The Jury's Role in Awarding Criminal Restitution under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473 (2014). The writ requirement soon fell away, and courts would order "immediate restitution" following a larceny conviction. *Id.* (quoting 3 William Blackstone, Commentaries *362-63).

The American colonies largely inherited this tradition, making restitution a central feature of criminal sentences in the pre-ratification era. Every colony eventually required larceny offenders "to make good what had been stolen plus an additional amount as punitive damages to the victim." Edgar J. McManus, Law and Liberty in Early New England 34 (1993). And colonial codes fixed restitutionary obligations to a host of other crimes, too. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 227, 305 & nn.148-150 (2014) (collecting colonial codes that required restitution for theft, property offenses, and other miscellaneous offenses).

The trend continued with early federal statutes. The First Congress, for instance, passed a penal statute that utilized restitution as punishment for larceny on federal land or the high seas. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 16, 1 Stat. 112, 116 (1790). The law levied a "fine[]" against the offender based on the value of the stolen property, and required "one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor." *Id.* And in 1802, a later Congress provided double restitution to victims of robbery, larceny, or trespass committed by a U.S. citizen on Indian Territory. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 13, § 4, 2 Stat. 139, 141 (1802).

Given this history, it is unsurprising that one state supreme court opined in 1876 that "no one w[ould] contend" that monetary penalties paid upon "conviction" "to the party injured" were anything but "punishment" subject to the Ex Post Facto Clause. *Caldwell v. State*, 55 Ala. 133, 135 (1876). The Eighth Circuit erred in treating restitution's compensatory component as proof that it is civil.

* * *

The MVRA's text and structure settle this case: Congress intended for restitution to be criminal punishment. That "ends the inquiry." *Smith*, 538 U.S. at 92.

II. Restitution Is Criminal Punishment in Purpose and Effect

Even were this Court to conclude that Congress intended to create a civil remedy in the MVRA, restitution is nonetheless criminal punishment because it functions as criminal punishment in purpose and effect. *See Hendricks*, 521 U.S. at 361.

The purpose-and-effects inquiry is guided by seven factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The factors are:

> (1) [w]hether the sanction involves an affirmative disability or restraint;
>
> (2) whether it has historically been regarded as a punishment;
>
> (3) whether it comes into play only on a finding of *scienter*;
>
> (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence;
>
> (5) whether the behavior to which it applies is already a crime;
>
> (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and
>
> (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson, 522 U.S. at 99-100 (cleaned up). These factors are "neither exhaustive nor dispositive." *Smith*, 538 U.S. at 97 (citations omitted).[9]

---

[9] This Court has stated that, when the legislature has "denominated" a sanction a "civil remedy," this Court requires "the clearest proof" that the sanction is criminal punishment in purpose and effect. *Smith*, 538 U.S. at 92 (citations omitted); *see 89 Firearms*, 465 U.S. at 365 (stating that the "clearest proof" standard applies when Congress has a "manifest preference" that the sanction be civil (citation omitted)). *But see Hudson*, 522 U.S. at 115-16 (Breyer, J., concurring in judgment) (explaining that the Court has "in fact" neutrally examined the sanction's purpose and effect even when purporting to invoke the "clearest proof" standard). The "heightened burden makes sense

The *Mendoza-Martinez* factors confirm what the statutory text already makes clear: the purpose and effect of the MVRA is to impose criminal punishment. Only the Seventh Circuit's outlier decision in *United States v. Newman*, 144 F.3d 531, 538-42 (7th Cir. 1998), reached a contrary conclusion using these factors. But, properly weighed, the factors show that restitution has a punitive purpose and effect.

A. Factor 1: Restitution Involves Affirmative Disabilities and Restraints

1. The MVRA is backed by "the paradigmatic affirmative disability or restraint"—imprisonment. *See Smith*, 538 U.S. at 100. While restitution itself is a monetary penalty, this Court asks whether the "statutory *scheme*" is punitive. *Id.* at 92 (citation omitted) (emphasis added). Here, that scheme includes the threat of reincarceration as part of the original conviction. *Supra* pp. 20-22.

