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,

-v-

MATTHEW CHARLES MCKINLEY,

Defendant-Appellant.
_____/

Supreme Court No. 147391

Court of Appeals No. 307360

Circuit Court No. 11-2060FH

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF QUESTIONS PRESENTED

I. IS RESTITUTION A FORM OF PUNISHMENT INFLICTED BY THE STATE TO PROMOTE THE GOALS OF DETERRENCE, RETRIBUTION, AND REHABILITATION?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

II. IS MICHIGAN'S RESTITUTION SCHEME UNCONSTITUTIONAL INSOFAR AS IT PERMITS THE TRIAL COURT TO ORDER RESTITUTION BASED ON UNCHARGED CONDUCT THAT WAS NEVER SUBMITTED TO A JURY OR PROVEN BEYOND A REASONABLE DOUBT?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Calhoun County Circuit Court following a jury trial, and a Judgment of Sentence was entered on November 14, 2011. A Claim of Appeal was filed on Claim_Filed, by the trial court pursuant to the indigent defendant's timely request for the appointment of appellate counsel dated November 14, 2011, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed in part and reversed in part in an opinion issued May 16, 2013. SADO filed a timely application for leave to appeal within 56 days of this opinion. This Court granted the application by order entered November 20, 2013. This Court has jurisdiction pursuant to Const 1963, art 1, §§ 4, 20; MCL 600.215(3); MCL 770.3(6); MCR 7.301(A)(2); and MCR 7.302(C)(2)(b).

STATEMENT OF FACTS

This appeal concerns an order of restitution entered by the Honorable Conrad Sindt of the Calhoun County Circuit Court. (9a-10a, 43a). Defendant-Appellant Matthew McKinley stands convicted of two offenses: malicious destruction of personal property over $20,000 ("MDOP"),[1] and inducing a minor to commit a felony.[2] (9a-10a, 33a). He is currently serving concurrent prison terms of 12 to 25 years for each offense. (9a-10a, 33a). After a post-sentencing hearing, the trial court ordered Mr. McKinley to pay a total of $158,180.44 in restitution. (9a). The court earmarked $63,749.44 for the four victims of the charged crimes; it designated the remainder for the victims of uncharged crimes. (30a-31a). This Court granted leave to appeal to consider the constitutionality of a restitution order predicated upon facts that were never submitted to a jury or proven beyond a reasonable doubt. (43a).

A. Factual Background

In early 2011, several businesses and churches in the Battle Creek area reported that air conditioning units had been removed from their properties without their permission. (33a). Surveillance footage from one of these businesses depicted two male subjects removing the units and loading them into an older two-toned GM pickup truck. (39a). The footage also captured a small two-door GM sedan. (39a).

Police soon focused on Mr. McKinley's girlfriend, whose name appeared next to suspicious entries in the logbooks of a local scrap yard. (33a). In their efforts to locate her, they discovered her recent arrest for driving on a suspended license in a truck registered to the defendant's address. (33a, 38a). When police went to that home, they found a GM sedan and a

[1] MCL 750.377a(1)(a)(i).

[2] MCL 750.157c.

pickup truck similar to those shown in the surveillance footage. (39a). Next to the truck lay several condensers and casings that appeared to be from commercial air conditioners. (39a). A search of the defendant's basement revealed wire, copper, and what appeared to be components of air conditioners. (34a, 39a). Police also found bolt-cutters and lopping shears at the top of the basement stairs. (34a, 39a).

Police subsequently identified the defendant's teenaged neighbor, Leroy Eldred, as the second male in the surveillance footage. (14a). After striking a cooperation agreement, Mr. Eldred implicated the defendant in numerous thefts of air conditioning units. (14a). He even drove with the police to point out all of the places they had hit. (14a, 19a).

B. Relevant Procedural History

The prosecution charged Mr. McKinley with four offenses: (1) malicious destruction of personal property over $20,000; (2) larceny over $20,000; (3) receiving and concealing stolen property in excess of $20,000; and (4) inducing a minor to commit a felony. (9a, 33a). The charging instrument named Kellogg Community College, the Seventh Day Adventist Church, the Maranatha Original Church of God, and Rokay Floral as the complainants. (15a, 23a, 35a). The prosecution did not charge Mr. McKinley with any of the other reported thefts. (29a-31a).

At trial, Mr. McKinley's alleged accomplices testified against him pursuant to their plea agreements with the prosecution. (41a). Investigators also testified regarding the results of their search. (34a, 38a-39a). In addition, the jury heard testimony from the representatives of each of the complaining entities. (35a). Kellogg Community College spent $21,447 to replace three missing units. (16a). The Seventh Day Adventist Church also lost three units and spent $7,890 to replace them. (15a). Rokay Floral spent $13,809.44 to replace two cooler condensers. (15a).

Lastly, the Maranatha Original Church of God reported at trial that its replacement costs totaled $16,380, but subsequently reported costs of $20,609 at the restitution hearing. (35a).

