APPEAL NUMBERS 03-4184 & 04-2912

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

V.

JAMES C. FALLON,
Appellant

UNITED STATES OF AMERICA,
Appellee

V.

KENNARD GREGG,
Appellant

SUPPLEMENTAL BRIEF FOR APPELLANTS BEFORE COURT EN BANC

Appeal On Behalf of James C. Fallon From Judgment in a Criminal Case Entered in the United States District Court For The Eastern District Of Pennsylvania, At Criminal Number 02-cr-00324-1, On October 16, 2003, By The Honorable James T. Giles

Appeal On Behalf of Kennard Gregg From Judgment In A Criminal Case Entered In The United States District Court For The Eastern District Of Pennsylvania, At Criminal Number 04-CR-00103 On July 2, 2004, By The Honorable John R. Padova

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ARGUMENT

A. Restitution is a criminal penalty because it is imposed to further the retributive, rehabilitative and deterrent goals of punishment, and not merely to compensate the victim.

Restitution is a criminal penalty imposed as part of a sentence for the criminal offense. The Supreme Court, this Court and the vast majority of other Circuits to have ruled on this issue have so held. These decisions cannot all be wrong. They are in accord with the text of the Mandatory Victim Restitution Act (MVRA) – the statute at issue in this case – and the legislative history that underlies it.

The Supreme Court first recognized that restitution is a criminal penalty in Kelly v. Robinson, 479 U.S. 36 (1986), holding that because restitution is a criminal penalty it is not dischargeable in bankruptcy. As the Court explained, restitution, like imprisonment and fines, is imposed to further the "rehabilitative and deterrent goals" of the criminal justice system. Id. at 49. The Court reasoned that as a monetary penalty, restitution is even more effective than a fine paid to the government, "an abstract and impersonal entity," since fines are "often calculated without regard to the harm the defendant has caused." Id.

Just this year, the Supreme Court reaffirmed that restitution is a criminal penalty in Pasquantino v. United States, 125 S. Ct. 1766, 1777 (2005), which

involved the same restitution statute at issue here – the MVRA. Pasquantino held that restitution was imposed to "mete out appropriate criminal punishment for [the defendant's] offense." Id.[1] The Court rejected the appellant's claim that the purpose of the restitution award in that case was to compensate a foreign government for the taxes that the appellants had evaded.

Like the Supreme Court in Kelly and Pasquantino, this Court has repeatedly held that restitution is a criminal punishment. In United States v. Palma, 760 F.2d 475 (1985), for example, this Court held that restitution under the Victim Witness Protection Act (VWPA) is a criminal, rather than civil, penalty, and that as such the Seventh Amendment right to a jury trial in civil cases does not apply. Every other circuit to consider the Seventh Amendment issue has agreed that restitution is a criminal penalty. Id. at 479 (citing cases).[2]

Similarly, in United States v. Edwards, 162 F.3d 87, 89-92 (3d Cir. 1998), this Court held that because restitution is a criminal penalty, the Ex Post Facto Clause is applicable in determining whether a defendant is subject to the MVRA if

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[1] The government in Pasquantino advanced the same position the Court adopted, arguing that restitution "remains a criminal punishment that is imposed as part of the sentence for an offense." Pasquantino v. United States, No. 03-725, Brief for United States at 21 (filed August 3, 2004).

[2] If this Court reverses itself, holding that restitution is a civil penalty, appellants assert their right to a jury trial under the Seventh Amendment.

his offense occurred before the effective date of the statute. Again, the vast majority of circuits have taken the same position. Id. at 89-90 (citing cases).

Finally, in United States v. Syme, 276 F.3d 131, 154 (3d Cir. 2002), this Court once again held that restitution is a criminal penalty, this time for purposes of the exact issue raised in the case at bar – whether the Sixth Amendment right to jury trial is applicable to restitution determinations.

Moreover, as this Court recognized in Edwards, the "statutory scheme and the legislative history of the MVRA point toward a determination that restitution should be considered a form of punishment under the statute." 162 F.3d at 91. "Section 3663A and related provisions indicate that restitution is a criminal penalty under the MVRA, as it is imposed as an integral and necessary part of sentencing, supervised release, and probation for the crime it implicates." Id.