Exacerbating that threat, paying restitution is a mandatory condition of probation and supervised release overseen by probation officers. *Supra* p. 19. "Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in the case of infraction." *Smith*, 538 U.S. at 101. That constant supervision at the hands of probation officers enforcing other terms of the criminal sentence makes the MVRA even more clearly criminal.

---

only when the evidence of legislative intent clearly points in the civil direction." *Smith*, 538 U.S. at 107 (Souter, J., concurring in judgment). Congress did not denominate restitution a civil remedy in the MVRA, so even if the Court concludes that Congress intended to create a civil remedy, it should apply the purpose-and-effect test without any thumb on the scale against the criminal defendant.

Contrast the MVRA with the sex-offender-registration scheme this Court deemed nonpunitive in *Smith*. That scheme imposed no affirmative disability, this Court held, because the scheme operated outside the probation system and implicated criminal consequences only if the State initiated a *new* prosecution in "a proceeding separate from the individual's original offense." *Smith*, 538 U.S. at 101-02. Here, probation officers meticulously monitor compliance, down to Mr. Ellingburg's officer texting him to demand $100. *Supra* pp. 7, 19-20. And magistrate judges can impose years of additional prison time by telephone as part of the original sentence. 18 U.S.C. §§ 3613A(b), 3614(a). Those "punitive restraints" easily satisfy this factor. *Smith*, 538 U.S. at 102.

The affirmative-disability factor also considers "how the effects of the Act are felt by those subject to it." *Id.* at 99-100. Restitution obligations have severe effects on offenders. Apart from reincarceration, "[c]ourts routinely extend probation or supervised release … as a sanction for nonpayment," lengthening offenders' time in the criminal-justice system. Lula A. Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. 470, 499 (2024). Nonpayment also can result in the loss of time credits under the First Step Act, thus foreclosing early release from prison. *See* U.S. Dep't of Just., First Step Act Approved Programs Guide 1-3 (Jan. 2024) (an inmate's refusal to participate in the Inmate Financial Responsibility Program pauses an inmate's ability to earn time credit under the First Step Act); 28 C.F.R. § 545.11(a)(2) (inmate's financial plan ordinarily includes paying court-ordered restitution).

Beyond increased prison time, nonpayment triggers a host of other collateral consequences. At the federal level, failure to pay jeopardizes public benefits like food stamps and low-income housing assistance. *See* 42 U.S.C.

§§ 608(a)(9)(A)(ii), 1437f(d)(1)(B)(v)(II). And in some States, unpaid federal criminal restitution bars the restoration of civil rights, like the right to possess firearms and vote. *See, e.g.*, Ariz. Rev. Stat. § 13-907 (conditioning the "automatic restoration of firearm rights" on "pay[ing] all victim restitution"); Tenn. Code Ann. § 40-29-202 (conditioning "right of suffrage" on payment of "all restitution" "ordered by the court as part of the sentence"); Fla. Stat. § 98.0751(2)(a)(5)(a) (conditioning "voting" on "[f]ull payment of restitution ordered to a victim by the court as a part of the sentence").

Compounding these effects, the vast majority of offenders cannot afford to pay. As of 2016, U.S. Attorney's Offices classified 91% of outstanding federal restitution debt as "uncollectible." GAO, *Federal Criminal Restitution* 25 (2018). That makes the MVRA's harsh, affirmative restraints the rule, not the exception.

2. In *Newman*, the Seventh Circuit asserted that the MVRA does not impose "an affirmative disability or restraint that operates in a manner analogous to imprisonment" because courts can "award only nominal restitution" if the defendant cannot pay. 144 F.3d at 540-41 (citing 18 U.S.C. § 3664(f)(3)(B)).

That assertion bungles the MVRA in two critical ways. First, as just discussed, nonpayment *can* result in imprisonment, which *Newman* ignored. Second, the MVRA does not permit nominal restitution. "[T]he court *shall* order restitution … *without* consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A) (emphases added). The provision the Seventh Circuit cited allows courts to consider economic circumstances only in crafting a payment plan. *Id.* § 3664(f)(3)(B). The MVRA does not permit courts to consider the defendant's circumstances in ordering restitution in the first place.

