No. 24-482

IN THE

Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR JENNIFER LAURIN IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether criminal restitution under the Mandatory Victim Restitution Act is penal for purposes of the Constitution's Ex Post Facto Clause.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Constitutional Provisions

Cited Authorities

Page

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Professor Jennifer Laurin is the George R. Killam, Jr. Chair of Criminal Law at the University of Texas School of Law. Professor Laurin studies, teaches, and writes about various topics in criminal law and criminal procedure, including how law and institutional design shape the functioning of criminal justice institutions. She served as Reporter to the American Bar Association's Criminal Justice Standards Task Force, and as Chair of the American Bar Association's Texas Capital Punishment Assessment team. As a scholar of criminal law, Professor Laurin has a strong interest in the orderly development of the law in this area.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imposition of restitution in criminal sentencing is nothing new. In the years leading up to the enactment of the Mandatory Victims Restitution Act,[2] this Court and lower federal courts understood that restitution ordered in criminal cases was a form of criminal punishment. Absent a contrary statement—and no such statement exists here—statutes incorporate the established meaning of common-law terms. When it passed the MVRA in 1996, Congress was well aware of judicial interpretations of "restitution" as criminal punishment, a fact reflected in congressional documents. The MVRA incorporated that

1. No party's counsel authored any part of this brief. No person or entity, other than Professor Jennifer Laurin and her counsel, paid for the brief's preparation or submission.

2. Pub. L. No. 104–132, 110 Stat. 1227 (1996) ("MVRA").

established, common-law interpretation of restitution. Thus the MVRA, like its statutory predecessors, imposes criminal punishment and therefore implicates the Ex Post Facto Clause of the Constitution.

ARGUMENT

"It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (quoting *Neder v. United States*, 527 U.S. 1, 23 (1999)). When Congress enacted the MVRA, there was a well-settled judicial understanding that criminal restitution was punishment. Indeed, congressional documents from the years leading up to the MVRA's enactment show that Congress was aware of the settled judicial understanding that restitution imposed in criminal cases was a form of punishment. The MVRA carried forward this understanding—the proverbial "old soil," 570 U.S. at 733. Because restitution under the MVRA is a criminal punishment, it implicates the Ex Post Facto Clause. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) ("If the intention of the legislature was to impose punishment, that ends the inquiry.").

I. In the Years Leading Up to the MVRA's Enactment, Courts Widely Accepted That Restitution Was Criminal Punishment.

The MVRA was enacted against a well-settled body of caselaw addressing the nature of restitution ordered in criminal cases. This precedent included cases addressing restitution under state statutes and the MVRA's federal

predecessor, the Victim and Witness Protection Act, Pub. L. No. 97–291, 96 Stat. 1248 (1982) ("VWPA").

For example, in *Hughey v. United States*, 495 U.S. 411 (1990), this Court held that restitution under the VWPA is limited to the loss caused by the offense of conviction and does not include losses caused by other charged conduct. 495 U.S. at 413. To reach that conclusion, the Court relied on the rule of lenity, *id.* at 422, which applies to statutes that impose criminal punishment. *See Crandon v. United States*, 494 U.S. 152, 168 (1990) ("[W]e are construing a criminal statute and are therefore bound to consider application of the rule of lenity."); *Ladner v. United States*, 358 U.S. 169, 178 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual. . . .").

Similarly, when this Court decided *Kelly v. Robinson*, 479 U.S. 36 (1986), it understood criminal restitution orders imposed under state law to be a form of criminal punishment. Specifically, the Court held that 11 U.S.C. § 523(a)(7)—which "codifies the judicially created exception to [bankruptcy] discharge for fines"—prevents "the discharge of a criminal judgment that takes the form of restitution." *Id.* at 51-52.[3] The Court reached

3. The Court subsequently held that criminal restitution orders were "debts" that were potentially dischargeable in Chapter 13 bankruptcy proceedings, *Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991), an issue that *Kelly* expressly left open, 479 U.S. at 50 n.12. Congress later overruled that result and expressly made criminal restitution orders non-dischargeable in Chapter 13 bankruptcy proceedings as part of the Criminal Victims Protection Act of 1990, Pub. L. No. 101–581, § 3, 104 Stat. 2865. *Johnson*, 501 U.S. at 83 n.4.

the conclusion that a criminal restitution qualified as a "fine[]" because, unlike a civil judgment, criminal restitution "is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a *criminal sanction* intended for that purpose." *Id.* at 52 (emphasis added) (quoting *In re Pellegrino*, 42 B.R. 129, 133 (Bankr. D. Conn. 1984)); *see also id.* at 49 n.10 ("[T]he direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine."); *Bearden v. Georgia*, 461 U.S. 660, 668 (1983) (characterizing criminal restitution and fines alike as "the debt [the criminal] owes to society for his crime").

