STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Karen M. Fort Hood, P.J., and E. Thomas Fitzgerald and Peter D. O'Connell, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

Supreme Court No. 147391

v.

MATTHEW CHARLES McKINLEY,
Defendant/Appellant.

Court of Appeals No. 307360
Circuit Court No. 11-2060-FH

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Is Michigan's restitution scheme unconstitutional?

Amicus answers: NO

(1) Is an order of restitution equivalent to a criminal penalty?

Amicus answers: NO

(2) Is Michigan's statutory restitution scheme unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt?

Amicus answers: NO

Statement of Facts

Amicus joints the statement of facts of the People as Appellee.

Argument

I.

Because an order of restitution is not a criminal penalty, but a state constitutional right of the victim under Article 1, § 24(1) to recompense for his or her loss, the statutory scheme in place under the legislature's authority given in Article 1, § 24(2) to "provide by law for the enforcement of this section" is not unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt.

A. Introduction

In its order granting the defendant's application for leave to appeal, this court directed that certain issues should be addressed:

- (1) whether an order of restitution is equivalent to a criminal penalty, and
- (2) whether Michigan's statutory restitution scheme is unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt. See *Southern Union Co v United States*, 567 US ___; 132 S Ct 2344; 183 L Ed 2d 318 (2012); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); contra *People v Gahan*, 456 Mich 264 (1997).

A negative answer to the first question, amicus submits, answers the second question in the negative as well; further, as amicus will argue, *People v Gahan*[1] is "contra" to neither *Southern*

[1] *People v Gahan*, 456 Mich 264 (1997).

Union Co v United States[2] nor *Apprendi v New Jersey*,[3] but entirely consistent with those cases, and this is so precisely because an order of restitution is not a criminal penalty.

B. An Order of Restitution Is Not a Criminal Penalty, Either as a Matter of Law or Function

1. The Michigan Constitution

Though defendant gives barely a passing nod to the Michigan Constitution, Article 1, § 24, it is foundational to the issues presented here.[4] § 24 gives crime victims certain rights under the state constitution; those rights, then, are *constitutional*, not statutory, belong to the victims of crime, and include the right of the victim to restitution. None of the victims' rights specified is a right to imposition of some *sanction* or other of the defendant.

Article 1, § 24 was proposed by Rep. William Van Regenmorter (House Joint Resolution P, 84th Legislature), approved by the House on April 20, 1988, approved by the Senate on January 12, 1988, and enacted into law by the People of the State on November 8, 1988, to be effective December 24, 1988. Very soon after its adoption by the People, Rep. Van Regenmorter wrote that the Joint Resolution was sparked by a "growing recognition that victims' rights in Michigan deserved constitutional status," which was "enhanced by some related developments. . . . On several occasions certain statutory rights for victims had been denied by judges, who relied upon a provision in the Michigan Constitution giving judges control over practice and procedure

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[2] *Southern Union Co v United States*, 567 US ___, 132 S Ct 2344, 183 L Ed 2d 318 (2012).

[3] *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000).

[4] ". . . a few years after the enactment of the CVRA, votes approved an amendment to the Michigan Constitution giving crime victims the right to restitution. . . . This led to a gradual shift from a defendant-centered approach to a victim-centered approach." Defendant's Brief, p. 15.

in the courts."[5] There is nothing in Article 1, § 24 that hints at some additional constitutionally-directed *sanction* of offenders; rather, the clear point is to insure a *victim*'s right to recover loss occasioned by the defendant's criminal actions. Article 1, § 24, not the statutes, drives restitution as a right of the victim, and has since December 24, 1988.[6] Unless "restitution" can be defined as "punishment," defendant's arguments collapse. It cannot.

2. English and legal usage distinguish restitution and punishment

As a matter of legal and English usage, the term *restitution* does not encompass *punishment*. A comparison between 1)civil damages and punitive damages, and 2)criminal restitution and criminal punishment, is instructive. Bryan Garner states that "At common law, *restitution* was ordinarily used to denote the return or restoration of some specific thing or condition. But 20th-century usage has extended the sense of the word to include not only the restoration or giving back of something, but also *compensation, reimbursement, indemnification, or reparation* for benefits derived from-or *loss caused to-another*."[7] And *Black's Law Dictionary* (7th ed.) defines restitution as the "[r]eturn or restoration of some specific thing to its rightful

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[5] William Van Regenmorter, "Crime Victims' rights—A Legislative Perspective," 17 Pepperdine L Rev. 59, 77 (1989).

