

NOS. 03-4184, 03-4490, 03-4542, 03-4560, 04-2912

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JAMES C. FALLON,
Appellant in No. 03-4184

PAUL J. LEAHY,
Appellant in No. 03-4490

TIMOTHY SMITH,
Appellant in No. 03-4542

DANTONE, INC.,
Appellant in No. 03-4560

KENNARD GREGG,
Appellant in No. 04-2912

CONSOLIDATED SUPPLEMENTAL BRIEF FOR
APPELLEE UNITED STATES OF AMERICA

PATRICK L. MEEHAN
United States Attorney

ROBERT A. ZAUZMER
Assistant United States Attorney
Chief of Appeals

615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8568

TABLE OF CONTENTS

ARGUMENT 1

 I. Recent Case Law 1

 II. The Calculation of Restitution is Akin to a
 Compensatory Civil Award for Which No Jury
 Right Exists 3

 A. Restitution is Most Comparable to a
 Civil Proceeding 4

 B. Whether Characterized as Civil or
 Criminal, There is No Right to a Jury
 Determination Regarding Restitution 13

TABLE OF AUTHORITIES

Cases

<u>Apprendi v. New Jersey,</u> 530 U.S. 466 (2000)	13-16
<u>Blakely v. Washington,</u> 124 S. Ct. 2531 (2004)	14
<u>Calero-Toledo v. Pearson Yacht Leasing Co.</u> 416 U.S. 663 (1974)	14
<u>Government of Virgin Islands v. Davis,</u> 43 F.3d 41 (3d Cir. 1994)	11
<u>Hughey v. United States,</u> 495 U.S. 411 (1990)	6
<u>Kelly v. Robinson,</u> 479 U.S. 36 (1986)	9
<u>Landgraf v. USI Film Products,</u> 511 U.S. 244 (1994)	11
<u>Libretti v. United States,</u> 516 U.S. 29 (1995)	14
<u>Pasquantino v. United States,</u> 125 S. Ct. 1766 (2005)	10
<u>Smith v. Doe,</u> 538 U.S. 84 (2003)	8
<u>United States v. Bach,</u> 172 F.3d 520 (7th Cir. 1999)	8
<u>United States v. Bajakajian,</u> 524 U.S. 321 (1998)	14

<u>United States v. Booker,</u>	
125 S. Ct. 738 (2005)	passim
<u>United States v. Burnette,</u>	
2005 WL 2178817 (1st Cir. Sept. 9, 2005)	1
<u>United States v. Bussell,</u>	
414 F.3d 1048 (9th Cir. 2005)	2
<u>United States v. Carruth,</u>	
418 F.3d 900 (8th Cir. 2005)	2
<u>United States v. Christopher,</u>	
273 F.3d 294 (3d Cir. 2001)	9, 11
<u>United States v. Diaz,</u>	
245 F.3d 294 (3d Cir. 2001)	7
<u>United States v. Edwards,</u>	
162 F.3d 87 (3d Cir. 1998)	4, 10
<u>United States v. Fruchter,</u>	
411 F.3d 377 (2d Cir. 2005)	2
<u>United States v. Garcia-Castillo,</u>	
127 Fed. Appx. 385 (10th Cir. Feb. 11, 2005)	2
<u>United States v. George,</u>	
403 F.3d 470 (7th Cir. 2005)	2
<u>United States v. Harris,</u>	
536 U.S. 545 (2002)	15
<u>United States v. King,</u>	
414 F.3d 1329 (11th Cir. 2005)	2
<u>United States v. Newman,</u>	
144 F.3d 531 (7th Cir. 1998)	7, 10
<u>United States v. Nichols,</u>	
2005 WL 2224829 (4th Cir. Sept. 14, 2005)	1

<u>United States v. Palma,</u>	
760 F.2d 475 (3d Cir. 1985)	4
<u>United States v. Simmonds,</u>	
235 F.3d 826 (3d Cir. 2000)	5
<u>United States v. Sleight,</u>	
808 F.2d 1012 (3d Cir. 1987)	12
<u>United States v. Sosebee,</u>	
419 F.3d 451 (6th Cir. 2005)	1
<u>United States v. Ursery,</u>	
518 U.S. 267 (1996)	5
<u>United States v. Washington,</u>	
131 Fed. Appx. 976 (5th Cir. May 20, 2005)	2