The defense cross-examined each of these representatives on the difference between the fair market value of the missing property and its replacement cost. (36a). This is a relevant consideration under the larceny statute, which requires proof of fair market value. (35a) (citing *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984). It is also an important consideration under Michigan's restitution scheme, which requires restitution to be set at fair market value unless it is too impractical to ascertain. MCL 769.1a(3); MCL 780.766(3). The representatives agreed that they were relaying replacement costs, not fair market value. (36a).

The jury acquitted Mr. McKinley of receiving and concealing. (9a, 33a). But the jury found him guilty of larceny, malicious destruction, and inducing a minor to commit those felonies. (9a, 33a). The Court of Appeals would later reverse the larceny conviction due to insufficient evidence of the fair market value of the stolen property. (33a). At sentencing, the trial court imposed concurrent prison terms of 12 to 25 years, but reserved the question of restitution for 28 days. (2a, 9a).

After sentencing, the trial court held a hearing on the amount of restitution to be imposed. (11a). The sole witness at this hearing was the officer-in-charge. (14a). He testified that Leroy Eldred, the co-defendant, had implicated Mr. McKinley in eight other thefts of a similar nature. (14a). He further listed the amount of restitution requested by each of those victims, with no indication as to the fair market value of the stolen property. (14a-19a). The trial court found by a preponderance of the evidence that Mr. McKinley had committed the uncharged crimes. (30a). It ordered Mr. McKinley to pay a total of $63,749.44 in restitution to the four victims of the

charged offenses. (30a). The trial court also assessed a total of $94,431 in restitution to be paid to the victims of uncharged thefts attributed to the defendant by Leroy Eldred. (30a-31a).

On appeal, Mr. McKinley challenged the constitutionality of Michigan's statutory restitution scheme on the grounds that it required restitution to victims of uncharged conduct without affording the jury trial protection of the Sixth Amendment or the Fourteenth Amendment's requirement of proof beyond a reasonable doubt. (40a). Mr. McKinley argued that this violated the rule of *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (1999), which requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (40a). The Court of Appeals, however, held that because Michigan's statutory restitution scheme does not set a specified maximum, the rule of *Apprendi* did not apply. (40a-41a). This Court granted leave to appeal to consider this question. (43a).

SUMMARY OF THE ARGUMENT

Michigan's statutory restitution scheme is unconstitutional because it allows judges to order restitution based on uncharged conduct that was never submitted to a jury or proven beyond a reasonable doubt. Under the Sixth and Fourteenth Amendments to the United States Constitution, any fact that increases the prescribed range of penalties for a crime must be submitted to a jury, and proven beyond a reasonable doubt. US Const, Ams VI, XIV; *Alleyne v United States*, __ US __; 133 S Ct 2151, 2163; 186 L Ed 2d 314 (2013); *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (1999). While judges may exercise discretion within the applicable range, they may not "inflic[t] punishment that the jury's verdict alone does not allow." *Blakely v Washington*, 542 US 296, 304; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

The United States Supreme Court has recently confirmed that the *Apprendi* rule applies to economic penalties. *Southern Union Co v United States*, __ US __; 132 S Ct 2344; 183 L Ed 2d 318 (2012). While the majority did not directly address orders of restitution, it did consider the impact of the Sixth Amendment upon punitive fines. *Id.* at 2348-49. The Court found that there is "no principled basis under *Apprendi* for treating criminal fines differently" than sentences of imprisonment or death. *Id.* at 2350.

Here, the trial court "'inflic[ted] punishment that the jury's verdict alone does not allow." *Id.* at 2350 (quoting *Blakely*, 542 US at 304). The jury found Mr. McKinley responsible for maliciously destroying personal property. (9a). It further determined that the four named complainants incurred more than $20,000 in replacement costs as a result of the charged crimes. (9a, 35a). The trial court required Mr. McKinley to pay restitution for not only those crimes, but also uncharged crimes established by hearsay admitted through the officer-in-charge at a post-trial hearing. (15a-19a). As a result, Mr. McKinley now owes $158,180.44 in restitution. (9a).

This order violates the rule of *Apprendi* and its progeny. Restitution, like punitive fines or terms of imprisonment, has been historically regarded as a form of punishment. Indeed, the majority of jurisdictions that have addressed this issue have found restitution to be punitive. Critically, the Legislature expressed its intent to punish by requiring courts to impose restitution "in addition to or in lieu of any other penalty." MCL 7691a(2); MCL 780.766(2). Restitution is also punitive in its effect. Thus, there is "no principled basis under *Apprendi*" for treating restitution differently than other forms of punishment. *Southern Union*, 132 S Ct at 2350.