B. Factor 2: Restitution Was Historically Regarded as Criminal Punishment

A punishment's historical treatment is an important factor "because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97. Restitution "has historically been regarded as punishment." *See Kennedy*, 372 U.S. at 168. "[R]estitution has been employed as a punitive sanction throughout history." *Victim Restitution in the Criminal Process*, *supra*, at 933. As explained above, Western societies always have utilized restitution to punish criminal offenders. That tradition carried over to colonial America, where the colonies routinely relied on restitution to mete out criminal punishment. And the tradition continued after ratification in federal and state schemes. *Supra* pp. 34-36. Restitution has long been "deemed punitive in our tradition." *See Smith*, 538 U.S. at 97.

In *Newman*, the Seventh Circuit opined that "[r]estitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions." 144 F.3d at 538; *see also id.* at 541 (stating that restitution "historically" operated as "an equitable, remedial measure designed to prevent the unjust enrichment of wrongdoers"). But, other than the shared label, restitution under the MVRA bears little resemblance to traditional civil restitution. Recall the key features of restitution under the MVRA: it is imposed as part of a criminal sentence, for a criminal conviction, along with (or in lieu of) other criminal punishment. *See supra* pp. 15-18. No civil restitution scheme—new or old—bears these characteristics.

The measures by which civil and criminal restitution are calculated also differ. Indeed, the word "restitution" is an awkward fit for the loss-based penalty imposed at

sentencing. As an equitable remedy, traditional civil restitution focuses on "the defendant's gain" and requires "disgorgement of that gain." *Liu v. SEC*, 591 U.S. 71, 79 (2020) (quoting 1 D. Dobbs, Law of Remedies § 4.3(5), 611 (1993)). As *Newman* noted, the "prevention of unjust enrichment" has always been "the central idea" of civil restitution. 144 F.3d at 538 (citation omitted). Civil restitution offers no recourse when "a legal wrong results in injury to the claimant but no benefit to others." Restatement (Third) of Restitution and Unjust Enrichment § 3, Comment *b* (2011).

By contrast, restitution under the MVRA is tied to the victim's losses—even when the defendant never received a corresponding benefit (as is often the case). *See* 18 U.S.C. § 3664(f)(1)(A). The victim's losses include lost or destroyed property, medical expenses, and funeral services. *Id.* § 3663A(b)(1)-(3); *see supra* p. 5. And they even include "lost income and necessary child care, transportation, and other expenses incurred during participating in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id.* § 3663A(b)(4); *supra* pp. 5-6. This regime looks nothing like civil restitution and its focus on the defendant's gain.

C. Factors 3 and 5: Restitution Applies Only to Criminal Offenses That Require Scienter

Restitution under the MVRA "comes into play only on a finding of scienter" for "behavior" that "is already a crime." *See Smith*, 538 U.S. at 105. A "criminal conviction" is "a prerequisite for" imposing restitution. *Cf. Hendricks*, 521 U.S. at 362. Restitution always—and only—kicks in "when sentencing a defendant convicted of an [eligible] offense." 18 U.S.C. § 3663A(a)(1).

A "finding of scienter is required" in virtually every case. *See Hendricks*, 521 U.S. at 362. The MVRA applies

to crimes of violence, offenses against property, and a handful of enumerated offenses. 18 U.S.C. § 3663A(c)(1). The enumerated offenses all require scienter. *Id.* §§ 670(a), 1365; 21 U.S.C. §§ 856(a), 2402(a). And virtually all federal crimes of violence and property offenses require scienter given the "'presumption of scienter' that typically separates wrongful acts 'from otherwise innocent conduct.'" *United States v. Hansen*, 599 U.S. 762, 780 (2023) (citation omitted).