Statutes

11 U.S.C. § 523(a)(7)	9
18 U.S.C. § 3663A	5
18 U.S.C. § 3664	5-7

Other

S. Rep. No. 532, 97th Cong., 2d Sess. (1982)	5
S. Rep. No. 179, 104th Cong., 2d Sess. (1996)	6
Note, A Proposal to Reform Criminal Forfeiture Under RICO and CCE, 97 Harv. L. Rev. 1929 (1984)	15

In these matters, which this Court has designated for en banc review, the Court has directed the parties to file supplemental briefs addressing (1) any recent case law regarding the issues before the Court, and (2) whether restitution is civil or criminal in nature.

I. Recent Case Law.

A number of circuit courts of appeals have addressed the question whether the Supreme Court decisions culminating with United States v. Booker, 125 S. Ct. 738 (2005), require that a determination of restitution must be based on a jury verdict or a defendant's admission. The courts are unanimous in concluding, albeit for varying reasons, that Booker and the Supreme Court's preceding Sixth Amendment decisions are inapplicable to restitution orders.

The cases are: United States v. Burnette, 2005 WL 2178817 (1st Cir. Sept. 9, 2005) (claim denied on plain error review); United States v. Nichols, 2005 WL 2224829, at *4 (4th Cir. Sept. 14, 2005) (not precedential); United States v. Sosebee, 419 F.3d 451, 461 (6th Cir. 2005) (holds that restitution is criminal punishment, but finds Appendi

inapplicable because there is no statutory maximum); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005) (holds that restitution is a civil remedy, and states that Booker is inapplicable for the additional reason that the restitution statutes present no statutory maximum); United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005) (agrees with Seventh Circuit); United States v. Bussell, 414 F.3d 1048, 1060-61 (9th Cir. 2005) (restitution order under VWPA is not subject to Booker); United States v. Garcia-Castillo, 127 Fed. Appx. 385, 392 (10th Cir. Feb. 11, 2005) (not precedential; finding that any error was not plain); United States v. King, 414 F.3d 1329, 1330-31 (11th Cir. 2005) (not plain error).

Likewise, the courts to address the Booker issue in the forfeiture context have held that Booker is inapplicable to a judgment of forfeiture. United States v. Fruchter, 411 F.3d 377, 382-83 (2d Cir. 2005) (stating that Booker does not apply to indeterminate sentencing regimes such as forfeiture and restitution); United States v. Washington, 131 Fed. Appx. 976 (5th Cir. May 20, 2005) (not precedential).

All of these decisions are consistent with the government's position in these appeals that the district judges appropriately resolved the restitution and forfeiture matters as sentencing issues subject to determination by the court.

II. The Calculation of Restitution is Akin to a Compensatory Civil Award for Which No Jury Right Exists.

For purposes of determining whether a criminal restitution judgment requires a jury finding, the restitution remedy is most appropriately seen as akin to a civil compensatory determination for which no right to trial by jury exists. As will be explained, the question presented by the Court, whether restitution is subject to the strictures of criminal or civil procedure, has arisen in a variety of contexts, with varying results. The best answer is that, because restitution presents both punitive and compensatory features, the applicable procedure is most appropriately defined in relation to the legal object at issue. With regard to the right to jury trial, it is dispositive that the calculation of restitution has never

been subject to determination by a criminal jury. It is a hybrid bearing punitive and compensatory features, which is part of the sentencing process and not a jury's finding of guilt.

A. Restitution is Most Comparable to a Civil Proceeding.

Restitution indisputably bears features of both criminal punishment and civil recovery. On the one hand, it is imposed as part of criminal sentencing, and it serves a rehabilitative purpose characteristic of sentencing. United States v. Edwards, 162 F.3d 87, 91 (3d Cir. 1998). Further, victims of crime do not have standing to contest restitution findings, and courts have authority under either the Victim and Witness Protection Act (VWPA) or its successor, the Mandatory Victims Restitution Act (MVRA), to mitigate the award of restitution on the basis of such factors as the defendant's means and the complexity of the restitution determination.¹

¹ Among these consolidated appeals, the Leahy-Smith-Dantone case is subject to the VWPA, which permitted a judge to award restitution in an amount less than the victim's loss upon consideration of the defendant's ability to pay. See United States v. Palma, 760 F.2d 475, 479 (3d Cir. 1985) (continued...)