The Court of Appeals did not dispute the punitive nature of restitution. (40a-41a). Instead, it found *Southern Union* inapplicable because Michigan's restitution scheme contains "no prescribed statutory maximum." (41a). But this is not accurate. The "statutory maximum" set by the restitution statute is "full restitution" for losses attributable to "the defendant's course of conduct that gives rise to the conviction." MCL 769.1a(2); MCL 780.766(2). The largest possible restitution award, therefore, is "calculated by reference to particular facts," namely, the "course of conduct" underlying the charged offenses. *Southern Union*, 132 S Ct at 2350. Further, the Court of Appeals also failed to account for the recent decision in *Alleyne*, *supra*, which extends the *Apprendi* rule to mandatory minimums. Because restitution is now mandatory in every case, the defendant's "course of conduct" will also trigger a mandatory minimum. Under either formulation, a trial judge cannot rely upon judge-found facts to increase restitution beyond what is authorized by the jury's verdict alone.

I. RESTITUTION IS A FORM OF PUNISHMENT INFLICTED BY THE STATE TO PROMOTE THE GOALS OF DETERRENCE, RETRIBUTION, AND REHABILITATION.

Introduction

The constitutional issues raised in this case require a threshold determination of whether a criminal restitution order constitutes punishment. (43a). The procedural safeguards of the Sixth and Fourteenth Amendments apply only in punitive settings.[3] *Kennedy v Mendoza-Martinez*, 372 US 144, 164; 83 S Ct 554; 9 L Ed 2d 644 (1963). "[P]unishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses[.]" *Id.* at 167.

This threshold question "has been extremely difficult and elusive of solution." *Id.* at 168. To answer it, this Court applies a two-part "intent-effects" test. *People v Cole*, 491 Mich 325, 334; 817 NW2d 497 (2012) (citing the description of the *Mendoza-Martinez* test offered in *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003)). First, this Court assesses whether the legislature intended the law as punishment. *Id.* If so, the inquiry is over and the law is deemed penal in nature. *Id.* If not, courts must proceed to the second step and determine whether the law is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (citations and quotations omitted).

Government-imposed restitution has historically been regarded as punishment. Indeed, the majority of jurisdictions that have addressed this issue have found restitution to be punitive. *See* Part A, *infra* (collecting cases). Against this backdrop, the Legislature created a statutory

[3] The applicability of other constitutional provisions also depend on whether punishment is involved. *See, e.g., Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (Ex Post Facto Clause); *Austin v United States*, 509 US 602, 619; 113 S Ct 2801; 125 L Ed 2d 488 (1993) (Excessive Fines Clause of the Eighth Amendment); *Hudson v United States*, 522 US 93, 105; 118 S Ct 488; 139 L Ed 2d 450 (1997) (Double Jeopardy Clause of the Fifth Amendment).

restitution scheme intended to serve the penological goals of deterrence, retribution, and rehabilitation. *See* Part B, *infra*. It began as an optional condition of probation, giving defendants the chance to own up to their wrongdoing and make their victims whole, subject to their ability to pay. *See, e.g,* 1931 PA 308. Over time, it has evolved into a mandatory condition of every criminal sentence, regardless of the defendant's poverty. *See* 1996 PA 560, 562. While there has been an increased focus on the rights of victims, the statutory text continues to equate restitution with punishment.

Thus, as discussed in Part C, the Legislature intended restitution as punishment. This is reflected in both the plain language of Michigan's statutory restitution scheme and its history. Alternatively, for the reasons discussed in Part D, the restitution is punitive in its effect. Under *Mendoza-Martinez*, therefore, restitution is subject to the procedural protections of the Sixth and Fourteenth Amendments.

Issue Preservation

At the restitution hearing, the defense grounded its constitutional claim on the premise that restitution was punitive. (27a). The trial court "[did] not accept the proposition that the setting of restitution constitutes a penalty phase." (29a). It added, "I don't believe there's any authority for the proposition that . . . [restitution] constitutes a penalty." (29a). The Court of Appeals did not address the question of punishment, but noted that "[t]he purpose of restitution is to make victims whole for the losses they have suffered as a result of a defendant's criminal course of conduct. (41a) (citing MCL 780.766(2) and *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006).

Standard of Review

Whether a statutory scheme inflicts punishment raises questions of constitutional law and statutory construction subject to *de novo* review. *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003); *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012)

Analysis

A. Historically, while civil restitution between private parties has been regarded as non-punitive, restitution administered by the government has always been considered penal in nature.

The concept of restitution is not new. Restitution has long been regarded as a criminal penalty serving purposes such as deterrence, rehabilitation, and retribution. *McCullough v Commonwealth*, 568 SE2d 449, 450-451 (Va App 2002). *See also* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv L Rev 931, 933 (1984) (noting that "restitution has been employed as a punitive sanction throughout history."). The Code of Hammurabi, dating back to the Babylon of 1772 BC, is often cited as the earliest restitution scheme. Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA...*, 73 Fordham L Rev 2711, 2717 (2005); Schafer, *Victim Compensation and Responsibility*, 43 S Cal L Rev 55, 65 (1970). "The Torah, the Code of Hammurabi, ancient English and Germanic law, Greek law, and Roman law all contained graduated scales of compensation for victims of crime." Note, *supra*, at 933 n 18.