As this Court observed in Edwards, the legislative history of the MVRA illuminates Congress's penalogical goals in enacting the MVRA, which made full restitution mandatory. 162 F.3d at 91. The Court specifically noted "the retributive aspect of a statutory modification mandating payment of restitution regardless of the defendant's means based solely on the nature of the crime." Id. at 92 n.6. The Senate Report on the MVRA took note of the Federal Judicial

Conference view that since 85% of offenders are indigent at time of sentencing, mandatory restitution would not actually increase benefits to victims. But the fact the legislation would not provide any greater compensation to victims was not seen as important. Congress dismissed the Judicial Conference's view as "underestimat[ing] the potential penalogical benefits of requiring the offender to be accountable for the harm caused to the victim." S. Rep. No. 104-179 at 18 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 931. The Senate thus viewed the MVRA as having greater penalogical value than its predecessor, the VWPA, under which the judge had discretion to impose less than the amount of loss, depending on the defendant's financial circumstances.

Accordingly, there is no sound basis to overrule the determination of prior panels of this Court that restitution is a criminal penalty. Such a decision would contravene Supreme Court precedent and the intent of Congress in passing the MVRA.

B. Under the *Blakely/Booker* definition of "statutory maximum" penalty, the amount of loss is a factual determination which sets the maximum amount of restitution the court may order, and therefore the amount of loss is an "*Apprendi* fact" that must be proven to the jury or admitted by the defendant.

Once it is recognized that restitution is a criminal penalty, it follows necessarily that Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States

v. Booker, 125 S. Ct. 738 (2005), apply to the factual determinations that set the maximum restitution which may be ordered. The cases that have ruled to the contrary fail to recognize how Blakely changed the definition of "statutory maximum."

The Eighth Circuit in United States v. Carruth, 418 F.3d 900 (8th Cir. 2005), makes precisely this mistake, as does the Sixth Circuit in United States v. Sosebee, 419 F.3d 451, 462 (6th Cir. 2005). In Carruth, a split panel ruled that "neither Apprendi nor Blakely prohibit judicial fact finding for restitution orders" because "[u]nder the MVRA there is no specific or set upper limit for the amount of restitution in contrast to criminal statutes which provide maximum terms of imprisonment and fine amounts." 418 F.3d at 904.

Carruth makes the mistake of applying the pre-Blakely definition of "statutory maximum." As the dissent correctly points out, "many in the pre-Blakely world understandably subscribed to the notion Apprendi does not apply to restitution because restitution statutes do not prescribe a maximum amount." Id. at 906 (Bye, J. dissenting). In the pre-Blakely world, the term "statutory maximum" was thought to refer to a specific number, such as "20 years," or "$20,000," identified in the criminal statute as the maximum penalty that could be imposed for that offense.

Under Blakely, however, "statutory maximum" no longer refers only to a specific number in the statute. Instead, "the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S. Ct. at 2537. Under this new understanding of the term, the statutory maximum is *case-specific* in that it depends on what facts were found by the jury or admitted by the defendant. The "judge exceeds his proper authority" if he "inflicts punishment that the jury's verdict alone does not allow . . ." Id.

Booker emphasized this new understanding by not even using the term "statutory maximum" when it reaffirmed Apprendi, stating the rule as follows:

> Any fact (other than a prior conviction) which is necessary to support a sentence exceeding *the maximum authorized by the facts* established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Booker, 125 S. Ct. at 756 (emphasis added). Thus, for Apprendi purposes, it makes no difference whether the statute specifies a maximum sentence; all that matters is the maximum that can be imposed based on the facts admitted or proven to the jury. Such facts that control the maximum penalty that may be imposed can be referred to as "Apprendi facts" in that they are subject to the Sixth Amendment jury trial right articulated in Apprendi.

The amount of loss for restitution purposes plainly qualifies as an "Apprendi fact," and it fits squarely within the Blakely definition of maximum penalty. To paraphrase the quote from Blakely above, "the statutory maximum [restitution] for Apprendi purposes is the maximum [amount of restitution] a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Under this new definition of "maximum penalty," the MVRA does have a maximum penalty, though it varies from case to case: the court can impose no more than "the full amount of each victim's losses . . . ." 18 U.S.C. § 3664(f)(1)(A).

The amount of loss is therefore the maximum penalty under the MVRA, and if, as in this case, there is no jury fact-finding or defendant admission regarding amount of loss, Blakely and Booker compel the conclusion that the maximum is zero.

C. The MVRA is subject to the *Blakely/Booker* Sixth Amendment rule because, as a completely determinate sentencing scheme, it does not permit the judge to exercise any discretion in deciding the amount of restitution.