On the other hand, there is no question that the fundamental purpose of restitution is compensatory, to restore to victims that which was taken from them. While the criminal justice system exacts punishment through incarceration and monetary fines, the goal of restitution is not to add to that burden but to assure that unlawful gains are returned to victims. As the Senate Judiciary Committee Report explained, the goal of the VWPA was to require "the wrongdoer . . . to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982); accord, United States v. Simmonds, 235 F.3d 826, 830 (3d Cir. 2000). Depriving criminals of the proceeds of their crimes, "like the confiscation of money stolen from a bank, does not punish [offenders] because it exacts no price in liberty or

¹(...continued)
(concluding that "Congress intended restitution [under the VWPA] to be an integral part of the sentencing process."). The Gregg and Fallon appeals are subject to the MVRA, which mandates an award of restitution equal to the victims' loss, but allows the court to impose a payment schedule which takes into account the defendant's means, and also permits the court to forego a full accounting of restitution if that would unduly delay the sentencing process. See 18 U.S.C. §§ 3663A, 3664.

lawfully derived property from them." United States v. Ursery, 518 U.S. 267, 298 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part).

The Supreme Court's decision in Hughey v. United States, 495 U.S. 411 (1990), reflects this understanding. There, the Court held that the VWPA "authorize[d] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction," id. at 413, and not for other conduct. The Court found support for that conclusion in "the ordinary meaning of 'restitution,'" which is "restoring someone to a position he occupied before a particular event." Id. at 416 (citing dictionary definitions).

In the subsequent MVRA, Congress made clear that restitution is limited to compensation. In part, Congress specified that "[a]ny 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." 18 U.S.C. 3664(j)(2). The committee report explained that "[t]he purpose of this provision . . . is to ensure that the victim is not compensated twice for the same

loss." S. Rep. No. 179, 104th Cong., 2d Sess. 934 (1996). The provision confirms that restitution is intended principally to compensate, not to punish. See United States v. Diaz, 245 F.3d 294, 312 (3d Cir. 2001) (because the "purpose of restitution under the MVRA is to compensate the victim for its losses and, to the extent possible, to make the victim whole," the district court "cannot order multiple defendants to pay restitution in amounts that will result in payment to the victim of an amount greater than the victim's loss"); see also United States v. Newman, 144 F.3d 531, 542 (7th Cir. 1998) ("The VWPA and MVRA ensure that victims recover the full amount of their losses, but nothing more.").

Other provisions of the MVRA afford rights to victims which resemble civil redress. Notably, a conviction and judgment of restitution has collateral estoppel effect in a subsequent civil proceeding by the victim regarding the same act, 18 U.S.C. § 3664(1), and the victim may enforce a restitution order as a lien against the property of the defendant, exactly like a personal civil judgment, id. at § 3664(m)(1)(B).

As the Seventh Circuit has explained, the restitution statutes in effect provide a tort remedy that enables a crime victim "to recover his damages in a summary proceeding ancillary to a criminal prosecution." United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999). The fact that restitution orders are imposed as part of the sentence in a criminal case does not mean that restitution is itself purely a criminal penalty. In Smith v. Doe, 538 U.S. 84 (2003), the Supreme Court held that Alaska's "Megan's Law" statute requiring convicted sex offenders to register with law enforcement authorities was "nonpunitive," id. at 105, even though the statute required the registration requirement to be included in the judgment of conviction for sex offenses. The Court reasoned that "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." Id. at 95-96.

The question whether restitution is criminal or civil in nature has arisen in a variety of contexts, with disparate results. This Court accurately stated that "restitution is best classified as compensatory, punitive, or a combination of both according to the context in which

the issue arises." United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001). To state it differently, this Court and the Supreme Court have treated restitution as civil or criminal depending on the particular interest at stake, and the determination whether that interest is best served by focusing on the compensatory or punitive aspect of the restitution remedy.