As the justice system evolved, governments inserted themselves into the process "and began to demand part of the payment being made from one private party to the other." Kleinhaus, *supra*, at 2717. In medieval England, for example, convicted criminals had to pay monetary compensation to both the victim and the feudal lord. *Id.* at 2717-2718. Gradually, a rift arose between criminal law and civil law. Note, *supra*, at 933. The victim's right to

compensation became predominantly associated with civil tort actions, where the government played only an indirect role. *Id.* In the criminal realm, the concept of restitution "evolved into fines when amounts previously paid to crime victims as restitution became payable to the king instead." *State v Mayberry*, 415 NW2d 644, 647 (Iowa 1987) (citing *State v Hart*, 699 P2d 1113, 1115 (Ore 1985), and Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 Minn L Rev 223, 228 (1965)).

Even as fines became more prevalant, the English common law continued to retain restitution as a part of criminal sentencing. Kleinhaus, *supra*, at 2718. An early American statute did the same, authorizing restitution as a punishment for robbery, larceny, or trespass on tribal land. *Id.* (citing 2 Stat 139 (1802)). In 1913, the U.S. Supreme Court authorized restitution as a condition on a pardon. Note, *supra*, at 934 (citing *Bradford v United States*, 228 US 446; 33 S Ct 576; 57 L Ed 912 (1913)). "By providing for restitution in the penal sections of state codes and authorizing it as a sentencing option in addition to fines or imprisonment or as a condition on parole or probation, today's legislatures have preserved restitution as a criminal penalty." *Id.*

Indeed, the majority of States that have tackled this issue have found restitution to be punitive. *Cox v State*, 394 So 2d 103, 106 (Ala Crim App 1981); *Ortiz v State*, 173 P3d 430 (Alaska Ct. App. 2007); *Eichelberger v State*, 916 SW2d 109, 110-111 (Ark 1996); *People v Shepard*, 989 P2d 183 (Colo App 1999); *Hardy v United States*, 578 A2d 178, 180 (DC 1990); *Spivey v State*, 531 So2d 965, 967 (Fla 1988); *Harris v State*, 413 SE2d 439, 441 (Ga 1992); *Pearson v State*, 883 NE2d 770, 772 (Ind 2008); *State v Corwin*, 616 NW2d 600, 602 (Iowa 2000); *State v Applegate*, 976 P2d 936, 938 (Kan 1999); *Goff v State*, 875 A2d 132 (Md 2005); *Comm. v Casanova*, 843 NE2d 699 (Mass App Ct 2006); *State v Good*, 100 P3d 644, 649 (Mont

2004); *State v Collins*, 510 NW2d 330 (1993); *People v Hall-Wilson*, 505 NE2d 584, 585 (NY 1987); *State v Dillon*, 637 P2d 602 (Ore 1981); *United Bldg Centers v Ochs*, 781 NW2d 79 (SD 2010); *Cabla v State*, 6 SW3d 543, 546 (Tex Crim App1999); *State v Short*, 350 SE2d 1 (WV 1986); *Keller v State*, 723 P2d 1244 (Wyo 1986). A majority of federal appellate courts have reached the same conclusion. *United States v Schulte*, 264 F3d 656, 661 (CA 6, 2001); *United States v Richards*, 204 F3d 177, 213-14 (CA 5, 2000); *United States v Siegel*, 153 F3d 1256, 1260 (CA 11, 1998); *United States v Edwards*, 162 F3d 87, 89-90 (CA 3, 1998); *United States v Baggett*, 125 F3d 1319, 1321-1322 (CA 9, 1997); *United States v Thompson*, 113 F3d 13, 15, n 1 (CA 2, 1997); *United States v Rezaq*, 134 F3d 1121, 1141, n 13 (CA DC, 1998); *United States v Williams*, 128 F3d 1239, 1241 (CA 8, 1997)(same). Even the United States Supreme Court has recognized that "[t]he purpose of awarding restitution" is "to mete out appropriate criminal punishment for [fraudulent] conduct." *Pasquantino v United States*, 544 US 349, 365; 125 S Ct 1766; 161 L Ed 2d 619 (2005).

B. Michigan's statutory restitution scheme is intended to serve the penological goals of deterrence, retribution, and rehabilitation.

1. Initial Version: Restitution as a Condition of Probation

Michigan's statutory restitution scheme traces its roots back to 1931, when the Legislature amended the probation statute to give judges the discretion to make restitution a condition of probation. 1931 PA 308 (amending, *inter alia*, Chapter XI of the Code of Criminal Procedure, now numbered as MCL 771.1 *et seq*). After this amendment, the statute read in relevant part: "The court may impose such other lawful conditions of probation, including restitution in whole or in part to the person or persons injured or defrauded, as the circumstances of the case may require or warrant, or as in its judgment may be meet and proper[.]" *Id.*; *former*

MCL 771.3. This language remained unchanged for half a century, except that "meet and proper" was shortened to "proper." *See, e.g.*, 1957 PA 73; 1978 PA 77; 1980 PA 514.

