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The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After *Southern Union v. United States*?

Introduction

On June 21, 2012, the scene changed dramatically with respect to the Mandatory Victims Restitution Act ("MVRA")[1], a statute I have long thought unconstitutional, but with no appellate agreement with me, except by dissenters. If I appear to be grinding an axe, the axe was given a sharp edge on June 21, 2012, when the Supreme Court decided *Southern Union v. United States*.[2]

I am a Senior United States District Judge who no longer takes criminal assignments. In years past, I have expressed myself officially on this criminal statute, exposing my view that the statute violates the Fifth and Sixth Amendments. I have no hesitancy in expressing myself again on the subject, this time unofficially, but with the hope of being reviewed.

When the Supreme Court, speaking through Justice Sotomayor, decided *Southern Union*, it, for the first time, held categorically that the Fifth and Sixth Amendments, given the extreme importance that had been elaborated by the Court in *Apprendi v. New Jersey,*[3] apply to the imposition of criminal fines, as well as to other criminal penalties.[4] It is time for the Court to apply its *Southern Union* and *Apprendi* reasoning to

the MVRA.

In a line of cases focusing on the roles of judge and jury in fact-finding related to criminal sentencing, the Court, during recent years, has rapidly elevated the status of the jury trial guarantee of the Sixth Amendment, finding that judicial fact-finding as part of criminal sentencing is unconstitutional, and reemphasizing the importance of the "due process" provided by the Fifth Amendment.

In 1999, the Court, after a long hiatus, decided *Jones v. United States*,[5] where it acknowledged that its prior jurisprudence, properly understood, should have made clear that the "due process" guaranteed by the Fifth Amendment and the jury trial promise of the Sixth Amendment, together, assure that any fact, other than a prior conviction, that increases the maximum criminal penalty, must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.

The very next term in 2000, in the watershed case of *Apprendi*, the Court carved into stone the *Jones* ruling, repeating with renewed emphasis, its conclusion that "any fact" other than that of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[6] In *Apprendi*, the Court examined New Jersey's hate crime statute, which allowed the trial judge, upon a preponderance of the evidence, to make a

factual determination as to whether the defendant committed a crime with the purpose of intimidating a person or group because of race, and for the court to use its said finding, if positive, to increase the maximum sentence. The defendant had been convicted of a second degree weapons offense, but the sentence was imposed for a first degree offense as a result of the hate element found by the judge without a jury.[7] The Supreme Court held that the New Jersey statute violated both the Fifth and the Sixth Amendments, because when taken together, these provisions in the Bill of Rights call for all relevant factual determinations to be made by a jury on the basis of proof beyond a reasonable doubt.

In *Ring v. Arizona*, the Court in 2002 applied *Apprendi* to an Arizona law that authorized the death penalty if the judge, without a jury, found one or more of ten aggravating factors. The Court predictably held that the defendant's Sixth Amendment rights were violated because the judge imposed a sentence greater than the statutory maximum by employing non-jury factfinding.[8]

In 2004, in *Blakely v. Washington*, the Court, reviewing Washington's sentencing guidelines, further clarified *Apprendi*, holding that the words "statutory maximum" for *Apprendi* purposes means the maximum sentence that a judge may impose, limited to the facts clearly established by the jury verdict or admitted by the defendant.[9] If *Apprendi* needed any reinforcement, *Blakely*

provided it. The Court has repetitively enunciated this principle: A trial court cannot rely on any "additional findings" to increase punishment beyond the evidence heard and responded to by the jury. The judge "exceeds his proper authority" if he " inflicts punishment that the jury's verdict alone does not allow."[10] The Court in *Blakely* concluded that the defendant's rights were compromised when he was sentenced to more than three years above the statutory maximum after the trial judge had found post-verdict that the defendant had acted with "deliberate cruelty."[11]

In the highly anticipated case of *United States v. Booker*, the Court in 2005 held that the Federal Sentencing Guidelines are also subject to the jury trial requirements of the Sixth Amendment.[12] Before *Booker*, district judges were required to impose sentences within the Federal Sentencing Guidelines range, absent certain exceptions.[13] In *Booker*, the Court once again extended *Apprendi* and held that a defendant's Sixth Amendment right "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'"[14] Justice Breyer, delivering the opinion of the Court in part, held that the provision of the Federal Sentencing Act making the Guidelines **mandatory** is incompatible with the Sixth Amendment.[15] The Court severed this

unconstitutional provision, making the Guidelines merely advisory.[16] The key word for the purpose of reexamining the MVRA in relationship to *Booker* is the shared word "mandatory."

In *Cunningham v. California*, decided in 2007, the Court had no problem in applying *Apprendi* to a California statute authorizing longer prison terms upon the judge's finding of enumerated aggravating circumstances.[17] The Court called for a " bright-line rule",[18] a rule that the courts, as yet, have not been able to find or to apply with any degree of consistency.

The Supreme Court has, in these closely sequential decisions, advertized and re-advertized the fact that a trial judge cannot mete out any "punishment" for which the jury has not found the requisite "facts" justifying the sentence.[19]

In *Southern Union*, the reason for this article, the Supreme Court granted *certiorari* to review an opinion of the First Circuit respecting a criminal fine. The Court's response to the First Circuit was eye-opening. The First Circuit had framed the issue as follows: "Whether a criminal fine must be vacated under *Apprendi* [] where a judge, and not a jury, determined the facts as to the number of days of violation under a schedule of fines."[20] The defendant-appellant had been convicted by a jury of a single count of violating 42 U.S.C. § 6928(d)(2)(A), the provision of the Resource Conservation and Recovery Act ("RCRA")

that criminalizes certain conduct that adversely affects the environment. Southern Union was charged with storing hazardous waste without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004," a period of 762 days.[21] The jury was not asked to find, and did not find, the number of days of violation, nor the duration of any particular violation.[22] Assuming that the trial court was understood by the jury in accordance with the rules of English grammar, there was no way the jury could find guilt for 762 days of violation or for any other number, except one. The trial court subsequently supplied a contrary answer at sentencing.[23] The penalty provision of RCRA, 42 U.S.C § 6928(d), imposes a fine of "not more than $50,000 for each day of violation."[24] The pre- sentence report set the maximum fine at $38.1 million, a sum arrived at by multiplying $50,000 by 762, the full number of days of the "or about" violation charged in the indictment, but not found by the jury.[25] Southern Union strenuously objected to this calculation on the ground that a fine of more than $50,000 violated its constitutional right under *Apprendi.* Because the jury had not determined the number of days or the duration of the violation, the maximum sentence, as argued by Southern Union, was the maximum fine for a one-day violation.[26] The trial court agreed with Southern Union's argument that *Apprendi* required the jury,

and not the court, to find the dates needed to calculate the maximum fine under § 6928(d), but strangely proceeded to find no *Apprendi* violation because the "content and context of the verdict all together" indicated that the jury had determined the necessary dates. The trial court apparently wanted to honor the Congressional purposes, calling upon it to read the jury's mind or to interpolate it extravagantly. Without articulating how its figures were arrived at, the trial court imposed a $6 million fine and a $12 million community service obligation on Southern Union, which promptly appealed to the First Circuit.[27]