Thus, for example, in Kelly v. Robinson, 479 U.S. 36 (1986), the Court determined that a restitution order is nondischargeable in bankruptcy, pursuant to Section 523(a)(7) of the Bankruptcy Code, which renders nondischargeable any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." The Supreme Court held that an order of restitution, applied in a state proceeding as a condition of probation, is a penalty "for the benefit of a governmental unit." The Court stated that while restitution does benefit a victim, it also serves a punitive function for the benefit of society as well. Id. at 52. That consideration led to the sensible conclusion that restitution is not an ordinary civil debt

subject to discharge upon the filing of bankruptcy, but rather falls within the class of obligations to the government which Congress held may not readily be avoided.²

Similarly, in United States v. Edwards, 162 F.3d 87 (3d Cir. 1998), this Court held that restitution is a criminal sanction subject to the ex post facto clause. But see United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998) (stating disagreement). This result follows from the fact that it is unfair to increase punishment for an offense after its commission. Indeed, even if restitution were seen

² The Supreme Court also touched on the question in Pasquantino v. United States, 125 S. Ct. 1766 (2005). The issue in Pasquantino was whether a federal wire fraud prosecution could apply to a scheme to evade a foreign country's excise taxes; the defendants argued in part that the availability of restitution in such a criminal proceeding would offend the rule against collection of taxes on behalf of a foreign sovereign (the so-called "revenue rule"). On this point, the Supreme Court stated: "The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that [fraudulent] conduct." Id. at 1777. This statement was dictum, in that the Court added that its result was unaffected by the question: "If awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than to assume that the later enacted restitution statute impliedly repealed [the wire fraud statute] as applied to frauds against foreign sovereigns." Id.

as purely civil, the same result would likely apply; the same principle of fairness which underlies the ex post facto clause informs the doctrine disfavoring retroactive application of any statutory enactment. See Landgraf v. USI Film Products, 511 U.S. 244 (1994).

In contrast, in Christopher, this Court held that a restitution order, unlike the other aspects of a criminal conviction which are abated when a defendant dies while a direct appeal is pending, is not subject to abatement. The Court emphasized that because "[h]istorically, restitution, an equitable remedy, was intended to reimburse a person wronged by the actions of another, [t]o absolve the estate from refunding the fruits of the wrongdoing would grant an undeserved windfall." Christopher, 273 F.3d at 299.

Similarly, in Government of Virgin Islands v. Davis, 43 F.3d 41 (3d Cir. 1994), the Court appropriately held that prejudgment interest may be included in a restitution award under the VWPA, in order to fulfill the compensatory goal of the Act to fully restore victims. Id. at 47 (stating, "restitution ordered under the VWPA is compensatory rather than punitive. Awards are designed to

compensate victims for their losses, rather than to serve retributive or deterrent purposes."). But see United States v. Sleight, 808 F.2d 1012, 1020 (3d Cir. 1987) (holding that restitution as a condition of probation under the Federal Probation Act was akin to a criminal penalty, for which prejudgment interest may not be ordered) .

In the short space allotted for this brief, the government cannot fully address these myriad areas. While we may not ultimately agree with every ruling, the government concurs in the basic understanding evident in these decisions that the application of civil or criminal doctrines in the restitution context should depend on the interest which the legal doctrine at issue aims to serve. Turning to the question whether or not a defendant is entitled to have a jury determine the amount of restitution, it is apparent that this determination is not akin to a finding of criminal liability to which the Sixth Amendment jury right applies, but rather is a calculation of compensation which a judge may undertake at the time of sentencing. The short answer to the Court's question is

that restitution is more akin to a civil compensatory award which a judge calculates as part of the sentencing process.

B. Whether Characterized as Civil or Criminal, There is No Right to a Jury Determination Regarding Restitution.

Regardless of whether restitution is characterized as "civil or criminal," there is an antecedent reason why the Sixth Amendment right to a jury trial does not apply to the determinations necessary to support an order of restitution. Before restitution is determined, a jury has found (or the defendant has admitted) the criminal conduct that permits a restitution award. The remaining issue is whether a jury must make the final calculation and award. There is insufficient support in doctrine or history to justify the conclusion that a monetary sanction in a criminal case that is tied to the degree of harm caused by the defendant's crime must be found by a jury.