[6] Defendant's statutory history, then, while interesting, is largely beside the point. What *does* matter is, given that the constitutional right of the victim is to restitution, not "partial" restitution. The statutory scheme, to implement this right, was amended to require that an order of "full" restitution (actually a redundancy) be entered. The defendant's ability to pay is not relevant to a determination of the amount of loss and entry of an appropriate order. That fact is relevant to payment under the order; a defendant cannot be incarcerated for failure to comply with a restitution order if impecunious, but the order is nonetheless to be entered, and good faith steps must be taken to make the required payment (and impecuniousness is not always a permanent condition).

[7] Garner, *Dictionary of Modern Legal Usage* (2nd ed, 1995) (emphasis supplied).

owner or status." *Webster's Third International Dictionary* defines it as " a restoration of something to its rightful owner; . . . a making good of or giving an equivalent for some injury." *Punishment*, on the other hand, is not restorative; *Black's Law Dictionary* (7th ed.) defines it as "[a] *sanction*—such as a *fine, penalty, confinement, or loss of property right or privilege*—assessed against a person who has violated the law" (emphasis supplied), and *Webster's* defines it as "suffering, pain, or loss *that serves as retribution*" (emphasis supplied).

The civil justice system is analogous. *Damages* in a civil case is understood as money "ordered to be to a person as *compensation for loss or injury*," *Black's Law Dictionary* (emphasis added); "a compensation for money for a loss or damage."[8] *Punitive damages* are defined as meant "to punish the defendant, and . . . To make an example of the defendant so as to deter others."[9] *Damages* comport with *restitution*, then, while *punishment* comports with *punitive damages*; with each the former is designed to recompense an injured person, while the latter is designed as a sanction without regard to recompense. No one thinks of ordinary damages as penal; no one *should* think of restitution as penal.

3. Restitution and punishment are distinct in function, and the function controls

Defendant's argument relies heavily on language in MCL 780.766, and the legislative intent allegedly objectified in the text. Defendant contends that restitution is punitive because it imposes a "harsh burden" on the defendant, and because in the statute the legislature has said restitution must be imposed "in addition to or in lieu of any *other* penalty" (emphasis supplied).

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[8] *Garner's Dictionary of Legal Usage.*

[9] *Garner.* And see *Black's Law Dictionary*: "Punitive damages. . . Are intended to punish and thereby deter blameworthy conduct."

The "legislature intended restitution to be punitive," defendant concludes, as "restitution is 'part of the sentence itself."[10] But defendant forgets it is not the intent of the legislature that is at issue here, but the intent of the People in adopting Article 1, § 24 that controls. The legislature's role is to implement this provision. Nothing in the constitutional provision itself gives rise to any possible implication that the People intended to punish the defendant; the only fair inference is that the People wished victims to receive recompense for their injuries.

And the statutory text, though containing the unfortunate carryover "other" from the pre-Article 1, § 24 statutory scheme, cannot lead to the conclusion that restitution is somehow retributive, for, as indicated previously concerning the English and legal usage of the terms, the matter is one of function not label[11]—if the statutory text provided that a "defendant's punishment shall include an order directing that he or she give an equivalent to the victim for the injuries inflicted," as a matter of constitutional law the order would not constitute punishment so as to require that the amount required for recompense be determined by a jury. The label does

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[10] Defendant's brief at 17.

[11] As observed in *United States v. Leahy*, 438 F.3d 328, 336 (CA 3, 2006), "The *Booker* Court confirmed the insignificance of legislative labeling in this context by asserting that 'the characterization of a fact or circumstance as an 'element' or 'sentencing factor' is not determinative of the question 'who decides,' judge or jury. . . . the *Booker* Court reaffirmed the reasoning of *Apprendi* and *Blakely* and applied it to invalidate the Federal Sentencing Guidelines, holding that '[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.'" So to with "restitution" and "punishment." The question is not the "legislative labeling," but whether restitution is, for purposes of the Sixth Amendment, a sanction; that is, is retributive or restorative—and, even if retributive, whether the facts necessary to establishing the loss and the amount "support a sentence *exceeding* the maximum authority by the facts established by a plea of guilty or a jury verdict."

not control.[12] The order could be denominated an "other punishment," in addition, say, to a sentence of incarceration, or it could be an "order of restitution," or an "order of reparation," or an "order of rutagaba," so long as it functions to give recompense to the victim for an injury, but not as some sanction that delivers nothing to the victim—as with probation, incarceration, or a fine—it is not punishment within the meaning of the constitution and the right to jury trial.