The First Circuit rejected Southern Union's argument and affirmed the trial court, but not employing totally different reasoning. It flatly held that "the *Apprendi* rule does **not** apply to the imposition of statutorily prescribed fines."[28] The First Circuit relied on the Supreme Court's decision in *Oregon v. Ice*,[29] in which that Court rejected an *Apprendi* challenge to a state sentencing scheme that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences. The Court in *Ice* discussed the common law history of imposing sentences consecutively rather than concurrently, and found that it was the judge and not the jury who had historically made such decisions.[30] In *Ice*, the Court said:

> Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the

> length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution. Introducing *Apprendi's* rule to these decisions on sentencing choices or accouterments surely would cut the rule loose from its moorings.[31]

The First Circuit concluded that the above-quoted language in *Ice* was entitled to "great weight" and characterized it as "an express statement . . . that it would not be appropriate to extend *Apprendi* to criminal fines."[32]

The Supreme Court granted *certiorari* directed to the First Circuit not for the purpose of clarifying *Ice*, but to resolve the mounting conflict between the First Circuit conclusion in *Southern Union* that *Apprendi* does not apply to criminal fines and the contrary decisions of the Second Circuit in *United States v. Pfaff*,[33] and the Seventh Circuit in *United States v. LaGrou Distribution Systems*,[34] the latter two courts having employed *Apprendi* to vacate criminal fines.[35] In reversing the First Circuit, the Supreme Court held unequivocally for the first time that *Apprendi* applies to the imposition of criminal fines.[36] The Court explained that it had never distinguished one form of penal sanction from another, so that *Apprendi* applies to all criminal sanctions.[37] Although the punishments discussed in earlier Supreme Court opinions had involved imprisonment or the death

sentence, and not a fine, the Court in *Southern Union* found that there is no principled basis for treating fines differently from other penalties.[38] The Court stated: "Instead, our decisions **broadly** prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]' — terms that each undeniably embrace fines."[39]

What does *Southern Union* mean for a renewed examination of the MVRA?[40] The MVRA **requires** courts, when sentencing defendants convicted of enumerated federal crimes, to order restitution to the identifiable victims in the full amount of the victims' losses. *Southern Union* is an arrow pointed at the heart of the MVRA. It reduces one line in *Ice* to a mere inadvertence. As appellant, Southern Union, understandably disclaimed any contention that its argument implicates the MVRA.[41] Justice Sotomayor makes no mention of the MVRA or of "restitution," but court-ordered "restitution" is so similar to the a "fine" that the question about *Apprendi*'s relationship to the MVRA was, in my view, spoken to by necessary implication.

After I twice held the MVRA unconstitutional, the United States, presumably after consultation with the Solicitor General, decided in both instances not to appeal. My view that the MVRA is unconstitutional has not been hidden from the United States, from defense lawyers, or from judges.[42] If the opinion in

Southern Union does not answer the MVRA question, it will at least give pause to federal courts who are presented with the problem when the MVRA is again challenged, as it surely will be.

Victim and Witness Protection Act

It goes without saying that a federal court can only order restitution to the extent authorized by statute. Prior to 1982, federal law authorized restitution only as a condition to a defendant's probation.[43] This was the year I became a federal judge.

In the 1970s and 1980s, a movement for victims' rights got underway. This influential group believed that the justice system was too focused on the protection of the rights of offenders at the expense of victims.[44] In response to this movement, President Reagan (who nominated me to my post), authorized and established a Task Force on Victims of Crime.[45] The Task Force recommended that Congress "require restitution in all cases, unless the court provides specific reasons for failing to require it."[46]

Fluffing off the Sixth Amendment, Congress in 1982 passed, and President Reagan signed, the Victim and Witness Protection Act ("VWPA").[47] The VWPA provides federal courts with **discretionary** authority to order restitution to victims of most federal crimes.[48] Congress declared that one of the purposes of

the VWPA was to "ensure that the Federal Government does all that is possible . . . to assist victims and witnesses of crime **without infringing on the constitutional rights of the defendant.**"[49] How to **avoid** infringing on a defendant's constitutional rights is the big, unanswered question. The VWPA codified many recommendations of the Task Force, including the use of a victim impact statement in pre- sentence reports to furnish materials upon which the court can calculate the harm to a victim.[50] The VWPA obligates the court to consider both the amount of loss sustained and the financial resources of the defendant.[51] Under the VWPA, the court can decline to order restitution upon a simple finding that the complication and prolongation of the sentencing process that results from formulation of a restitution order outweighs the need for restitution.[52]

In the years between the enactment of the VWPA and the enactment of the MVRA, federal judges ordered restitution in 20.2% of all cases,[53] but judges more often than not invoked their discretion not to impose restitution in cases where the defendant was indigent.[54] This resistence by sentencing courts to the VWPA led Congress in 1996 to conclude that it would no longer tolerate "the fact that a defendant's financial situation [took] precedence over the injury to the victim."[55]

Mandatory Victims Restitution Act

Finding that the VWPA was not achieving its purpose, Congress in 1996 amended the statute and largely replaced it with the MVRA, as part of the Antiterrorism and Death Penalty Act of 1996.[56] Unlike the VWPA, the MVRA is an absolutist statute. It **requires** the trial court to order restitution to all identifiable victims of certain crimes for the full amount of the victims' physical and/or pecuniary losses, without consideration of the defendant's economic circumstances.[57] The operative word is " MANDATORY". The MVRA, as a practical matter, eliminates all discretion, and makes restitution obligatory, without a jury trial, and without any burden upon the government or the victim to prove beyond a reasonable doubt, the essential elements upon which the punitive sanction of restitution can be fashioned.

Congress explained that the MVRA was needed both to "ensure [that] the loss to crime victims is recognized, and that they receive the restitution that they are due" and to "ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[58] During the Congressional consideration of the MVRA, representatives of the Judicial Conference of the United States told Congress that 85% of federal offenders were "indigent at the time of sentencing," and therefore that mandatory restitution would not lead to any increased benefit for victims.[59] The Senate responded: "[T]his position underestimates the benefits that even nominal

restitution payments have for the victim of crime, as well as the potential penalogical benefits of requiring the offender to be accountable for the harm caused to the victim."[60]

Under the MVRA, restitution follows automatically when a defendant has been convicted of, or pleads guilty to, certain crimes.[61] In order to qualify as a "victim", a person or business entity must have been "directly and proximately harmed as a result" of the crime.[62] As with the VWPA, if the court finds from the record (whatever the "**record**" may consist of), that the number of victims is so large as to make restitution impracticable, or that determining complex issues of fact related to the cause of, or amount of, the victim's losses would complicate or prolong the sentencing process to a degree that the providing of restitution is outweighed by the burden on the sentencing process, the court may decline to order restitution.[63] This is meaningless ghost language left over from the VWPA. Courts have rarely attempted to employ this language as an escape mechanism from the ominous and overriding word "**mandatory**." When Congress repudiated the VWRA by enacting the MVRA, it did not mean to let the courts shove restitution quietly under the rug. I had pointed out in the Federal Sentencing Reporter why and how the courts could avoid the impossible task in the VWPA. Many courts took my advice.[64] If this led Congress to the MVRA, I

regret my small contribution. On the few occasions in which this ghost from the VWPA has been laboriously employed by a trial court in an MVRA case, it has rarely met with appellate success. "**Mandatory**" means "**mandatory**". I cannot advise any court today how to escape the clutches of the MVRA, that is, absent a finding that the statute is unconstitutional.