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), where the Court first held that any fact, other than prior conviction, that increases a maximum statutory penalty must be submitted to a jury, involved an increase in imprisonment, not an award of restitution. The Apprendi

rule was based on "longstanding tenets of common-law criminal jurisprudence" which require the jury to find facts which subject a defendant to a longer term of imprisonment than the maximum that would otherwise apply. Blakely v. Washington, 124 S. Ct. 2531, 2536-37 (2004); see Apprendi, 530 U.S. at 476-83, 489-90 n.15 (2000); see id. at 501-518 (Thomas, J., concurring). There is no comparable common-law right to a jury determination of the amount of a monetary sanction that is based on the harm resulting from a defendant's conduct, particularly when that amount is intended to compensate victims and deprive criminals of their ill-gotten gains.

Indeed, criminal forfeiture, which, like restitution, bears punitive and remedial features, see United States v. Bajakajian, 524 U.S. 321, 329 & n.4 (1998) (forfeiture is a punitive "fine" subject to review under the Excessive Fines Clause), has been held not to be subject to the right to a jury trial. Libretti v. United States, 516 U.S. 29 (1995). The holding is consistent with the fact that there was no common-law tradition of having a jury determine the extent of a defendant's property that was

subject to forfeiture. Under the common law, the necessary consequence of conviction for certain crimes was the forfeiture of all of the defendant's property, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974), and the jury's only role was to determine what assets the defendant owned. See Note, A Proposal to Reform Criminal Forfeiture Under RICO and CCE, 97 Harv. L. Rev. 1929, 1937-38 (1984).

Assessment of the historical record is significant. In Harris v. United States, 536 U.S. 545 (2002), the Court held that a sentencing judge may determine facts that increase a mandatory minimum sentence of imprisonment within the existing range. In distinguishing this situation from penalty increases subject to the Apprendi rule, the plurality opinion cited the absence of "historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements." Id. at 560 (Kennedy, J.). Likewise, there is no historical tradition of treating a monetary award of restitution to victims as an aspect of criminal punishment akin to a

maximum term of imprisonment for which a jury determination is necessary.

For all of these reasons, informed by the compensatory purpose of assuring full restitution to victims, apart from the infliction of punishment accomplished by other aspects of sentencing, this Court should conclude that the restitution is akin to a civil compensatory remedy which may be determined by a court. The government further submits, for reasons already briefed, that even if this Court finds that restitution is a criminal sanction fully subject to the Sixth Amendment, the determination of the amount of restitution by the judge does not run afoul of the Apprendi line of cases because the

restitution statute presents no statutory maximum which the judge, based on his or her own findings, might exceed.

Respectfully submitted,

PATRICK L. MEEHAN
United States Attorney

/s Robert A. Zauzmer
ROBERT A. ZAUZMER
Assistant United States Attorney
Chief of Appeals
Pa. Bar No. 58126

United States Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8568

CERTIFICATION

1. The undersigned certifies that this brief contains 2,973 words, exclusive of the table of contents, table of authorities, and certifications, and therefore complies with the Court's order dated September 19, 2005 permitting the government to file a supplemental brief in the Leahy-Smith-Dantone appeal limited to 3,000 words.

2. I hereby certify that the electronic version of this brief sent by e-mail to the Court was automatically scanned by ScanMail Real-Time Scan Monitor, version 3.82, by Trendmirco, 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.

ROBERT A. ZAUZMER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the Consolidated Supplemental Brief of Appellee United States of America have been served by e-mail and by first class mail, postage prepaid, upon:

David L. McColgin, Esq.
Robert Epstein, Esq.
Defender Association of Philadelphia
601 Walnut Street, Suite 540 West
Philadelphia, PA 19106

Counsel for appellants James C. Fallon
and Kennard Gregg

Robert E. Welsh, Jr., Esq.
Welsh & Recker
2000 Market Street, Suite 2903
Philadelphia, PA 19103

Counsel for appellant Paul J. Leahy

Jeffrey M. Miller, Esq.
Nasuti & Miller
150 South Independence Mall West, Suite 1064
Philadelphia, PA 19106

Counsel for appellant Timothy Smith

Ian M. Comisky, Esq.
Blank Rome
130 North 18th Street
One Logan Square
Philadelphia, PA 19103

Counsel for appellant Dantone, Inc.

Peter Goldberger, Esquire
50 Rittenhouse Place
Ardmore, PA 19003-2276

Counsel for Amicus Curiae NADCL

ROBERT A. ZAUZMER
Assistant United States Attorney

DATED: October 5, 2005.