Defendant reads too much into the use of "other," failing to read the statute in context with the rest of the *corpus juris*—here, Article 1, § 24, which is superior to the statute. The text employed by the legislature should not be taken to mean something inconsistent with the constitutional provision. It is quite true that when a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which naturally leads one first to the principal expression of intent—the text of the statute. But this textual approach is not "strict constructionism," which Justice Scalia has described as "a degraded form of textualism that brings the whole philosophy into disrepute."[13] A court in its attempt to discover the "objectified" intent of the legislature does so by seeking to determine "what a reasonable person would gather from the text of the law, *placed alongside the remainder of the corpus juris*."[14] The text of the statute—that "when

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[12] As Justice Cardozo said long ago, "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder v. Com. of Mass.*, 291 U.S. 97, 114, 54 S.Ct. 330, 335, 78 L.Ed 674 (1934).

[13] Scalia, *A Matter of Interpretation*, p. 23.

[14] Scalia, *A Matter of Interpretation*, p. 17. And see Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 427, 538 (1947)(quoting Justice Holmes as saying, with regard to legislative intent, "I don't care what their intention was. I only want to know what the words mean").

sentencing a defendant convicted of a crime, the court shall order, *in addition to* or in lieu of any *other penalty* authorized by law or in addition to any *other penalty* required by law, *that the defendant make full restitution* to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate" (emphasis supplied)—must be read in context with Article 1, § 24, which contains no language of penalty or sanction. Restitution does not function as a penalty, and the law, the statute *placed aside the remainder of the corpus juris*," does not express an objectified intent it function as a sanction.[15] Most importantly, for constitutional purposes, because it does not function punitively, any label placed upon it is of no constitutional moment concerning the right to jury trial.

C. Because Restitution Is Not Punitive, Michigan's Statutory Restitution Scheme Permitting the Trial Court to Order Restitution Based on Uncharged Conduct That Was Not Submitted to a Jury or Proven Beyond a Reasonable Doubt Is Not Unconstitutional under *Southern Union Co V United States*, *Apprendi V New Jersey*, Nor *Alleyne V United States*

Defendant's argument that Michigan's statutory restitution scheme—along with virtually every other restitution scheme in the country—is unconstitutional because restitution is not

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[15] As a matter of English and legal usage, "restitution" and "punishment" are not synonyms, and, if words are to have any meaning, cannot be made to be. Humpty Dumpty is only correct, if at all, when in Looking-Glass Land: "'I don't know what you mean by 'glory,' Alice said.'Humpty Dumpty smiled contemptuously. 'Of course you don't-till I tell you. I meant 'there's a nice knockdown argument for you.' 'But 'glory' doesn't mean 'a nice knock-down argument,' Alice objected.' 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean-neither more nor less.' 'The question is' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'" Lewis Carroll, *Through the Looking Glass and What Alice Found There, in* the Annotated Alice: the Definitive Edition 213 (Martin Gardner ed., Norton Publishers) (2000).

determined by a jury is virtually without case support from any jurisdiction considering that question in light of any of the United States Supreme Court recent jury-trial cases.[16]

1. *Apprendi* and facts enhancing the statutory maximum

Defendant pled guilty to possession of a firearm for an unlawful purpose, punishable at the top end by 10 years. A separate New Jersey statute provided that the top end was 20 years if at sentencing the judge found by a preponderance of the evidence that in committing the offense the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." The state, as part of the plea agreement, reserved the right to seek the enhanced sentence, and the defendant reserved the right to challenge it, if imposed, on constitutional grounds. The trial judge held a hearing at sentencing, and determined that "by a preponderance of the evidence" Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute. Apprendi was sentenced to a 12-year term of imprisonment.[17]

The Supreme Court found that this violated the Sixth Amendment right to jury trial. Guilt of a charged offense must be proven beyond a reasonable doubt, and to a jury, unless jury trial is waived. This means all *elements* of the offense must be proven to the jury beyond a reasonable doubt. The question of labels came into play, as the State argued that the bias motive was not an element of the offense, but a "sentencing fact." And so the question became whether the label given the fact controlled, or whether the function it was given under the statutory

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[16] *Southern Union Co v United States*, 567 US ___; 132 S Ct 2344; 183 L Ed 2d 318 (2012); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Alleyne v United States*, —— U.S. ——, 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013).