Section 3664 of the MVRA attempts to establish procedures for issuing and enforcing the restitution order.[65] The process begins with the district court directing the probation officer to obtain and provide information in the form of a pre-sentence report from which the court can attempt to fashion a restitution order.[66] I have never seen or heard of any written direction like this for a trial judge to a probation officer. After consulting all identified victims to the extent practicable, the United States Attorney is **required** to provide the probation officer, no later than 60 days before the sentencing hearing, with a list of all victims and the amounts subject to restitution.[67] Prior to submitting the pre-sentence report, the probation officer **must** provide notice to all identified victims of (1) the amounts subject to restitution; (2) the opportunity to submit information concerning the losses; (3) the scheduled date, time, and place of the sentencing hearing; (4) the availability of a lien in favor of the victim; and (5) the opportunity to file an affidavit relating to the amount of the victim's losses.[68]

The probation officer's report must also include, to the extent practicable, a complete accounting of each victim's loss, the amount of the restitution, if any, owed pursuant to a plea agreement, and information relating to the economic circumstances of the defendant.[69] To me, this procedure implies that the victim is precluded from participating in plea negotiations the time when "looking after the victim's interest" is most critical. Victims are not promised that they can offer evidence, except by affidavit, or how to disagree with the restitution suggested by the probation officer, or with the amount set forth in a plea agreement to which he is not a party.

After reviewing the probation officer's report, the court may act on the report alone, request additional documentation, or conduct a separate restitution hearing.[70] Separate restitution hearings are rare. If the victim's losses cannot be determined by the trial court from the report alone within 10 days prior to the imposition of the sentence, the U.S. Attorney or the probation officer must so advise the defendant, and the court must within 90 days after the imposition of a custodial and/or probationary sentence and/or the fine set a hearing for the determination of the victim's compensable losses and the ordering of restitution.[71] The **government** bears the burden of proving by a mere preponderance of the evidence the essential facts for fixing restitution.[72] Under such circumstances, the trial court

in my experience predictably agrees with the plea agreement and/or the pre-sentence report, or, after a desultory hearing, finds that the government has met its burden of proof and routinely awards restitution at a figure somewhere between the maximum and minimum amounts discussed, and without regard to the defendant's financial resources.[73] The court is not allowed to consider the fact, if it be a fact, that a victim has received, or is entitled to receive, compensation with respect to his loss from insurance or from any other source, or that he has filed, or recovered upon, a civil action against the defendant.[74]

In addition to fixing the amount of restitution, the court must fix a payment schedule. At this juncture, the court may, for the first time, consider the defendant's financial circumstances.[75] I can find no decision recognizing a defendant's right, the government's right, or a victim's right, to contest the "schedule" suggested in the pre-sentence report if the court chooses to use it as part of the sentence. The court may direct the defendant to make one lump sum payment, an in-kind payment, partial payments at specified intervals, a combination of payments, or may allow nominal payments if the court finds that the defendant's financial situation calls for it.[76] The statutory language, literally understood, would allow a soft-hearted trial judge to enter the following schedule: (1) the amount of the defendant's monthly prison income while he is

in custody;[77] (2) fifty dollars a month while he is on supervised release; and (3) the entire balance (perhaps 5 million dollars) being due at the end of supervision or when the defendant publishes the great American novel, whichever event first occurs. After all, restitution is MANDATORY. The schedule is **discretionary**. The process is so haphazard as not only to frustrate the muddy Congressional intent, but to elicit laughter from the affected parties. I do not mean to mock the MVRA too cruelly by pointing out (1) that if more than one defendant contributed to the loss, the court may make each defendant liable for the full amount, or may apportion liability among the defendants to reflect the level of contribution to the victim's loss;[78] (2) that if more than one victim has sustained a loss and there are more defendants than one who contributed, the court may provide a different payment schedule for each victim and each defendant;[79] (3) that the United States can be a victim, but the court must ensure that all other victims receive full restitution before the United States receives anything;[80] and (4) that if a victim has received compensation from insurance or any other source, the court must order restitution be paid to the entity that provided, or is obligated to provide, that compensation.[81]

The restitution order constitutes a final judgment, notwithstanding the facts that (1) it can be corrected; (2)

appealed; (3) modified; (4) amended; or (5) adjusted.[82] Whether or not a postponement of the actual imposition of the restitution portion of the sentence elongates the time for an appeal is still a matter of debate. A full scale restitution hearing may take longer than the trial would have taken, a good reason why a jury trial of restitution would likely contribute to negotiated settlements of the entire case, including restitution.

From the time restitution is ordered, until it is paid in full, the defendant must inform the court and the Attorney General of material changes in his economic circumstances; or, the court can accept information on the subject from the government or from the victim, and, using such hearsay, adjust the defendant's payment schedule, including an ordering of payment in full.[83] The MVRA says absolutely nothing about a hearing, jury or non-jury, before an amended payment schedule can be ordered.

The court may, upon finding that a defendant has defaulted on restitution, revoke probation or supervised release.[84] In other words, the court can send a defendant back to jail.[85] The number of times a sentencing court has received a financial update and thereupon revoked a defendant is unknown. Self-reporting by a dead-beat or a well-off defendant is unusual. Financial resources take constant monitoring or the provision is meaningless. Although no empirical study has been performed, I

can deduce that the implementation of restitution is an impossible task for U.S. Attorneys, overworked courts, and administrators.

Violence Against Women Act

Shortly before enacting the MVRA, Congress made restitution mandatory for victims of sex crimes, child exploitation, and related crimes in the Violence Against Women Act,[86] ("VAWA" or " section 2259"). As with the MVRA, the offender under VAWA is **required** to pay restitution in the full amount of his victims' losses. The defendant's financial situation is not considered.[87] The procedures for imposing and enforcing restitution orders in VAWA may have been used as a template for Congress to use substantial the same language for restitution in the MVRA.[88] The Fifth and Sixth Amendment questions arising from this connection between the two statutes are unavoidable. The question of the constitutionality of the VAWA is beyond the scope of this article. I hope that the VAWA's brooding presence will not intimidate the courts who will be called upon to evaluate the MVRA in the light of *Southern Union*. I am not undertaking to kill two birds with one stone, but I do see the other bird.

Crime Victims Rights Act

Further complicating the inquiry, victims of federal crimes are now provided with a bundle of rights by another statute, the Crime Victims Rights Act ("CVRA"), part of the Justice for All

Act of 2004.[89] The statute overlaps the VWPA, the MVRA, and the VAWA. Crime victims have "[t]he right to full and timely restitution as provided in law [,specifically the MVRA and VAWA]. "[90] The CVRA provides victims a right to appear, be heard, and to consult with the government attorney.[91] The CVRA requires the government to "make [its] best efforts to see" that the court in which the prosecution is pending permits the victim or victims to appear and be heard.[92] These rights may be enforced by motion made by the victim or a private attorney on his behalf.[93] How will the court decide whether the United States has made its best effort? The provision of the CVRA that allows victims to employ private counsel, if it was designed to solve, or to palliate, the inherent, obvious, automatic, and inescapable conflict-of-interest that federal prosecutors face when they are required to do the impossible and the unethical, it fails in both respects.[94] It is both unethical and logically impossible to represent the conflicting interests of the United States and of the victim at the same time. In practice, not many victims retain private counsel. They rely on the U.S. Attorney, who they have no reason to believe is not representing them, that is, unless they are sophisticated Wall Street defendants. U.S. Attorneys, despite the unequivocal language in the MVRA, occasionally comply with the code of professional conduct by

undertaking the unpleasant task of explaining to their "client" the seriousness of the conflict. The only worthwhile "right" provided by the CVRA that he did not already have is his right to petition the appellate court for a writ of mandamus if the district court refuses to allow him to pursue his restitution claim.[95] Mandamus is a cumbersome procedure, but it beats having no standing whatsoever to seek direct appellate review.[96] The incidence of any kind of appellate review of restitution in MVRA cases would call for a thorough computer search of which I am incapable.