Together, those two factors tightly link restitution to the criminal offense. The condition that restitution applies only "on the commission of a crime … is significant of penal and prohibitory intent." *See Kurth Ranch*, 511 U.S. at 781 (citation omitted); *Hudson*, 522 U.S. at 102 n.6 (recognizing that *Kurth Ranch* applied a "*Kennedy*-like test"). And "[t]he existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." *Hendricks*, 521 U.S. at 362. Whatever the label, restitution is, for all intents and purposes, a criminal punishment that applies only to defendants convicted of criminal offenses requiring scienter.

The Seventh Circuit in *Newman* correctly recognized that the already-a-crime factor favors treating the MVRA as imposing criminal punishment. 144 F.3d at 541 n.10. *Newman* correctly noted that "most federal criminal laws" require scienter. *Id.* at 541. But *Newman* surmised that the scienter factor supported a civil classification because the MVRA requires no *additional* scienter beyond the underlying offense. *Id.*

Newman's demand for additional scienter would make every criminal punishment look like a civil remedy. District courts do not and cannot make additional mens rea findings before sending offenders to prison or imposing criminal fines. Someone convicted of federal first-

degree murder, for example, "shall be punished by death or imprisonment for life." 18 U.S.C. § 1111(b). The punishment follows inexorably from the conviction, with no scienter required beyond "malice aforethought." *Id.* § 1111(a). Yet death and imprisonment are quintessential criminal punishments that "come[] into play only on a finding of *scienter*." *See Hudson*, 522 U.S. at 99 (citation omitted). Furthermore, the Sixth Amendment forecloses courts from making factual findings on scienter required to increase the maximum penalty. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). This Court has never suggested that a sanction becomes criminal punishment only if it entails an "*independent* scienter requirement," as the Seventh Circuit demanded. 144 F.3d at 541 (emphasis added).

D. Factor 4: Restitution Implicates the Traditional Aims of Punishment

Restitution under the MVRA also "implicate[s] … the two primary objectives of criminal punishment: retribution [and] deterrence." *See Hendricks*, 521 U.S. at 361-62.

As already discussed, those objectives appear on the face of the statute. *See supra* p. 22. And this Court has repeatedly acknowledged the punitive and deterrent effects of restitution statutes. *Kelly*, for example, described state restitution statutes as "further[ing] the rehabilitative and deterrent goals of state criminal justice systems." 479 U.S. at 49. *Kelly* called restitution "an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused." *Id.* at 49 n.10. And *Kelly* recognized the "precise deterrent effect" of restitution, given the "direct relation between the harm and the punishment." *Id.*; *see also supra* pp. 23-24.

What is more, Congress expressed its understanding of the punitive purposes of restitution when it enacted the MVRA. *See supra* p. 29. The Senate Judiciary Committee declared restitution "an integral part … of criminal justice." S. Rep. No. 104-179, at 12 (MVRA); S. Rep. No. 97-532, at 30 (VWPA). Congress understood that the MVRA was not likely to provide full compensation to victims. The Senate Judiciary Committee recognized that few defendants would be able to "make significant payments," meaning restitution would "not lead to any appreciable increase in compensation to victims of crime." S. Rep. No. 104-179, at 18, 21 (citation omitted). No matter. Significant "penalogical [sic] benefits" accompany restitution orders, which "requir[e] the offender to be accountable for the harm [he] caused." *Id.* at 18.

The Seventh Circuit in *Newman* understood this factor to require the court to identify "the primary purpose of the MVRA." 144 F.3d at 541. The court concluded that the MVRA does "not directly promote the traditional aims of punishment: retribution and deterrence." *Id.*

That is wrong. This factor asks only whether the MVRA "*implicate[s]* either of the two primary objectives of criminal punishment," not whether it principally promotes those aims. *Hendricks*, 521 U.S. at 361-62 (emphasis added). Restitution plainly does. As this court has explained, restitution orders "mete out … criminal punishment." *Pasquantino*, 544 U.S. at 365; *see also supra* pp. 22-23.