This Court made mention of this language in *People v Teasdale*, 335 Mich 1, 5-6; 55 NW2d 149 (1952). That case did not involve an order of restitution, but instead addressed the validity of the requirement that the defendants reimburse the prosecution for "costs involved in the apprehension, examination, trial and probationary oversight" of the defendants. *Id.* at 4. The *Teasdale* Court agreed that the statute gave the trial court the authority to impose such costs as a condition of probation, so long as the costs were actually incurred. *Id.* at 5, 7-8. It reasoned that "[t]he evident purpose of the statute is not the punishment of the offender but the reimbursement of the state." *Id.* (quoting *State v Morehart*, 183 NW 960 (Minn 1921)).

The *Teasdale* Court added, in *obiter dictum*, that the same could be said of an order of restitution imposed as a condition of probation. *Id.* at 5-6. No restitution had been ordered in that case; the defendants' act of maintaining a gaming room was not really amenable to such an order. *Id.* at 3. Still, the Court opined, "The theory of the statute clearly is that if the law violator is not punished he properly any be required, as evidence of good faith on his part, to compensate one who has sustained a pecuniary loss because of the unlawful act[.]" *Teasdale*, 335 Mich at 6. Further, although the *Teasdale* Court did not mention it, the version of MCL 771.3 in place at the time contained no language suggesting the intent to punish.

After *Teasdale*, three important developments took place. First, the United States Supreme Court decided *Martinez-Mendoza*, *supra*, which provided a new framework for defining punishment. Second, this Court placed a renewed emphasis on rehabilitation as an important penological goal in Michigan. *People v Lorentzen*, 387 Mich 167, 179-181; 194 NW2d 827 (1972). The Court identified three goals of punishment: (1) rehabilitation; (2)

deterrence of others; and (3) prevention of future crimes. *Id.* at 180. This Court would later reaffirm that "the ultimate goal of sentencing in this state is not to exact vengeance, but to protect society through just and certain punishment reasonably calculated to rehabilitate and thereby "'convert bad citizens into good citizens....'" *People v Schultz*, 435 Mich 517, 532; 460 NW2d 505 (1990).

The most significant post-*Teasdale* development was the creation of a mandatory restitution scheme. When *Teasdale* was decided, restitution was authorized only as a condition of probation. *People v Littlejohn*, 157 Mich App 729, 733; 403 NW2d 215 (1987) (Kelly, P.J., concurring) (citing MCL 771.3). In 1985, however, the Legislature for the first time authorized restitution as a condition of all sentences, not just probationary terms. *Littlejohn*, 157 Mich App at 733. As discussed below, the Legislature did this with an intent to punish.

2. *Updated Version: Expanded but Permissive Scheme*

The Legislature accomplished this through a scheme of several overlapping statutes. It added MCL 769.1a to the Code of Criminal Procedure, permitting restitution for any felony or misdemeanor conviction. *Former* MCL 769.1(1) (as enacted by 1985 PA 89). It also added virtually identical restitution provisions to what is now known as the William Van Regenmorter Crime Victim's Rights Act ("the CVRA"), MCL 780.751 *et seq*, named for the legislator who introduced it. *Former* MCL 780.766(2) (as enacted by 1985 PA 87); *see also* 2005 PA 184. Meanwhile, an expanded version of the probation statute, MCL 771.3, continued to authorize restitution as a condition of probation. *See* 1985 PA 89.

Initially, these provisions made restitution permissive, not mandatory. *Former* MCL 769.1(2) (as enacted by 1985 PA 89); *former* MCL 780.766(2) (as enacted by 1985 PA 87). Early versions of the statutory scheme gave judges the discretion to impose full or partial restitution,

depending upon the defendant's ability to pay. *See People v Grant*, 455 Mich 221, 241; 565 NW2d 389 (1997). In addition, defendants could petition the trial court to cancel outstanding restitution obligations upon a showing of manifest hardship. *Former* MCL 771.3(6) (as modified by 1985 PA 89).

Despite this defendant-centered approach, the Legislature wrote of restitution using the language of punishment. *See* Part C, *infra*. Restitution could be imposed "in addition to or in the place of any other penalty provided by law." *Former* MCL 769.1(1) (as enacted by 1985 PA 89). *See also former* MCL 780.766(2) (as enacted by 1985 PA 87) (permitting restitution "in addition to or in lieu of any other penalty authorized by law"). Further, restitution was considered "part of a sentence." *Former* MCL 771.3(7) (as modified by 1985 PA 89).