The Sixth Amendment

The importance of the Fifth Amendment will be discussed *infra*. As a preface to the Sixth Amendment, the Fifth Amendment proscribes government interference with a fundamental right without first affording the affected person "due process."[97] The Sixth Amendment next guarantees the right to a jury trial in all criminal proceedings.[98] As the Supreme Court said in *Apprendi*: " Taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[99] After *Apprendi*, *Blakely*, *Booker*, and now *Southern Union*, I find more reason than ever to stick to my long-held belief that **all of the facts essential to the**

imposition of any and all criminal penalties must be proven beyond a reasonable doubt to a jury. The right of confrontation is, of course, part of the right to a jury trial. As it now stands, the imposition of the restitution **mandated** as an integral part of a defendant's sentence, is, as a practical matter, controlled by the probation officer in accordance with his levels of integrity, intelligence, and workload. The pre-sentence report, which is based on hearsay that would otherwise be inadmissible, becomes the sole "evidentiary" source for the restitution order. A judge "may accept any undisputed portion of the pre-sentence report as a finding of fact."[100] This means that unless the defendant or the victim has the fortitude to stand his ground with the court on the restitution issue, the court will simply rubberstamp the probation officer's report. The stage at which the defendant is allowed to dispute, or is required at his peril to dispute, the victim's claim and/or the probation officer's report, is decided on an *ad hoc* basis. If the defendant protests the amount of restitution, or the schedule of payments, before the judge imposes the custodial sentence, and/or the fine, the defendant might upset the prosecutor (his lawyer?), or, even worse, the judge. Trial judges are virtually forced to adopt "bureaucratically prepared, hearsay-riddled pre-sentence reports."[101] The principles of *Apprendi*, reiterated most recently in *Southern Union*, cannot be squared with this

casual and routine restitution practice. In assessing the constitutionality of any statute "**as applied**," the way it is applied is a necessary part of the inquiry. The MVPA is, if not unconstitutional on its face, unconstitutional in its application.

There are many illustrations of the courts' casual treatment of the Sixth Amendment[102], but the case decided by the Fourth Circuit the day after *Southern Union* was handed down is one that stands out. In *United States v. Jinwright*, the trial court being reviewed by the Fourth Circuit, had awarded restitution to the United States for its losses arising out of conduct that did not occur during the time period embraced within the charged conspiracy.[103] The trial court, all by itself, "**attributed**" all of the United States losses to the defendant's **overall** conduct.[104] The defendant had been acquitted of some of the conduct alleged in the indictment.[105] The Fourth Circuit found that the trial court was allowed to consider, in fashioning restitution, the entire criminal scheme that had caused the harm, including activity not described in the indictment.[106]

The most recent manifestation of the continuing debate over the MVRA came from the Seventh Circuit on July 5, 2012. In *United States v. Breshers*, Judge Wood found that the trial court did not plainly err when it found that the words "physical injury

” in the MVRA do not exclude mental injury. The trial court had determined the amount of mental injury without a jury, and included it in the restitution order.[107] The Fourth Circuit fortunately had a fallback position, i.e., that the defendant did not object to the restitution order before he appealed.[108] When and how the victim was supposed to preserve his right to appeal was not made clear to the victim or to me. I was taught that criminal statutes are to be construed in favor of a defendant, not the government or the victim.

Is Restitution a Penalty, Compensation, or Both?

Most courts that have found the MVRA not to violate the Sixth Amendment, blithely assume that restitution does not constitute criminal punishment, and instead is compensation to the victim.[109] In 1986, the Supreme Court in *Kelly v. Robinson*, albeit in the context of deciding whether restitution under the VWPA is subject to discharge in bankruptcy, held that restitution constitutes a **criminal penalty and not compensation.**[110] It said:

> Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation. . . . Because criminal proceedings focus on the

> State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.[111]

After *Kelly*, there was no longer any reason to believe that any penal sanction is **compensatory** for Sixth Amendment purposes. **If restitution is punitive for one statutory purpose, it is punitive for all statutory purposes**. Nevertheless, some courts continue to hold that restitution can be compensatory for some purposes, while punitive for others.[111] I do not think the Supreme Court will agree with them when it takes up the issue.

In 2005, after the MVRA was enacted, the Supreme Court again expressed itself on this general subject in *Pasquantino v. United States*, as follows: "[t]he purpose of awarding restitution [is] to mete out appropriate **criminal** punishment for [] conduct."[112] This predicts again that when the Court decides expressly whether mandatory restitution under the MVRA constitutes punishment, it will join the majority of the courts who agree with me that restitution is criminal punishment.[113] The fact that there is a conflict among the circuits on the constitutionality of the MVRA calls for the Supreme Court to speak, and to speak explicitly and unequivocally.[114]

Some courts that agree with me that restitution is punishment have nevertheless upheld the MVRA by a finding that the statute does not violate *Apprendi* because, unlike the sentencing provisions addressed in *Blakely* and *Booker*, the MVRA does not contain a "**prescribed maximum penalty**."[115] The Second Circuit is among those courts who have used this escape route from the Sixth Amendment. In *United States v. Reifler*, the Second Circuit held:

> [T]he MVRA fixes no range of permissible restitutionary amounts and sets no maximum amount of restitution that the court may order. Thus, we conclude that the *Booker-Blakely* principle that jury findings, or admissions by the defendant, establish the " maximum" authorized punishment has no application to MVRA orders of restitution.[116]

Before *Southern Union*, at least one scholar had already recognized the inherent flaw in the overreaching conclusion that the MVRA does not violate *Apprendi*, *Blakely*, and *Booker* because it does not contain a "maximum amount" beyond which a judge can impose a penalty.[117] Professor Kleinhaus points out that *Blakely* only refines the *Apprendi* rule, which remains that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the . . . statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[118] According to Kleinhaus, with whom I totally agree, the Court in *Booker* only "further enhanced the relevancy of the *Blakely* understanding of the statutory maximum for sentencing purposes"

by "**remov[ing] any mention of 'statutory maximum' when it reaffirmed the *Apprendi* holding**," and, instead, made clear that: "[a]ny fact . . . 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."[119] It is not specific statutory language, but the language of the Sixth Amendment itself, that controls the extent of a court's authority to craft a defendant's sentence, whatever criminal penalties are imposed, including restitution."[120] This proposition is not a mere extension of *Southern Union*, but a reiteration of it.