[17] *Apprendi v. New Jersey*, 120 S.Ct. at 2352.

scheme controlled. The Court found that function controlled; whatever the label, a fact functions as an element of the offense if it acts to "increase the prescribed range of penalties to which a criminal defendant is exposed,"[18] the Court being careful to note that it was not suggesting "that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute."[19] Because the bias motive increased the statutory maximum from 10 years to 20 years, defendant receiving a sentence of 12 years, that fact was one that defendant was entitled to have determined by a jury beyond a reasonable doubt. By way of analogy, this situation is no different than if Michigan statute provided that a felonious assault—an assault with a deadly weapon—was punishable by 4 years in prison, but if at sentencing the judge found by a preponderance of the evidence that defendant intended to do great bodily harm, the sentence was up to 10 years.[20] A legislature cannot create a "core" offense and then spin all aggravating facts off to the judge at sentencing.

But Michigan has no statutory provision where the maximum sentence is enhanced by some fact—other than the fact of a prior conviction—in our indeterminate-sentencing scheme.[21] Nor can *Apprendi* apply to restitution, a point to which amicus will return.

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[18] *Apprendi v. New Jersey*, 120 S.Ct. at 2363.

[19] *Apprendi v. New Jersey*, 120 S.Ct. at 2358.

[20] Many examples are possible; as another, the legislature could not create an offense of "robbery" carrying 10 years, the maximum of which is life if the defendant was armed, that aggravating fact to be found as a "sentencing" fact by the trial judge by a preponderance of the evidence at sentencing.

[21] And so *Apprendi* has no application here. *People v. Drohan,* 475 Mich. 140 (2006).

2. *Alleyne* and facts enhancing a statutory mandatory maximum

Alleyne and an accomplice robbed a store manager who was taking his store's daily deposits to the local bank. The accomplice approached the manager with a gun, and the manager surrendered the deposits on demand. Alleyne was later charged in federal court with several federal offenses, including using or carrying a firearm in relation to a crime of violence; the minimum sentence that could be imposed was 5 years. If, however, the firearm was "brandished," the minimum that could be imposed was 7 years, and 10 years if it was discharged. At sentencing after Alleyne was convicted by the jury, the trial judge found that brandishing was a sentencing factor that the court could find by a preponderance of the evidence, so found, and sentenced Alleyne to 7 years.

The Supreme Court held that where an offense carries a mandatory minimum, any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Because, in the Court's view, "a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed," a fact increasing "either end of the range [of ceiling and floor] produces a new penalty and constitutes an ingredient of the offense."[22] Again the Court was careful to note that "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law'" was not governed by the Sixth Amendment, as the Court had "long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."[23]

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[22] *Alleyne v United States*, 133 S.Ct. at 2160.

[23] *Alleyne v United States*, 133 S.Ct. at 2161, 2163. The dissenting opinion, interestingly, was joined by Justice Scalia, long a champion of the "increases the statutory range" view, that dissent stating that because conviction by the jury of the charged offense permitted a sentence of

Alleyne has little effect on Michigan sentencing law. Only several offenses in Michigan carry a statutory mandatory minimum; see, for example, MCL 750.520b(2)(b), providing that the sentence shall be "For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, *but not less than 25 years*" (emphasis supplied); MCL 750.529, providing that "If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of *not less than 2 years*" (emphasis supplied). But *Alleyne* has nothing to do with restitution, the amount of which has neither a statutory floor nor ceiling, but is determined by a calculation of the loss suffered by the victim so as to award recompense to the victim as required by Article 1, § 24.