In addition, pre-MVRA cases from lower federal appellate courts explicitly held that restitution under the VWPA is criminal punishment. Specifically, those courts harmonized the fact that the VWPA provides "no right to jury trial as to the amount of restitution" with the reality that "the Seventh Amendment would require such a trial if the issue were decided in a civil case," *Kelly*, 479 U.S. at 53 n.14, by reasoning that criminal restitution, as a form of punishment, was not a Seventh Amendment suit at common law. *See, e.g.*, *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) (rejecting a Seventh Amendment argument because "Congress made restitution under the Act a criminal penalty"); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) ("So long as the restitution provision is a permissible form of punishment, it is not subject to civil requirements. . . . Restitution undoubtedly serves traditional purposes of punishment."); *United States v. Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984) ("Restitution, as an aspect of criminal punishment, has a history far older than the American system of justice or,

for that matter, the English legal tradition as a whole."); *see also Kelly*, 479 U.S. at 53 n.14 ("Every Federal Court of Appeals that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment.").

State-court decisions from the years preceding enactment of the MVRA likewise hold that criminal restitution is punishment. For example, only four years before Congress passed the MVRA, the Supreme Court of Georgia concluded that a post-sentencing increase in a defendant's obligation to pay restitution violated the Double Jeopardy Clause because "restitution is punishment when ordered as part of a criminal sentence" and not "a civil remedy for the victim." *Harris v. State*, 261 Ga. 859, 860 (1992). Other state-court decisions agree with that analysis. *See, e.g.*, *State v. Duran*, 224 Neb. 774, 776 (1987) (concluding that "restitution pursuant to [a state statute] is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty"); *Spielman v. State*, 298 Md. 602, 610, (1984) ("It hardly can be contended that one who has been ordered to pay restitution . . . has not received punishment."); *State v. Crawford*, 289 Or. 151, 153 (1980) (en banc) (applying the rule "that a defendant is subject to no greater penalty than that which was in effect upon the date of the commission of the crime" to invalidate a restitution order); *Cox v. State*, 394 So. 2d 103, 106 (Ala. Crim. App. 1981) (same).

II. In the Years Preceding the Enactment of the MVRA, Congress Was Aware of—and Agreed With—the Well-Settled Body of Caselaw Holding That Restitution Is Criminal Punishment.

Congressional statements about the penal nature of the VWPA's restitution provisions confirm that restitution under that statute—and, therefore, under the MVRA—is "punishment" for constitutional purposes. The Senate Report on the VWPA stated that "[t]he principle of restitution is an integral part of virtually every formal system of criminal justice," and "holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 97-532, at 30. The Senate Report also observed that the purpose of the VWPA's restitution mechanism was to give courts "flexibility in determining the kind of restitution which would both satisfy the victim and provide maximum rehabilitative incentives to the offender." *Id.* at 32. These statements "show that Congress was aware of the punitive past of restitution" and "had both offender punishment and victim compensation in mind when enacting the VWPA." Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and the MVRA through the Lends of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2723-24 (2005).

The House Report accompanying the Sentencing Reform Act of 1984, which "carried forward and strengthened" the VWPA, characterized "restoration of the victim" as "one of the purposes of sentencing" in criminal cases, and "created a presumption in favor of restitution as part of the punishment of convicted

defendants." H.R. Rep. No. 98-1017, p. 78 (1984) ("House Report").

Further, prompted by the Seventh Amendment litigation discussed above, House Report at 79 (citing *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984)), the House Report set out the Committee's view that "the restitution provisions of the Victim and Witness Protection Act of 1982 impose a criminal penalty" such that "[t]he seventh amendment is not applicable." *Id.* at 80. The Committee based this view on "the language and legislative history" of those provisions, which the Committee believed "clearly and unambiguously create a criminal penalty." *Id*. Per the Committee, the text of the VWPA characterizes restitution as a penalty by authorizing a court to order restitution "in addition to or in lieu of any other penalty." *Id*. (quoting 18 U.S.C. 3579(a) (1984)) (emphasis omitted). The Committee also noted that the sponsor of the VWPA had explained that the statute "explicitly recognizes the importance of restitution as a criminal sanction." *Id*. (quoting 128 Cong. Rec. H8205 (daily ed. Sept. 30, 1982) (remarks of Rep. Rodino)); *see also id*. at 80 n.20 (explaining that "[t]he section-by-section analysis" of the VWPA "states plainly that '[r]estitution is a criminal penalty'" (citations omitted)).

Two other aspects of the VWPA's restitution provisions supported the Committee's conclusion that restitution under the Act was criminal in nature. First, the "origin" of the VWPA's restitution provisions "underscore[d] the fact that they authorize a criminal penalty." Report at 80. The Committee explained that the VWPA's restitution provisions "are derived from criminal code revision legislation that Congress" considered "for some 12 years," and "[t]hat legislation has treated restitution as a criminal penalty." *Id*. Second, the structure and scope

of the VWPA's restitution provisions "contradict[ed] the notion that they create a civil action" rather than a criminal penalty. *Id.* The Committee explained that the type of damages that restitution can cover, the district court's discretion to order restitution, and the VWPA's interaction with civil remedies that victims may seek and obtain in separate proceedings support the Committee's determination that restitution under the VWPA is criminal in nature. *Id.* at 80-81.

CONCLUSION

When Congress enacted the MVRA, it incorporated the accepted judicial understanding that restitution ordered in criminal cases is a form of punishment. Therefore, retroactive changes in law that enhance a defendant's exposure to criminal restitution, like other laws that retroactively enhance punishment, violate the Ex Post Facto Clause of the Constitution.

Respectfully submitted,

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