In addition to the reasons stated above, it is particularly clear that Blakely and Booker apply to the MVRA because this statute establishes a completely determinate sentencing scheme. The judge has absolutely no discretion to impose

an amount of restitution any greater or less than "the full amount of each victim's losses." 18 U.S.C. § 3664(f)(1)(A). The judge acquires the authority to impose that amount of restitution only upon a finding regarding the amount of loss. The restitution penalty is thus entirely determined by this fact finding, and the only genuine discretion left to the judge is in setting the payment schedule. See 18 U.S.C. § 3664(f)(2) and (3). Blakely ruled that determinate sentencing schemes accord with the Sixth Amendment only if the jury finds, or the defendant admits, the facts that increase the maximum penalty. 124 S. Ct. 2540-41. The same rule must apply here to the even more clearly determinate sentencing scheme in the MVRA.

D. The appropriate remedy is to interpret the MVRA in a manner consistent with the Sixth Amendment.

The MVRA can be applied in a manner that complies with the Sixth Amendment, and without any excision of terms, as long as the court determines restitution *only* on the basis of the "loss" found by the jury beyond a reasonable doubt or admitted by the defendant.

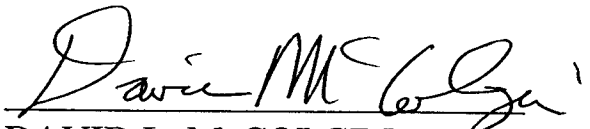
The MVRA is not subject to a Booker-style remedy. Unlike the mandatory federal sentencing guidelines, the MVRA cannot be rendered constitutional merely by declaring that the amount of restitution is "advisory," or discretionary as it was

under the VWPA. Regardless of whether the judge must impose restitution in the full amount of the loss, or has discretion to impose a lower amount, the maximum that can be imposed is still determined by the amount of loss. Amount of loss is thus an Apprendi fact that must be determined based on facts proven to the jury or admitted. Apprendi itself, of course, did not involve a determinate guidelines scheme, but just a factual determination (that defendant acted with an intent to intimidate) that raised the maximum from 10 to 20 years. 530 U.S. at 468-69. The fact that the judge had the discretion to impose less than 20 years made no difference to the analysis. Apprendi's Sixth Amendment rule, accordingly, applies to the MVRA, even if the statute could be read to make restitution discretionary.

CONCLUSION

For the foregoing reasons, the restitution orders in these cases should be vacated.

Respectfully submitted,



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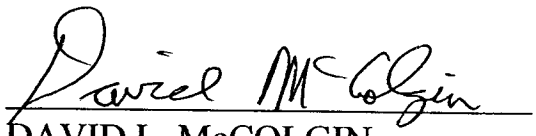
CERTIFICATE OF BAR MEMBERSHIP

It is hereby certified that David L. McColgin is a member of the bar of the Court of Appeals for the Third Circuit.



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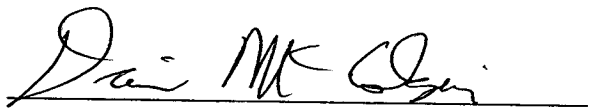
CERTIFICATE OF COMPLIANCE

I, David L. McColgin, Assistant Federal Defender, Supervising Appellate Attorney, Defender Association of Philadelphia, Federal Court Division, hereby certify that appellant's supplemental brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this supplemental brief contains 1,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect for Windows 12.0 word count software in font size 14, type style Times New Roman.



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CERTIFICATION

I, David L. McColgin, Assistant Federal Defender, Supervising Appellate Attorney, Defender Association of Philadelphia, Federal Court Division, hereby certify that the electronic version of the attached brief sent by e-mail to the Court was automatically scanned by Symantec AntiVirus Corporate Edition, version 8.00, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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CERTIFICATE OF SERVICE

I, David L. McColgin, Assistant Federal Defender, Supervising Appellate Attorney, Defender Association of Philadelphia, Federal Court Division, hereby certify that I have filed this same day, both in electronic and paper form, the Supplemental Brief for Appellant Before Court En Banc and served copies upon the following:

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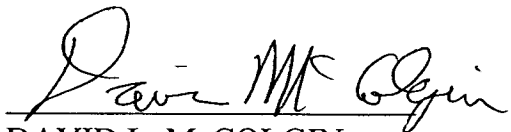

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