3. *Southern Union* and facts enhancing a statutory fine

Southern Union is a rather straightforward application of *Apprendi* to statutory fines, none of which go to the victim of an offense, and functions retributively, rather than restoratively. Southern Union was convicted under the Resource Conservation and Recovery Act, the verdict form stating that the company unlawfully stored liquid mercury "on or about September 19, 2002 to October 19, 2004." It was sufficient for conviction for the jury to find unlawful storage on even one day. Violations of the statute were punishable by a fine of "not more than $50,000 for each day of violation," and so the question became whether the company

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anywhere from 5 years to life, "No additional finding of fact was 'essential' to any punishment within the range. After rendering the verdict, the jury's role was completed, it was discharged, and the judge began the process of determining where within that range to set Alleyne's sentence. Everyone agrees that in making that determination, the judge was free to consider any relevant facts about the offense and offender, including facts not found by the jury beyond a reasonable doubt." *Alleyne v. United States*, 133 S.Ct. at 2169 (Roberts, C.J., dissenting).

was entitled to a jury determination of the duration of the violation. The trial judge held not, finding that this was a sentencing fact. The Supreme Court disagreed.

The Court rejected the Government's argument that *Apprendi* does not apply to punishment by way of fine rather than incarceration.[24] The Court was quite clear that fines are punitive, and that the amount of the fine often turns on facts concerning the commission of the offense, such as its duration:

> Fines were by far the most common form of noncapital punishment in colonial America. They are frequently imposed today, especially upon organizational defendants who cannot be imprisoned. And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts. Sometimes, as here, the fact is the duration of a statutory violation.[25]

The Court concluded that it had "never distinguished *one form of punishment from another*," its decisions instead "broadly prohibit[ing] judicial factfinding that increases maximum criminal "sentence[s]," "penalties," or "punishment [s]"—terms that each undeniably embrace fines."[26]

Again, this case has nothing to do with restitution; while the Court unmistakably held that its jury trial/element decisions did not distinguish "one from of punishment from another," they *did* concern facts going to *punishment*, and only to *punishment*, that either enhanced the statutory maximum or increased a statutory mandatory minimum. The decision is, just as are *Apprendi* and *Alleyne*, inapplicable to restitution, which, as has been argued, is not punishment at all. And case decisions applying these decisions, including *Southern Union*, have so held.

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[24] *Southern Union Co. v. United States*, 132 S.Ct. at 2350.

[25] *Southern Union Co. v. United States*, 132 S.Ct. at 2350.

[26] *Southern Union Co. v. United States*, 132 S.Ct. at 2351.

4. *Pasquantino v. United States* and the "revenue rule"[27]

A word concerning the post-*Apprendi* case of *Pasquantino* is appropriate here, and it is noteworthy that the decision never mentions either *Apprendi* or the right to jury trial. The case had to do with the so-called "revenue rule," which generally bars courts from enforcing the tax laws of foreign sovereigns. The question was whether "a plot to defraud a foreign government of tax revenue violates the federal wire fraud statute,"[28] a question the court answered affirmatively. There was no issue concerning restitution and the right to jury trial; defendant cites the case because, in explaining why its ruling did not violate the revenue rule by collection of a foreign tax, given that Canada was to receive the defrauded taxes through restitution, the Court said that the "purpose of awarding restitution *in this action* is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct."[29] *Pasquantino* is limited to its unique situation, as the "in this action" language indicates.

Those cases considering consider *Pasquantino* in the context of *Apprendi* have rejected application of the case to jury-trial issues. For example, the 7th Circuit has said that "The problem with the defendants' argument is that we have rejected it many times, even after *Pasquantino* was decided. *See, e.g., United States v. LaGrou Distrib. Sys.*, 466 F.3d 585, 593 (7th Cir.2006) ("We reiterate: restitution is not a penalty for a crime for *Apprendi* purposes since restitution for harm done is a classic civil remedy that is administered for convenience by the courts that have entered

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[27] *Pasquantino v. United States,* 544 U.S. 349, 125 S.Ct.1766, 161 L.Ed.2d 619 (2005)

[28] *Pasquantino v. United States*, 125 S.Ct. at 1770.

[29] *Pasquantino v. United States*, 125 S.Ct. at 1777.

criminal convictions. (internal quotation marks omitted))."[30] The 3rd Circuit, though denominating restitution as "punishment," has nonetheless found *Pasquantino* inapplicable in the jury-trial context, as "though post-conviction judicial fact-finding determines the amount of restitution a defendant must pay, a restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." And that court rejected the defendant's argument, similar to the one made by the defendant here, that