E. Factors 6 and 7: Restitution Sweeps Beyond Mere Victim Compensation

At the final two factors, this Court evaluates whether a sanction serves "a nonpunitive purpose[] or is excessive with respect to th[at] purpose." *Smith*, 538 U.S. at 97.

Newman concluded that the MVRA is not excessive because "victims recover the full amount of their losses, but nothing more." 144 F.3d at 542.

That conclusion misses how the MVRA deviates from a compensatory goal in numerous respects. Recovery is not limited to victims, and the MVRA puts courts and probation officers, not victims, in charge of the restitution process. *See supra* pp. 33-34.

Moreover, victims are rarely made whole in practice, as Congress understood when it enacted the MVRA. *See supra* p. 29. Because most defendants cannot afford to pay, "the vast majority of restitution dollars never end up in the hands of crime victims." Hagos, *supra*, at 477. As the Justice Department itself warns victims: "Realistically, … the chance of full recovery is very low…. [I]t is rare that defendants are able to fully pay the entire restitution amount owed." U.S. Dep't of Just., Restitution Process (last updated Oct. 10, 2023), https://www.justice.gov/criminal/criminal-vns/restitution-process. The evidence bears out this warning: 91% of restitution balances are "uncollectible." GAO, *supra*, at 25.

In purpose and effect, restitution ordered under the MVRA is criminal punishment.

CONCLUSION

The court of appeals' judgment should be vacated.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ATTICUS W. DEPROSPO
ROHIT P. ASIRVATHAM
R. SHANE ROBERTS, JR.
BRETT V. RIES
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

JUNE 23, 2025

STATUTORY APPENDIX

TABLE OF CONTENTS

18 U.S.C. § 1512 note (1982). Effective Date.

(a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b)(1) The amendment made by section 2 of this Act shall apply to presentence reports ordered to be made on or after March 1, 1983.

(2) The amendments made by section 5 of this Act shall apply with respect to offenses occurring on or after January 1,1983.

Approved October 12, 1982.

18 U.S.C. § 2248 note. Effective Date.

The amendments made by this subtitle shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act.

18 U.S.C. § 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.

18 U.S.C. § 3612. Collection of unpaid fine or restitution

(a) NOTIFICATION OF RECEIPT AND RELATED MATTERS.—The clerk or the person designated under section 604(a)(18) of title 28 shall notify the Attorney General of each receipt of a payment with respect to which a certification is made under subsection (b), together with other appropriate information relating to such payment. The notification shall be provided—

(1) in such manner as may be agreed upon by the Attorney General and the Director of the Administrative Office of the United States Courts; and

(2) within 15 days after the receipt or at such other time as may be determined jointly by the Attorney General and the Director of the Administrative Office of the United States Courts.

If the fifteenth day under paragraph (2) is a Saturday, Sunday, or legal public holiday, the clerk, or the person designated under section 604(a)(18) of title 28, shall provide notification not later than the next day that is not a Saturday, Sunday, or legal public holiday.

(b) INFORMATION TO BE INCLUDED IN JUDGMENT; JUDGMENT TO BE TRANSMITTED TO ATTORNEY GENERAL.—(1) A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include—

(A) the name, social security account number, mailing address, and residence address of the defendant;

(B) the docket number of the case;

(C) the original amount of the fine or restitution order and the amount that is due and unpaid;

(D) the schedule of payments (if other than immediate payment is permitted under section 3572(d));

(E) a description of any modification or remission;

(F) if other than immediate payment is permitted, a requirement that, until the fine or restitution order is paid in full, the defendant notify the Attorney General of any change in the mailing address or residence address of the defendant not later than thirty days after the change occurs; and

(G) in the case of a restitution order, information sufficient to identify each victim to whom restitution is owed. It shall be the responsibility of each victim to notify the Attorney General, or the appropriate entity of the court, by means of a form to be provided by the Attorney General or the court, of any change in the victim's mailing address while restitution is still owed the victim. The confidentiality of any information relating to a victim shall be maintained.

(2) Not later than ten days after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General.