Other courts also deny that *Blakely* altered the understanding of the term "statutory maximum."[121] In *United States v. Carruth*, the Eighth Circuit joined the Second Circuit in finding that restitution does not violate *Apprendi* because the MVRA prescribes no "statutory maximum."[122] However, Judge Bye entered a strong dissent, voicing his belief that *Apprendi* and *Blakely* "dictate[] a conclusion that any dispute over the amount of restitution due and owing a victim of a crime must be submitted to a jury and proved beyond a reasonable doubt."[123] Judge Bye said:

> Once we recognize restitution as being a " criminal penalty" the proverbial *Apprendi* dominos begin to fall. While 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, this notion is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum. To this end, *Blakely*'s definition of "statutory maximum" bears repeating again, "*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." Applying this definition to the present case, it dictates a conclusion that the district court's order imposing a $26,400 restitution amount violates the Sixth Amendment's jury trial guarantee because all but $8,000 of said amount was based upon facts not admitted to by Carruth or found by a jury beyond a reasonable doubt.[124]

Similarly, in *United States v. Leahy*, a divided Third Circuit, sitting *en banc*, held restitution not to be the type of criminal punishment that evokes Sixth Amendment protection under *Booker*, because orders of restitution have little in common with prison sentences and instead combine features of both criminal and civil penalties.[125] Judge McKee, writing for a substantial minority, rejoined as follows:

> The majority's analysis requires that we accept the proposition that an order of restitution rests upon the jury's verdict *alone*, even though no restitution can be imposed until the judge determines the amount of loss. We must also accept that adding a set dollar amount of restitution to a sentence does not "enhance" the sentence beyond that authorized by the jury's verdict alone. I suspect that a defendant who is sentenced to a period of imprisonment and ordered to pay restitution in the amount of $1,000,000 would be surprised to learn that his/her sentence has not been enhanced by the

> additional penalty of $1,000,000 in restitution. "*Apprendi* held [] [that] every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313, 124 S. Ct. 2531 (emphasis in original). Determining the amount of loss is "legally essential" to an order of restitution. . . . I therefore cannot accept the majority's attempt to suggest that restitution is "not really" additional punishment.[126]

These two eloquent dissents, if nothing else, prove that I am not alone. I hasten to add my own separate reason for joining the dissenters. The MVRA **does**, in fact, contain the "**statutory maximum**" being referred to by *Reifler, Carruth*, and *Leahy* to get around the Sixth Amendment. The MVRA **is** a "**statute**". It **does** fix the "**maximum penalty**", i.e., **the amount of the victim's loss**. What difference would it make to a serious Sixth Amendment analysis of the MVRA if the statute had mandated restitution to the victim in the entire amount of his loss, but not to exceed five billion dollars? The MVRA provides the same **maximum** amount and **minimum** amount. This does not create a distinction with a difference. There is still a "**statutory maximum**," if that concept can legitimately come into play.

In the midst of this judicial melee, *Southern Union* takes center stage, undercutting all rationales previously used to find that the MVRA does not violate the Sixth Amendment. Justice Sotomayor, writing for her six-justice majority (including Justice Scalia), explained that for *Apprendi* purposes there is no

principled reason to treat criminal fines differently from the variety of sentences that had previously been struck down because they allowed judges to find facts that increased a defendant's penalty.[127] *Southern Union* stands for the all inclusive proposition that there is no reasoned way (if there ever was a reasoned way) to distinguish between fines, which are clearly criminal penalties, and other criminal penalties.[128] A "fine" and "restitution" are both imposed as an integral part of the sentence. If there is a meaningful difference between a "fine" and "restitution," it is that the fine is not **mandatory**, but discretionary. The sentencing court being reviewed in *Southern Union* could have exercised its discretion under the unique procedural circumstances of that case and imposed a $50,000 fine, or no fine, or something in between, and the Supreme Court would have never been confronted with the problem it resolved.

A fine is paid directly to the government. Restitution is also paid to the government, received by it on behalf of the victim, and disbursed to the victim in accordance with some bureaucratic understanding of the restitution order, which is often ambiguous.[129] The amount of a criminal fine is most often calculated by reference to the amount of the defendant's gain or the victim's loss.[130] "Willful failure to pay," whether a criminal fine or a restitution obligation, can subject a

defendant to incarceration.[131] The two penalties are identical for Sixth Amendment purposes. Justice Sotomayor said, simply and straightforwardly, that going beyond what the jury actually found, is "exactly what *Apprendi* guards against."[132]

Courts have either not understood *Apprendi* before *Southern Union* came along, or they have been disingenuous when they conclude that there is no lesson in *Apprendi* for the MVRA. Courts who suggest that "additional facts required to impose the penalty of restitution are not really 'additional facts' at all," fit nicely into this category.[133]

A future ruling by the Supreme Court that the MVRA violates the Sixth Amendment will mean either that restitution as a penalty will disappear, or that the government must prove to a jury that the defendant caused the victim's loss, and the amount of that loss.[134] If Congress insists on retaining mandatory restitution, trial courts will, as a practical matter, either keep the jury, if it has found a defendant guilty, or empanel a new jury for restitution. For the court to inform the trial jury up-front that if it finds the defendant guilty, it will have further duties, such a revelation would prejudice the United States and help the defendant. The bifurcation procedure will not be easy, but it is no different in kind from a state court's holding over a jury for its findings in a capital case. The dissenters in *Apprendi*, *Blakely*, *Booker*, and now in *Southern*

Union, speak of the confusion that may ensue if juries have to determine facts related to sentencing.[135] Justice Breyer cautions that a defendant may be prejudiced by a prosecutor's producing witness after witness to testify during the guilt phase of the trial about losses.[136] The Justice would only have a reason to worry if the victim's losses must be proven as part of the proof of guilt, something no one contemplates. Justice Breyer also warns that because 98% of federal convictions and 94% of state convictions are the result of guilty pleas, complex jury trial requirements may affect the strength of the government's bargaining position while it is negotiating pleas.[137] The Bill of Rights contains no language guaranteeing the government's bargaining rights, or the victim's bargaining rights. The Sixth Amendment was designed to protect the defendant, not the victim, who had a civil remedy long before the Bill of Rights was drafted. The majority in *Southern Union* responds to Justice Breyer by pointing out that even if his predictions have merit, it is the Constitution that must be enforced.[138] Congress cannot, for public policy reasons, ignore the Sixth Amendment, which unequivocally precludes non-jury factfinding whenever it has the effect of increasing the penalty. Justice Sotomayor says that this "should be the end of the matter."[139]

The Fifth Amendment

The MVRA not only violates the Sixth Amendment, but the Fifth Amendment, which contains the "Due Process Clause." A criminal statute must operate on all defendants alike, and not be subject to arbitrary or uneven exercises of power.[140] Standards for decision- making must be reasonable and ascertainable. In the MVRA, Congress unleashed courts without providing any meaningful guidance for them in order to accord "due process." There are no rules of evidence and no rules of discovery. District courts have no choice but to proceed on an *ad hoc* basis. Many have often been reversed for procedural or substantive errors as a result of their futile efforts to comply with the MVRA. It was the understatement of the century when the Second Circuit said in 2002: "Congress's passage of the [MVRA] in 1996 has introduced a touch of confusion into our case law . . ."[141] Although courts of appeal have told lower courts that the determination of the restitution amount "is by nature an inexact science,"[142] district courts have at the same time been instructed to "engage in [both] an expedient and reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim."[143] A district court must "explain its findings with sufficient clarity to enable [the court of appeals] to adequately

perform its function on appellate review."[144]