> the conviction itself yields a restitution amount of zero dollars, and the factual finding of the amount of loss therefore increases the sentence beyond the maximum sum authorized by the facts . . . . On the contrary, *we see the conviction as authorizing restitution of a specific sum, namely the 'full amount of each victim's loss'*; when the court determines the amount of loss, it is merely giving definite shape to the restitution penalty born out of the conviction. . . . there is no restitution range . . . that starts at zero and ends at 'the full amount of each victim's losses'; rather, the single restitution amount triggered by the conviction . . . is the full amount of loss," the court noting that it was joining the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits" in so holding.[31]

5. Case authority rejects application of *Apprendi*, *Alleyne*, or *Southern Union* to orders of restitution

Case authority is virtually unanimous that, regardless of whether it is a burden—after all, an award of damages in a civil case is a burden on the civil defendant[32]—restitution need not be

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[30] *United States v. Bonner*, 522 F.3d 804, 807 (CA 7, 2008).

[31] *United States v. Leahy*, 438 F.3d 328, 337 -338 (CA 3, 2006) (emphasis supplied). See also *United States v. Shmuckler*, 911 F.Supp.2d 362, 369 (E.D.Va., 2012).

[32] " . . . whether a court judgment infringes upon someone's life does not make the judgment inherently criminal. For example, a defendant who is found liable in a civil tort case could also be on the hook for a significant damage award."*United States v. Wolfe*, 701 F.3d 1206, 1217 (CA 7, 2012).

determined by a jury under the Sixth Amendment right to jury trial. Amicus will quickly note only several of the cases; these cases themselves often catalogue those cases reaching the same result:

- Where there is no applicable minimum or maximum sentence or penalty, there is no *Apprendi* issue. . . . .Thus, restitution proceedings as they are currently conducted neither usurp the jury's fact-finding function nor deteriorate the constitutional protections afforded to criminal defendants. . . . . a judge has the authority to conduct restitution hearings and, in so doing, make factual determinations relevant to the restitution award. As long as the proper procedural mechanisms are employed in the restitution hearing, we see no violation of the Sixth Amendment . . . [33]

- . . . state and federal courts have . . . uniformly held that *Blakely* and *Apprendi* are inapplicable to restitution orders because "restitution statutes do not set a maximum restitution amount that can be ordered." *People v. Smith,* 181 P.3d 324, 327 (Colo.Ct.App.2007); *see United States v. Milkiewicz,* 470 F.3d 390, 404 (1st Cir.2006) (stating that "[t]he statutory restitution scheme is materially different from the sentencing regimens at issue in *Blakely* "); *United States v. Reifler,* 446 F.3d 65, 118 (2d Cir.2006) (concluding that the *Blakely* principle requiring jury findings to establish the maximum authorized punishment has no application to restitution orders made under the Mandatory Victims Restitution Act); *United States v. Wooten,* 377 F.3d 1134, 1144 n. 1 (10th Cir.2004) (stating that a restitution order does not violate either *Blakely* or *Apprendi* if it does not exceed the statutory-maximum restitution amount or the value of the damages to the victim); *see also State v. Clapper,* 273 Neb. 750, 732 N.W.2d 657, 662 (2007) (adopting the principle that the *Apprendi–Blakely* rule

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[33] *Commonwealth. v. Denehy,* 466 Mass. 723, 738, 2014 WL 46095, 8 (Mass., 2014). Massachusetts is one of the states that defendant lists as considering restitution as constituting punishment. But when considering that question in specific terms of whether restitution is within *Apprendi*, Massachusetts answered no. And so defendant's list does not prove anything in the context of the Sixth Amendment right to jury trial. Indeed, other of the states listed by defendant have concluded that no jury determination regarding restitution is required. See e.g. *People v. Smith,* 181 P.3d 324, 326 (Colo.App., 2007); *Smith v. State,* 990 N.E.2d 517, 521 -522 (Ind.App.,2013); *State v. Field,* 116 P.3d 813, 817 (Mont., 2005); *People v. Horne,* 767 N.E.2d 132, 139 (N.Y., 2002); *State v. McMillan,* 11 P.3d 1136, 1139 (Or.App., 2005).