(c) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine or restitution concerning which a certification has been issued as provided in subsection (b). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid. Any money

received from a defendant shall be disbursed so that each of the following obligations is paid in full in the following sequence:

(1) A penalty assessment under section 3013 of title 18, United States Code.

(2) Restitution of all victims.

(3) All other fines, penalties, costs, and other payments required under the sentence.

(d) NOTIFICATION OF DELINQUENCY.—Within ten working days after a fine or restitution is determined to be delinquent as provided in section 3572(h), the Attorney General shall notify the person whose fine or restitution is delinquent, to inform the person of the delinquency.

(e) NOTIFICATION OF DEFAULT.—Within ten working days after a fine or restitution is determined to be in default as provided in section 3572(i), the Attorney General shall notify the person defaulting to inform the person that the fine or restitution is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.

(f) INTEREST ON FINES AND RESTITUTION.—

(1) IN GENERAL.—The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment. If that day is a Saturday, Sunday, or legal public holiday, the defendant shall be liable for interest beginning with the next day that is not a Saturday, Sunday, or legal public holiday.

(2) COMPUTATION.—Interest on a fine shall be computed—

(A) daily (from the first day on which the defendant is liable for interest under paragraph (1)); and

(B) at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the first day on which the defendant is liable for interest under paragraph (1).

(3) MODIFICATION OF INTEREST BY COURT.—If the court determines that the defendant does not have the ability to pay interest under this subsection, the court may—

(A) waive the requirement for interest;

(B) limit the total of interest payable to a specific dollar amount; or

(C) limit the length of the period during which interest accrues.

(g) PENALTY FOR DELINQUENT FINE.—If a fine or restitution becomes delinquent, the defendant shall pay, as a penalty, an amount equal to 10 percent of the principal amount that is delinquent. If a fine or restitution becomes in default, the defendant shall pay, as a penalty, an additional amount equal to 15 percent of the principal amount that is in default.

(h) WAIVER OF INTEREST OR PENALTY BY ATTORNEY GENERAL.—The Attorney General may waive all or part of any interest or penalty under this section or any interest or penalty relating to a fine imposed under any prior law if, as determined by the Attorney General, reasonable efforts to collect the interest or penalty are not

likely to be effective.

(i) APPLICATION OF PAYMENTS.—Payments relating to fines and restitution shall be applied in the following order: (1) to principal; (2) to costs; (3) to interest; and (4) to penalties.

(j) EVALUATION OF OFFICES OF THE UNITED STATES ATTORNEY AND DEPARTMENT COMPONENTS.—

(1) IN GENERAL.—The Attorney General shall, as part of the regular evaluation process, evaluate each office of the United States attorney and each component of the Department of Justice on the performance of the office or the component, as the case may be, in seeking and recovering restitution for victims under each provision of this title and the Controlled Substances Act (21 U.S.C. 801 et seq.) that authorizes restitution.

(2) REQUIREMENT.—Following an evaluation under paragraph (1), each office of the United States attorney and each component of the Department of Justice shall work to improve the practices of the office or component, as the case may be, with respect to seeking and recovering restitution for victims under each provision of this title and the Controlled Substances Act (21 U.S.C. 801 et seq.) that authorizes restitution.

(k) GAO REPORTS.—

(1) REPORT.—Not later than 1 year after the date of enactment of this subsection, the Comptroller General of the United States shall prepare and submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary

of the Senate a report on restitution sought by the Attorney General under each provision of this title and the Controlled Substances Act (21 U.S.C. 801 et seq.) that authorizes restitution during the 3-year period preceding the report.

(2) CONTENTS.—The report required under paragraph (1) shall include statistically valid estimates of—

(A) the number of cases in which a defendant was convicted and the Attorney General could seek restitution under this title or the Controlled Substances Act (21 U.S.C. 801 et seq.);

(B) the number of cases in which the Attorney General sought restitution;

(C) of the cases in which the Attorney General sought restitution, the number of times restitution was ordered by the district courts of the United States;

(D) the amount of restitution ordered by the district courts of the United States;

(E) the amount of restitution collected pursuant to the restitution orders described in subparagraph (D);

(F) the percentage of restitution orders for which the full amount of restitution has not been collected; and

(G) any other measurement the Comptroller General determines would assist in evaluating how to improve the restitution process in Federal criminal cases.