If a district court thinks, as it might well think, that a resolution of the restitution issue will be too difficult or impossible, it will spend more time trying to compose a persuasive opinion to justify its conclusion in this regard, than to conduct the restitution hearing it wants to avoid. If the probation officer, with the concurrence of the U.S. Attorney, concludes that a restitution order in a particular case is impossibly complex, and recommends against it, the trial court can find it very tempting to apply the rubberstamp. The Second Circuit has advised that Congress's intent was that "sentencing courts not become embroiled in intricate issues of proof," and that the "process of determining an appropriate order of restitution be streamlined."[145] Trial courts have employed their various versions of streamlining.[146] Fixing restitution in a complex case is never easy.[147] Trial courts are left in a quandary, unless they are willing to take the probation officer's advice, that, 90% of the cases will be concurred by the U.S. Attorney.[148]

Policy Considerations: The MVRA Demands Miracles

The amount of federal criminal debt grew from approximately $6 billion in 1996 to over $50 billion in 2007.[149] Approximately 80% of this debt was comprised of restitution orders owed to

third parties.[150] The federal criminal debt increased by only $430 million per year during the roughly fourteen years that the discretionary VWPA provided the only federal restitution framework.[151] In 2009, under the MVRA, the debt was growing at a rate of around $5 billion per year.[152]

Reported collection rates of criminal debt under the VWPA reached as high as 13.3%.[153] However, in 2009 the rate of criminal debt collection under the MVRA was just 3.5%.[154] The Department of Justice acknowledges that "[b]y far, the greatest impediment to collecting restitution is the lack of relationship between the amount ordered and its collectibility."[155] This inequity has been exacerbated by the MVRA's fanciful amendment to the VWPA, providing that sentencing courts **must** order restitution in the full amount of the victims' losses **without regard to the offenders' ability to pay.**[156] A report from the United States General Accounting Office on criminal debt in 2004 informed us that "collection of the total restitution assessed may be unrealistic from the outset."[157]

Courts and other critics have poked fun at the MVRA.[158] For instance, what is the likelihood that a criminal defendant will ever pay his restitution obligations when over 85% of federal criminal defendants are indigent at the time of their arrest?[159]

Their economic condition does not improve during incarceration or upon release.[160]

I myself served on the short-lived Collection Task Force created by the Administrative Office of the United States Courts after the enactment of the MVRA. I and other members of the Task Force quickly learned that the government spends more money trying to collect restitution than the amount it collects. All of the expensive bells and whistles the Task Force helped to inaugurate were soon abandoned. They were expensive pipe dreams. They did not work. By 2009, each restitution order cost $400 to $500 to administrate.[161] The Congressional Budget Office found that when litigation and enforcement costs of the U.S. Attorneys are included, the total cost of imposing and implementing one restitution order is $2,000.[162] This, of course, is an average and does not indicate that restitution is collected in a majority of cases.

District Judge Maryanne Trump Barry, representing the Judicial Conference of the United States, informed Congress that "the costs associated with [the MVRA] are, in far too many cases, simply unjustified . . . it is simply a matter of bad policy to force the criminal justice system to make these expenditures where there is only a remote possibility restitution will ever be collected."[163] The cost of implementation, unless curtailed, will create a need for more federal judges, more federal

prosecutors, more and better trained probation officers, and more personnel in the collection clerks' offices. In short, Congress utterly failed to comprehend the price tag for MVRA, and is still oblivious to the problems its statute have created.

Mandatory restitution simply fails to accomplish its stated purpose. It actually leads to **decreased** victim compensation because when all of the parties, including the defendant, the victims, the judge, and the U.S. Attorney, recognize that a defendant cannot pay the restitution they lose heart.[164] In practice, there are few consequences to be suffered by an offender who does not meet the terms of his restitution. The Department of Justice, which is responsible for collecting both fines and restitution, has delegated its collection efforts to its Financial Litigation Units ("FLUs").[165] While the FLUs' case load has drastically increased as a result of the MVRA, its staff has not increased.[166] A defendant who believes, often with good cause, that the restitution portion of his sentence is fundamentally unfair, and learns that the order is, as a practical matter, unreviewable, will lose whatever incentive to pay that he might otherwise have had.[167]

Perhaps the most amusing piece of judicial sarcasm to illustrate the futility of the MVRA is a case from the District of West Virginia, in which Judge Faber ordered the defendant to serve twelve and one-half years in prison and to pay $515 million

dollars in restitution.[168] The judge then told the defendant that if he would pay the $515 million in fifteen days he would knock off the interest.[169] Judge Faber obviously got some perverse enjoyment at the expense of the MVRA, but he was also acknowledging several insurmountable problems.

"Let's not kid ourselves," wrote Judge Easterbrook of the Seventh Circuit:

> It is hard, perhaps impossible, for a judge to know how much a given defendant will be able to pay years later. Schedules are guesswork. If the judge sets one that turns out to be too high, the defendant won't pay (you can't get blood from a stone); but if the judge errs on the low side, the defendant keeps the money and the victim loses out.[170]

A restitution order misleads the victim into thinking he is going to recover for his injuries. He may forego his civil remedy by allowing the statute of limitations to run or for the defendant to dissipate his assets.[171] When restitution is not paid, the result "may compound victims' pain and anger, and may increase the negative feelings that accompany the victimization itself and the criminal justice experience."[172] Tellingly, probation officers and prosecutors often encourage victims to view the restitution order as a "symbolic victory," so as not to create false hopes.[173] The Judicial Conference has sternly warned Congress that imposing restitution orders without consideration of the defendants' ability to pay will "erode respect for the justice

system on the part of victims."[174] While public policy is not the province of the courts, when public policy exceeds the bounds of the ability of the judicial system to handle what is thrust upon them (judges and judicial personnel are, after all, human), the courts must step in to save the system from collapse.

Very few judges are even asked to revoke for a defendant's violation of his restitution order. Serious judges become impatient, if not downright grumpy, when a U.S. Attorney or a probation officer seeks revocation. Some courts even understand that incarceration after revocation arguably violates the Eighth Amendment, there being no possibility that the defendant can pay.[175] The MVRA has also rightly been criticized for increasing the number of victims. Offenders with restitution hanging over their heads are likely to recidivate.[176] The Supreme Court itself has expressed concern that a heavily enforced victim restitution policy "may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation."[177]

A Few Relevant Questions as Yet Unanswered

I could come up with a hundred questions that should be addressed and answered while the courts are reconsidering the constitutionality of the MVRA in light of *Southern Union*. Here are just a few:

(1) At what point in the criminal proceeding does the victim have his first and/or last opportunity to express himself on the restitution question?

(2) If a victim and/or his private counsel want to offer evidence on the loss, but the U.S. Attorney thinks his evidence is inadmissible, who decides whether to offer it? Can the U.S. Attorney demand a *Daubert* hearing when the victim offers an " expert?"

(3) How does a victim preserve the right of the United States to appeal and/or his right to petition for a writ of *mandamus*? Can he rely on the U.S. Attorney to preserve these rights?

(4) Although the trial court cannot participate in plea negotiations, can he participate in a pretrial discussion of the restitution question, which will be part of the sentence?