This Court examined this version of the statutory restitution scheme in *People v Peters*, 449 Mich 515; 537 NW2d 160 (1995). The *Peters* Court did not squarely address the question of whether restitution amounted to punishment. Rather, the question in that case was whether an order of restitution would abate if the defendant died before his appeal could be heard. *Id.* at 516. This Court's abatement inquiry differed somewhat from the *Mendoza-Martinez* inquiry. Instead of a "punitive versus non-punitive" dichotomy, the abatement inquiry examines whether the sanction is compensatory or non-compensatory. *Id.* at 517. Anything that did not directly compensate for a party's loss fell in the category of "[p]urely punitive sanctions" that would abate upon the defendant's death "because they no longer continue to serve a purpose." *Id.* Compensatory sanctions, on the other hand, would survive because they still served the purpose of making others whole. *Id.*

The *Peters* Court held that restitution fell in the latter category, given its obvious function as a compensatory measure. *Peters*, 449 Mich at 523. It reasoned that "the fact that defendant,

now his estate, will experience some 'financial pain' does not transform the restitution order into a primarily penal sanction." *Id.* To hold otherwise would deny victims their constitutional right to restitution under Const 1963, art 1, §24. *Id.* Thus, nothing in *Peters*, however, states that restitution is not punishment. Rather, *Peters* merely recognizes that restitution serves other goals and is therefore not a "[p]urely punitive sanction[]." *Id.* at 517.

Similarly, this Court did not squarely confront the nature of restitution when it decided *People v Grant*, 455 Mich 221, 224; 565 NW2d 389 (1997). The *Grant* Court construed the statutory scheme as it existed before 1994. *Id.* at 232, n 11. At issue was whether the trial court was required to place on the record its reasons for setting restitution at a particular amount. *Id.* at 223. This Court examined the text of the statute and answered negatively. *Id.* at 244. In a footnote, it added that "requir[ing] a defendant to return victims to something resembling their precrime status contrasts with the policy factors of rehabilitation, deterrence, protection of society, and punishment, that are the general foundation for criminal sentences usually involving a term of imprisonment, a fine, or both." *Id.* at 230, n 10. This footnote, however, constituted *obiter dictum*, as it was unnecessary to the decision in *Grant*. Indeed, the *Grant* Court did not apply the *Martinez-Mendoza* test; it simply asserted that "Although restitution implies a penalty, the line between penal and that which is compensatory is not always clear." *Id.*

3. Current Version: Mandatory Regardless of Ability to Pay

In 1989, a few years after the enactment of the CVRA, voters approved an amendment to the Michigan Constitution giving crime victims the right to restitution. Const 1963 art 1, §24(1). This led to a gradual shift from a defendant-centered approach to a victim-centered approach. In 1994, the Legislature made restitution a mandatory condition of every sentence. 1993 PA 341 (amending MCL 780.766); 1993 PA 343 (amending MCL 769.1). In 1997, it eliminated judges'

discretion to impose anything less than "full restitution," regardless of the defendant's ability to pay. 1996 PA 560 (amending MCL 769.1a); 1996 PA 562 (amending MCL 780.766). More recently, in 2009, the Legislature made defendants liable for the replacement value of lost or damaged property if the fair market value of the property cannot be determined or is impractical to ascertain. 2009 PA 27 (amending MCL 769.1a); 2009 PA 28 (amending MCL 780.766).

These changes imposed an even harsher burden on criminal defendants. Today, MCL 769.1a, MCL 780.766, and its counterparts retain the language of punishment. Restitution must be imposed "in addition to or in lieu of any other penalty." MCL 769.1a(2) (adult felons or misdemeanants); MCL 780.766(2) (adult felons); MCL 780.826(2) (adult misdemeanants). *See also* MCL 712A.30(2) (juveniles); MCL 780.794(2) (same). This is the version of the statutory restitution scheme before the Court in this case.

C. The plain language of Michigan's statutory restitution scheme evinces the Legislature's intent to punish, thereby satisfying the first prong of the *Martinez-Mendoza* test.

The first prong of the *Martinez-Mendoza* test considers whether the Legislature intended restitution as punishment. *See Cole*, 491 Mich at 334. Whether a statutory scheme was intended to be civil or criminal is primarily a question of statutory construction. *Smith*, 538 US at 92. Statutes *in pari materia* are to be read together to determine legislative intent; all statutes addressing the same general subject matter must be considered part of a unified system. *Duffy v Michigan Dep't of Natural Res.*, 490 Mich 198, 206; 805 NW2d 399 (2011). When determining how to apply a statute, this Court discerns the Legislature's intent from its plain language. *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). If that language is unambiguous, this Court presumes that the Legislature intended the meaning clearly expressed

without further judicial construction. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

The Legislature intended restitution to be punitive. Indeed, restitution is "part of the sentence itself." *Cole*, 491 Mich at 335. The Code of Criminal Procedure, specifically MCL 769.1a(2), provides in relevant part:

> [W]hen sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, 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.

The Crime Victim's Rights Act uses virtually identical language in requiring adult offenders to pay restitution "in addition to or in lieu of any other penalty." MCL 780.766(2) (addressing felony convictions); MCL 780.826(2) (addressing misdemeanor convictions). Similarly, juvenile offenders must pay restitution "in addition to or in lieu of any other disposition or penalty authorized by law[.]" MCL 780.794(2).