does not apply to restitution orders in reliance on 11 federal circuit courts reaching the same conclusion); *State v. Martinez,* 392 N.J.Super. 307, 920 A.2d 715, 722 (N.J.Super.Ct.App.Div.2007) (holding that restitution order does not punish defendant beyond statutory maximum); *People v. Horne,* 97 N.Y.2d 404, 740 N.Y.S.2d 675, 767 N.E.2d 132, 139 (2002) (holding that sentencing court is not increasing a maximum sentence available when it makes factual determinations affecting restitution, but is merely issuing a sentence within an authorized statutory range); *State v. McMillan,* 199 Or.App. 398, 111 P.3d 1136, 1139 (2005) (holding that restitution statutory maximum is the amount of pecuniary damages as determined by the court); *State v. Kinneman,* 155 Wash.2d 272, 119 P.3d 350, 355 (2005) (holding that restitution statute provides a scheme that is more like indeterminate sentencing not subject to jury determinations under the Sixth Amendment). . . . Minnesota's restitution statutes also do not prescribe a statutory maximum for restitution amounts. . . . Based on the unmistakable consensus of the persuasive authority, we conclude that *Blakely* and *Apprendi* are inapplicable to restitution orders.[34]

- . . . .ten of the Federal Circuit Courts of Appeals have found the *Booker* line of cases inapplicable to the imposition of restitution. *See, United States v. Milkiewicz,* 470 *F.*3d 390, 403 (1st Cir.2006); *United States v. Reifler,* 446 *F.*3d 65, 113-20 (2d Cir.2006); *United States v. Leahy,* 438 *F.*3d 328, 337-38 (3d Cir.) (en banc), *cert. denied,* ---- *U.S.* ----, 127 *S.Ct.* 660, 166 *L.Ed.*2d 547 (2006); *United States v. Garza,* 429 *F.*3d 165, 170 (5th Cir.2005) (per curiam), *cert. denied,* --- *U.S.* ----, 126 *S.Ct.* 1444, 164 *L.Ed.*2d 143 (2006); *United States v. Sosebee,* 419 *F.*3d 451, 461 (6th Cir.), *cert. denied,* --- *U.S.* ----, 126 *S.Ct.* 843, 163 *L.Ed.*2d 718 (2005); *United States v. George,* 403 *F.*3d 470, 473 (7th Cir.), *cert. denied,* --- *U.S.* ----, 126 *S.Ct.* 636, 163 *L.Ed.*2d 515 (2005); *United States v. Miller,* 419 *F.*3d 791, 792-93 (8th Cir.2005), *cert. denied,* --- *U.S.* ----, 126 *S.Ct.* 1379, 164 *L.Ed.*2d 85 (2006); *United States v. Bussell,* 414 *F.*3d 1048, 1060 (9th Cir.2005); *United States v. Wooten,* 377 *F.*3d 1134, 1144-45 & n. 1 (10th Cir.), *cert. denied,* 543 *U.S.* 993, 125 *S.Ct.* 510, 160 *L.Ed.*2d 381 (2004); *Dohrmann v. United States,* 442 *F.*3d 1279, 1281 (11th Cir.2006); *cf. United States v. Alamoudi,* 452 *F.*3d 310, 314-15 (4th Cir.2006)

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[34] *State v. Maxwell,* 802 N.W.2d 849, 851 -852 (Minn.App.,2011).

(addressing forfeiture of substitute assets in the same legal context). No Circuit Court of Appeals has found otherwise. . . .

we regard the differences between the two statutory schemes (relating principally to the ability to pay) to be essentially irrelevant to the Sixth Amendment issue raised, and the federal decisions that we have cited to be compelling precedent as to which defendant offers no countervailing argument. Accordingly, we reject defendant's claim that the Sixth Amendment bars the sentencing judge's determination of the amount of restitution to be paid in this case.[35]

- The rule of *Apprendi* does not apply to restitution. We agree with the Seventh Circuit's conclusion that restitution "is not a criminal punishment but instead is a civil remedy administered for convenience by courts that have entered criminal convictions, so the Sixth Amendment does not apply."[36]

- *Southern Union* concerned a determinate punishment scheme with statutory maximums: "[O]ur decisions broadly prohibit judicial factfinding that increases *maximum* criminal 'sentence[s],' 'penalties,' or 'punishment [s].' " . . . Restitution carries with it no statutory maximum; it's pegged to the amount of the victim's loss. A judge can't exceed the non-existent statutory maximum for restitution no matter what facts he finds, so *Apprendi's* not implicated.