(5) While in prison, can a defendant who anticipates release, challenge the restitution portion of his sentence by *habeas corpus*, knowing that unless he can get the restitution obligation set aside, it will be around his neck for the remainder of his life? Not all criminal defense lawyers have gone to school on "restitution." A defendant's lawyer may very well have been competent on all other aspects of the case, but wholly incompetent in his ability to represent the defendant on this subject.

(6) What obligation, if any, does a Public Defender or a

U.S. Attorney, have to appeal from a restitution order when he knows it is erroneous?

(7) Does his restitution obligation survive the defendant, so that his estate remains liable? It would be ironic if a trial court imposed a death sentence and simultaneously ordered restitution. After all, restitution is “MANDATORY”. It would be equally ironic if a well-off defendant died after a custodial sentence is imposed, but before the probation officer’s report is complete as to a complex restitution question. Under such circumstances, is the court required to order post-death restitution, and order the U.S. Attorney to open an estate for the deceased defendant so that his assets can be marshalled and disbursed?

(8) If the restitution portion of the sentence is not imposed simultaneously with the custodial sentence, when does the time for an appeal begin to run, or are there separate triggering events for separate appeals?

(9) Is the victim obligated to inform the court about the outcome of a post-judgment lien enforcement or a civil action against the defendant? If he is obligated and fails to meet his obligation, what is his penalty?

(10) Does the trial court enjoy deferential review of his restitution order to the extent he is given the same benefit of the doubt by the appellate court that was enjoyed by the defendant at trial?

(11) Is “interest” implicitly due on the restitution award? If so, do payments go first to accrued interest and only then to restitution?

(12) How can the sentencing court fairly decide on the amount of a fine without knowing the amount of restitution?

(13) How can the sentencing court fix the period of supervised release without the restitution order and payment schedule as a factor?

Conclusion

Not long after the VWPA was enacted, I, while an active judge, held the VWPA unconstitutional.[178] The government appealed, something it did not do after I reached the same conclusion with respect to the MVRA years later. The Eleventh Circuit disagreed with me on the constitutionality of the VWPA, but then presciently said: “As with any newly enacted legislation, the courts would have to resolve many questions of interpretation, some of which have been foreshadowed by the district court in this case; but this **lack of precision** does not render the statute constitutionally deficient under the due process clause.”[179] The MVRA was enacted in 1996. It is no longer **new**, as the VWPA was when the Eleventh Circuit found it to be constitutional, despite its imprecision. The MVRA is more vague and imprecise than the VWPA ever was. The deficiencies of the VWPA are magnified by the **mandatory** aspect of the MVRA.

During the sixteen years the MVRA has been on the books and never evaluated by the Supreme Court, the passage of time has not wiped out its constitutional imperfections. Instead, they have become more severe and more glaring.

On June 21, 2012, *Southern Union* opened the door to a reconsideration of the MVRA. It will be interesting to watch how the courts deal with *Southern Union* in application to the MVRA.

* * *

If I have been too bashful or have pulled any punches, I apologize.

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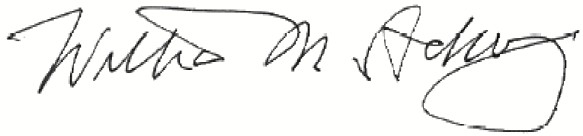

William M. Acker, Jr.

[1] 18 U.S.C. § 3663A, *et seq.*

[2] ____ U.S. ____, 132 S. Ct. 2344 (2012).

[3] 530 U.S. 466 (2000).

[4] 132 S. Ct. at 2357.

[5] 526 U.S. 227, 243 n.6 (1999).

[6] 530 U.S. at 490.

[7] *Id.*

[8] 536 U.S. 584, 592-93 and n.1 (2002).

[9] 542 U.S. 296, 303 (2004).

[10] *Id.* at 304.

[11] *Id.* at 303.

[12] 543 U.S. 220, 233 (2005).

[13] *See* 18 U.S.C. § 3553(b)(1)(2006).

[14] 543 U.S. at 232. Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in Booker's drug case was 21 years and 10 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence that mandated a sentence of 30 years. *Id.* at 221.

[15] *Id.* at 250.

[16] *Id.*

[17] 549 U.S. 270 (2007).

[18] 549 U.S. at 288.

[19] *Blakely*, 542 U.S. at 304.

[20] *United States v. Southern Union Co.*, 630 F.3d 17, 21 (1st Cir. 2010) (citation omitted).

[21] 132 S. Ct. at 2349.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] 630 F.3d at 22.

[29] 129 S. Ct. 711 (2009).

[30] *Id.* at 718-19.

[31] *Id.* at 719 (emphasis added).

[32] 630 F.3d at 34.

[33] 619 F.3d 172 (2d Cir. 2010).

[34] 466 F.3d 585 (5th Cir. 2006).

[35] 132 S. Ct. at 2349.

[36] *Id.* at 2357.

[37] *Id.* at 2351.

[38] *Id.*

[39] *Id.* (emphasis added).

[40] 18 U.S.C. § 3663A, *et seq.*

[41] *See* Petition for Writ of Certiorari, *Southern Union Company v. United States*, 2011 WL 2877878, at *17 n.10 (No. 11-94).

[42] *See United States v. Kemp*, 938 F. Supp. 1554 (N.D. Ala. 1996) (appeal dismissed by the Eleventh Circuit on motion of the United States); *United States v. Bishop*, 228 F. Supp. 2d 1306 (N.D. Ala. 2002); *United States* v. *Searcy*, 293 F. Supp. 2d 1248 (N.D. Ala. 2003). *See also United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005). Prior to the enactment of the MVRA, the writer held the Victim and Witness Protection Act, a precursor to the MVRA, discussed *infra*, unconstitutional on its face as violative of the right to a jury trial under the Seventh Amendment and violative of the Fifth Amendment requirements of due process and equal protection. *See United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), *rev'd sub nom. United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117, 105 S. Ct. 2362 (1985). The writer also expressed his view that restitution under the Victim and Witness Protection Act is impractical and unworkable in an article in the Federal Sentencing Reporter. *See* William M. Acker, Jr., Making Sense of Victim Restitution: A Critical Perspective, 6 Federal Sentencing Reporter 234 (Jan.-Feb. 2004).

[43] *See* Federal Probation Act of 1925, 18 U.S.C. § 3651-3656, repealed Oct. 12, 1984 ("While on probation and among the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . .").

[44] *See* Brian Kleinhaus, Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment, 73 Fordham Law Review 2711, 2719 (2005).

[45] *See id.* *See also* Final Report of the President's Task Force on Victims of Crime, vi (1982), OFFICE FOR VICTIMS OF CRIME, available at http://www.ojp.usdoj.gov/ovc/publications/presidentstskforcerprt/welcome/html.

[46] *See id.*

[47] Pub. L. 97-291, 1982 S. 2420, codified at 18 U.S.C. § 3663.

[48] 18 U.S.C. § 3663(a)(1)(A).

[49] Pub. L. No. 97-291 §§ 2-9, 96 stat. 1249. (emphasis added).

[50] Kleinhaus article, *supra* note 44, at 2722.

[51] 18 U.S.C. § 3663(1)(B)(I).

[52] *Id.* § 3663(1)(B)(ii).

[53] Kleinhaus article, *supra* note 44, at 2725.