Significantly, acquitted defendants are not required to pay restitution. Rather, the statutory scheme applies only to defendants who have been "convicted of a felony, misdemeanor, or ordinance violation[.]" MCL 769.1a(2); 780.766(2). Further, there must be a nexus between the restitution ordered and "the defendant's course of conduct that gives rise to the conviction[.]" MCL 769.1a(2); MCL 780.766(2).

The language mandating restitution "in addition to or in lieu of any other penalty" reflects the Legislature's determination that restitution is itself a penalty. In *Cole*, this Court construed similar language in assessing whether lifetime electronic monitoring amounted to punishment. 491 Mich at 336. The *Cole* Court reasoned that because the statutory scheme required lifetime electronic monitoring "[i]n addition to any other penalty[,]" then the Legislature must have

considered lifetime electronic monitoring to be a penalty in its own right. *Id.* (quoting MCL 750.520b(2)(d)). The same logic applies here.

Restitution is not only punitive, but part of the sentence itself. The Legislature directed that trial courts "shall order" restitution "when sentencing a defendant[.]" MCL 769.1a(2). *See also* MCL 780.766(2) (providing that courts "shall order" restitution "when sentencing a defendant convicted of a crime"); MCL 780.826(2) (requiring that courts "shall order" restitution "when sentencing a defendant convicted of a misdemeanor"). If the defendant receives a probationary sentence, restitution becomes a condition of that probation. MCL 769.1a(11); MCL 780.766(11); MCL 780.826(11). If the defendant is sentenced to prison or jail, money is deducted from his or her prisoner account throughout the period of incarceration. MCL 780.830a. These deductions are applied first to restitution before any other debt may be satisfied, as restitution has collection priority over all other obligations. MCL 780.826a. If the prisoner still owes restitution upon his or her release, restitution becomes a condition of parole. MCL 769.1a(11); MCL 780.766(11); MCL 780.826(11). Parolees and probationers who fail to make a good faith effort to pay off their restitution obligations may find themselves back in custody. MCL 769.1a(11); MCL 780.766(11); MCL 791.240a(11).

Taken as whole, this statutory scheme indicates that the Legislature intended restitution to be punitive and "part of the sentence itself." *Cole*, 491 Mich at 335. Because this language is unambiguous, this Court must conclude that the Legislature "intended the meaning clearly expressed" and "[n]o further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Restitution is therefore subject to the procedural protections of the Sixth and Fourteenth Amendments.

D. Alternatively, the financial burdens imposed by Michigan's statutory restitution scheme are punitive in effect, thereby satisfying the second prong of the *Martinez-Mendoza* test.

Because the Legislature considered the assessment to be punitive, no further inquiry is needed. *Cole*, 491 Mich at 336 (citing *Smith*, 538 US at 92). If, however, this Court finds otherwise, the inquiry continues. *Id.* at 334. As a second step, reviewing courts must look beyond the Legislature's label and consider the law's purpose and effects by weighing these seven factors:

(1) Whether the sanction involves an affirmative disability or restraint;

(2) Whether it has historically been regarded as a punishment;

(3) Whether it comes into play only on a finding of scienter;

(4) Whether its operation will promote the traditional aims of punishment—retribution and deterrence;

(5) Whether the behavior to which it applies is already a crime;

(6) Whether an alternative purpose to which it may rationally be connected is assignable for it; and

(7) Whether it appears excessive in relation to the alternative purpose assigned.

Smith, 538 US at 92. If the law is punitive in effect despite the Legislature's intent, it is subject to the procedural protections of the Sixth and Fourteenth Amendments. *Mendoza-Martinez*, 372 US at 168-169.

The *Smith* Court wrote that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" 538 US at 92 (quoting *Hudson v United States*, 522 US 93, 100; 118 S Ct 488; 139 L Ed 2d 450 (1997) (quoting *United States v Ward*, 448 US 242, 249; 100 S Ct 2636; 65 L Ed 2d 742 (1980)). Some of the Justices, however, criticized this standard. Then-Justice Souter observed that the

"clearest proof" standard "makes sense only when the evidence of legislative intent clearly points in the civil direction." *Smith*, 538 US at 107 (Souter, J., concurring in judgment). If the Legislature's intent is ambiguous, there is little sense in deferring to that ambiguity. *Id.* For this reason, he has advocated for a neutral analysis of the challenged statute's purpose and effects, as have Justices Ginsburg and Breyer. *Smith*, 538 US at 114-115 (Ginsburg, J., dissenting with Breyer, J.).

Here, as discussed above, the Legislature expressed its intent to punish when it enacted its statutory restitution scheme. At the very least, nothing in the statute's language or history establishes the opposite proposition with any certainty. It makes little sense to apply a presumption in favor of a non-punitive intent that the Legislature has not clearly expressed.

On balance, six of the seven *Mendoza-Martinez* factors weigh in favor of a finding that restitution is punitive in effect if not in design. First, a restitution order "involves an affirmative disability or restraint[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). Restitution is mandatory, even when the defendant is unable to repay it. MCL 769.1a(2); MCL 780.766(2). It is a condition of every probationary sentence and every term of parole. MCL 769.1a(11); MCL 780.766(11). Accordingly, any willful non-payment can lead to further incarceration. MCL 769.1a(11); MCL 771.3(1)(e); MCL 780.766(11); MCL 791.236(5).