  The Fourth Circuit has already held that *Southern Union* doesn't apply to restitution because " *there is no prescribed statutory maximum* in the restitution context." *United States v. Day,* 700 F.3d 713, 732 (4th Cir.2012) (emphasis in original). And, prior to *Southern Union,* other circuits came to the same conclusion. *See Milkiewicz,* 470 F.3d at 404 (1st Cir.); *Reifler,* 446 F.3d at 117–20 (2d Cir.); *United States v. Sosebee,* 419 F.3d 451, 454 (6th Cir.2005).[37]

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[35] *State v. Martinez,* 3920 A.2d 715, 721 - 722 (N.J.Super.A.D., 2007).

[36] *State v. Field,* 116 P.3d 813, 817 (Mont., 2005).

[37] *United States v. Green,* 722 F.3d 1146, 1150 -1151 (CA 9, 2013).

- . . . the only way *Southern Union* may affect the outcome of this case is if we first conclude restitution is a criminal penalty. (If so, the issue becomes whether *Southern Union's* holding that *Apprendi* applies to criminal fines should extend to another type of criminal penalty: restitution.) Reaching such a conclusion, however, would be in direct opposition to this Circuit's well-established precedent that restitution is not a criminal penalty. . . ."We reiterate: restitution is not a penalty for a crime for *Apprendi* purposes since restitution for harm done is a classic civil remedy that is administered for convenience by the courts that have entered criminal convictions."[38]

- Prior to *Southern Union,* every circuit to consider whether *Apprendi* applies to restitution held that it did not. . . . *Southern Union* does not discuss restitution, let alone hold that *Apprendi* should apply to it. Instead, far from demanding a change in tack, the logic of *Southern Union actually reinforces the correctness of the uniform rule adopted in the federal courts to date.* That is, *Southern Union* makes clear that *Apprendi* requires a jury determination regarding any fact that "increases the penalty for a crime beyond the prescribed statutory maximum.". . .

  Critically, however, *there is no prescribed statutory maximum* in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense. . . . As the Sixth Circuit aptly explained in *United States v. Sosebee,* "restitution is not subject to [*Apprendi*] because the statutes authorizing restitution, unlike ordinary penalty statutes, do not provide a determinate statutory maximum." 419 F.3d 451, 454 (6th Cir.), *cert. denied,* 546 U.S. 1082, 126 S.Ct. 843, 163 L.Ed.2d 718 (2005). That logic was sound when written before *Southern Union,* and it remains so today.[39]

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[38] *United States v. Wolfe*, 701 F.3d 1206, 1217 (CA 7, 2012).

[39] *United States v. Day*, 700 F.3d 713, 732 (CA 4, 2012) (first emphasis added; second emphasis in the original).

Amicus will not belabor the point. Case decisions overwhelming hold that the amount of restitution need not be determined by a jury, and that neither *Apprendi*, *Southern Union*, or *Alleyne* compel a different result.

D. Conclusion: *Gahan* Was Correctly Decided, and Remains Good Law

This Court's order granting leave to appeal suggested that *People v Gahan*[40] is contrary to *Apprendi* and *Southern Union*. But it is not. MCL 780.766(2) provides in part that the court must order that "the defendant make full restitution to any victim of the defendant's course of conduct *that gives rise to the conviction* or to the victim's estate." The amount of restitution is determined by the trial court at sentencing, the burden being on the People by a preponderance of the evidence.[41] This Court unanimously concluded that the statutory scheme includes compensation to victims injured by the defendant's "course of criminal conduct, even though these losses were not the specific factual predicate of the defendant's conviction. Furthermore, the Crime Victim's Rights Act provides criminal defendants adequate process."[42] Nothing in the United States Supreme Court decisions discussed requires that the finding of loss occasioned by defendant's course of conduct be made by a jury. If the injury of the victim was proximately caused by defendant's course of criminal conduct, as determined by the trial judge at a sentencing hearing, due process is satisfied.[43]

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[40] *People v Gahan*, 456 Mich 264 (1997).

[41] MCL 780.767(4).

[42] *People v. Gahan,* 456 Mich. at 277-278.

[43] See *United States v. Church*, 731 F.3d 530, 538 (CA 6,2013).

Relief

WHEREFORE, the amicus requests that the Court of Appeals be affirmed.

Respectfully submitted,

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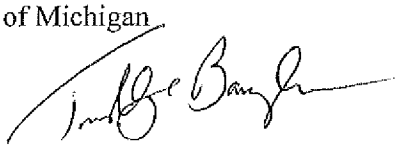

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