[54] *See* 141 Cong. Rec. H1302, H1306 (daily ed. Feb. 7, 1995).

[55] *Id.* (statement of Rep. Hyde).

[56] Pub. L. No. 104-132, 110 Stat. 1214, now codified at 18 U.S.C. § 3663A.

[57] *Id.* §§ 3663A(a)(1); 3664(f)(1)(A).

[58] S. Rep. No. 104-179, at 12 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 930.

[59] The Judicial Conference of the United States was created by Congress in 1922 to aid in policy-making that effects the administration of the federal courts. During congressional hearings on the MVRA, U.S. District Judge Maryanne Trump Barry, chair of the Committee on Criminal Law of the Judicial Conference, testified to Congress on behalf of the Judicial Conference. *See* A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing on S. 173 before the S. Comm. on the Judiciary, 104th Congress. 1 (1995).

[60] Sen. Rep. No. 104-179, at 18.

[61] 18 U.S.C. § 3663A(c). The MVRA did not supplant the VWPA, so a court in its discretion, may still order restitution to be paid to the victims of federal crimes provided for in the VWPA. Presumptively, the court cannot do both.

[62] Congress explained this causation standard as follows:

> The committee intends this provision to mean, except where a conviction is obtained by a plea bargain, that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under [the convicted offense(s)].
>
> . . .
>
> In all cases, it is the committee's intent that highly complex issues related to the cause or amount of a victim's loss may not be resolved under the provisions of mandatory restitution. The committee believes that cases in which the amount of the victim's losses are speculative, or in which the victim's loss is not clearly causally linked to the offense, should not be subject to mandatory restitution.

S. Rep. No. 104-179, at 19. The Supreme Court has held that restitution may only be ordered "for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990) (prior to the enactment of the MVRA, addressing restitution ordered pursuant to the VWPA).

[63] 18 U.S.C. § 3663A(c)(3).

[64] *See* note 42, *supra*.

[65] Section 3664 also governs the issuance and enforcement of orders of restitution authorized pursuant to the VWPA.

[66] *Id.* § 3664(a). *See also* Fed. R. Crim. P. 32(c)(1)(B)(2009) ("If the law permits restitution, the probation officer must conduct an investigation and submit a report [containing] sufficient information for the court to order restitution.")

[67] *Id.* § 3664(d)(1).

[68] 18 U.S.C. § 3664(d)(2)(A)(I)-(vi).

[69] *Id.* § 3664(a).

[70] *Id.* § 3664(d)(4).

[71] *Id.* § 3664(d)(5). The Supreme Court recently held, however, that even when the sentencing court misses the 90-day deadline to make the final determination of the victim's losses and impose restitution, the court retains jurisdiction over restitution so as to be able to enter the order later, as long as the court made clear its intent to order restitution prior to the expiration of the deadline. *United States v. Dolan*, 130 S. Ct. 2533, 2539 (2010).

[72] *Id.* § 3664(e). The Supreme Court has stated that the preponderance of the evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *In re Winship*, 397 U.S. 358, 371 (1970).

[73] *Id.* § 3664 (f)(1)(A).

[74] *Id.* § 3664(f)(1)(B).

[75] *Id.* § 3664(f)(2).

[76] *Id.* § 3664(f)(3).

[77] *But see United States v. Rush*, __ F. Supp. 2d __, 2012 WL 1185903 (D.D.C. April 10, 2012) (holding that a district court that ordered a defendant to pay restitution lacked the authority to set the defendant's monthly payments under the Inmate Financial Responsibility Program (IFRP) at the minimum amount possible because the amount that an inmate had to pay under the IFRP was a matter entrusted to the Executive Branch).

[78] *Id.* § 3664(h).

[79] *Id.* § 3664(I).

[80] *Id.* § 3664(I).

[81] *Id.* § 3664(j)(2).

[82] *Id.* § 3664(o)(1)-(2). Courts routinely hold that a defendant has waived his right to appeal a court's restitution order when a defendant has signed an appeal waiver in a plea agreement, even when the plea agreement says nothing about restitution. *See, e.g., United States v. Gibney*, 519 F.3d 301, 306 (6th Cir. 2008) (because "restitution is a part of one's sentence under the statutory scheme," defendant waived right to appeal restitution order when he waived right to appeal sentence) (quoting *United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000)); *United States v. Johnson*, 541 F.3d 1064, 1067 (11th Cir. 2008) (" [A] waiver of the right to appeal a sentence necessarily includes a waiver of the right to appeal the restitution imposed.").

[83] *Id.* § 3664(k).

[84] *Id.* § 3613A(a)(1).

[85] *Id.* § 3614(a).

[86] Pub. L. No. 103-322, 108 Stat. 1796, 1907-1910, now codified at 18 U.S.C. § 2259.

[87] *Id.* § 2259(b)(1).

[88] *See id.* § 2259(b)(2).

[89] Pub. L. 108-405, 118 Stat. 2260, codified at 18 U.S.C. § 3771.

[90] 18 U.S.C. § 3771(a)(6).

[91] *Id.* § 3771(a).

[92] *Id.* § 3771(c).

[93] *Id.* §§ 3771(c)(1)(providing that the U.S. Attorney shall advise the crime victim that the victim can seek the advice of an attorney with respect to his or her rights); 3771(d)(1) (allowing the crime victim, the U.S. Attorney, and/or the victim's lawful representative to assert the victim's rights). Before the CVRA was enacted, the Tenth Circuit rebuked a trial judge presiding over the Oklahoma City bombing prosecutions for permitting an attorney for the bombing victims to participate in oral argument at the sentencing hearing, stating that "[i]n the absence of any authority permitting the participation of victims' counsel, we harbor concerns about the propriety of the district court's rulings." *See* Paul G. Cassell, Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure, 2007 Utah Law Review 861, at 883 (2007) (citing *United States v. Fortier*, 242 F.3d 1224, 1230 (10th Cir. 2001)). However, the CVRA has changed that.

[94] While in some cases eliminating the dual representation of the United States and the victims by the same lawyer, the CVRA has also created its own problems; namely, there is nothing stopping a victim, through his lawyer, from advancing a separate legal theory during the sentencing phase than was advanced by the prosecution during the trial. *See United States v. Hardy*, 707 F. Supp. 2d 597, 605 (W.D. Pa. 2010) (observing that the victim argued that no causation needed to be shown prior to his receiving restitution under VAWA, while the defendant and the government both agreed that causation was required); *United States v. Church*, 701 F. Supp. 2d 814, 824-25 (W.D. Va. 2010) (observing difference between the victim's and government's legal arguments).

[95] *Id.* § 3771(d)(3). For an example, *see, e.g., United States v. Stewart*, 552 F.3d 1285 (11th Cir. 2008) (granting petition for writ of mandamus filed by home purchasers who had paid mortgage brokerage fees to bank, holding that they qualified as victims under the CVRA and were thus entitled to appear and be heard in guilty plea proceeding for bank executive to charges of conspiracy to deprive bank of honest services, even though home purchasers were not mentioned in the information).

[96] *See United States v. Johnson*, 983 F.2d 216, 219 (11th Cir. 1993).

[97] *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law").

[98] *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .").

[99] *Apprendi*, 530 U.S. at 477 (internal alteration and quotation marks omitted).

[100] Fed. R. Crim. P. 32(i)(3)(A.).