(3) RECOMMENDATIONS.—The report required under paragraph (1) shall include recommendations on the best practices for—

(A) requesting restitution in cases in which restitution may be sought under each provision of this title and the Controlled Substances Act (21 U.S.C. 801 et seq.) that authorizes restitution;

(B) obtaining restitution orders from the district courts of the United States; and

(C) collecting restitution ordered by the district courts of the United States.

(4) REPORT.—Not later than 3 years after the date on which the report required under paragraph (1) is submitted, the Comptroller General of the United States shall prepare and submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the implementation by the Attorney General of the best practices recommended under paragraph (3).

18 U.S.C. § 3613. Civil remedies for satisfaction of an unpaid fine

(a) ENFORCEMENT.—The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that—

(1) property exempt from levy for taxes pursuant to section 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 shall be exempt from enforcement of the judgment under Federal law;

(2) section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law; and

(3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law.

(b) TERMINATION OF LIABILITY.—The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined. The liability to pay restitution shall terminate on the date that is the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution. In the event of the death of the person ordered to pay restitution, the individual's estate will be held responsible for any unpaid balance of the restitution amount, and the

lien provided in subsection (c) of this section shall continue until the estate receives a written release of that liability.

(c) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 of this title, an assessment imposed pursuant to section 2259A of this title, or an order of restitution made pursuant to sections[1] 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).

(d) EFFECT OF FILING NOTICE OF LIEN.—Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f)(1) and (2) of the Internal Revenue Code of 1986, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor, except with respect to properties or transactions specified in subsection (b), (c), or (d) of section 6323 of the Internal Revenue Code of 1986 for which a notice of tax lien properly filed on the same date would not be valid. The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed

[1] So in original. Probably should be "section".

shall be considered for all purposes as the filing prescribed by this section. The provisions of section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.

(e) DISCHARGE OF DEBT INAPPLICABLE.—No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding.

(f) APPLICABILITY TO ORDER OF RESTITUTION.—In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.

18 U.S.C. § 3613A. Effect of default

(a)(1) Upon a finding that the defendant is in default on a payment of a fine or restitution, the court may, pursuant to section 3565, revoke probation or a term of supervised release, modify the terms or conditions of probation or a term of supervised release, resentence a defendant pursuant to section 3614, hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance with the order of a fine or restitution.

(2) In determining what action to take, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the fine or restitution order, and any other circumstances that may have a bearing on the defendant's ability or failure to comply with the order of a fine or restitution.

(b)(1) Any hearing held pursuant to this section may be conducted by a magistrate judge, subject to de novo review by the court.

(2) To the extent practicable, in a hearing held pursuant to this section involving a defendant who is confined in any jail, prison, or other correctional facility, proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other communications technology without removing the prisoner from the facility in which the prisoner is confined.

18 U.S.C. § 3614. Resentencing upon failure to pay a fine or restitution

(a) RESENTENCING.—Subject to the provisions of subsection (b), if a defendant knowingly fails to pay a delinquent fine or restitution the court may resentence the defendant to any sentence which might originally have been imposed.

(b) IMPRISONMENT.—The defendant may be sentenced to a term of imprisonment under subsection (a) only if the court determines that—

(1) the defendant willfully refused to pay the delinquent fine or had failed to make sufficient bona fide efforts to pay the fine; or

(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

(c) EFFECT OF INDIGENCY.—In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payments because the defendant is indigent.

18 U.S.C. § 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider—

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) 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.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a

result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii),[2] when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

> (A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.
>
> (B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21

---

[2] So in original. Probably should be "(ii)),".

U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

(a)(1) 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 or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3664. Procedure for insurance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing; ·

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony

heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(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.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each

victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3)

may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who

provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as- compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(*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 of chapter 235 of this title;

(B) appealed and modified under section 3742;

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

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.