The threat of a longer term of imprisonment counsels in favor of characterizing restitution as punitive. The possibility of additional incarceration led the Alaska Court of Appeals to conclude that "even though restitution orders may further the aim of compensating the victim, these orders also have penal characteristics that cannot be ignored. *Ortiz v State*, 173 P3d 430, 433 (Alaska Ct App 2007). The Supreme Court of South Dakota has also characterized restitution as punitive because of the threat of additional incarceration for wilful non-payment.

United Bldg. Centers v Ochs, 781 NW2d 79, 84 (SD 2010) (holding that a criminal restitution order cannot be discharged in bankruptcy).

As for the second factor, restitution "has historically been regarded as a punishment" for all of the reasons discussed in Part A, *supra*. *Mendoza-Martinez*, 372 US at 168 (citation omitted). *See, e.g.*, Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv L Rev 931, 933 (1984) (noting that "restitution has been employed as a punitive sanction throughout history."). This factor therefore favors the defendant.

As for the third factor, restitution "comes into play only on a finding of scienter[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). Acquitted defendants are not required to pay restitution. Rather, the statutory scheme applies only to defendants who have been "convicted of a felony, misdemeanor, or ordinance violation[.]" MCL 769.1a(2); MCL 780.766(2). Further, there must be a nexus between the restitution ordered and "the defendant's course of conduct that gives rise to the conviction[.]" MCL 769.1a(2); MCL 780.766(2). *See also Grant*, 455 Mich at 236.

As for the fourth factor, restitution "promote[s] the traditional aims of punishment—retribution and deterrence[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). "From the viewpoint of a defendant in a criminal trial, payment of restitution is as much a penalty as payment of a fine." *Keller v State*, 723 P2d 1244, 1246 (Wyo 1986). In fact, restitution is an even more effective deterrent than a fine. *Note*, *supra* at 938. While "[f]ines are fixed arbitrarily and unpredictably," restitution "more directly corresponds to the loss the offender has caused[.]" *Id.* at 938-939. Restitution also serves the goal of retribution. *Id.* at 939. "As punishment, restitution attempts to redress the wrongs for which a defendant has been charged and convicted in court." *Cabla v State*, 6 SW3d 543, 546 (Tex Crim App 1999). Indeed, "[t]he purpose of awarding restitution" is

"to mete out appropriate criminal punishment for [fraudulent] conduct." *Pasquantino v United States*, 544 US 349, 365; 125 S Ct 1766; 161 L Ed 2d 619 (2005).

In *Kelly v Robinson*, 479 US 36, 49; 107 S Ct 353; 93 L Ed 2d 216 (1986), the United States Supreme Court held that the punitive nature of a restitution order prevented it from being discharged in bankruptcy. It identified "imprisonment, fines, and ***restitution***" as "most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Id.* at 49 (emphasis added). It further recognized that "forc[ing] the defendant to confront, in concrete terms, the harm his actions have caused" is "an effective rehabilitative penalty." *Id.* at 49 n 10.

As noted above, the same conclusion has been reached by a majority of the jurisdictions that have addressed the nature of restitution. *See* Part A, *supra*. In Maryland, restitution "is a criminal sanction, not a civil remedy" and "serves the familiar penological goals of retribution and deterrence, and especially rehabilitation." *McDaniel v State*, 45 A3d 916, 920 (Md App 2012). In Oregon, restitution "is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim." *State v Dillon*, 637 P2d 602, 606 (Or 1981). Similarly, Georgia and New York recognize, "'Viewed from the perspective of punishing a defendant, restitution is recognized as an effective rehabilitative penalty because it forces defendants to confront concretely—and take responsibility for—the harm they have inflicted, and it appears to offer a greater potential for deterrence.'" *Harris v State*, 413 SE2d 439, 441 (Ga 1992) (quoting *People v Hall-Wilson*, 505 NE2d 584, 585 (NY 1987)).

In Indiana, "[t]he principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused." *Pearson v State*, 883 NE2d 770, 772 (Ind 2008). Victim compensation is a secondary purpose. *Id.* Similarly,

Kansas recognizes that "[r]estitution is not merely victim compensation but also serves the functions of deterrence and rehabilitation of the guilty." *State v Applegate*, 976 P2d 936, 938 (Kan 1999). Florida also views restitution as "a criminal sanction" with a purpose "not only to compensate the victim, but also to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Spivey v State*, 531 So2d 965, 967 (Fla 1988). Alaska and Colorado have adopted similar positions. *Karr v State*, 686 P2d 1192, 1197 (Alaska 1984) ("Restitution should not only compensate the victim ... but should [also] further the rehabilitation of the offender."); *People v Shepard*, 989 P2d 183 (Colo App 1999) ("[W]hile restitution provides compensation for incurred expenses, it is primarily considered part of a criminal sentence because it advances the rehabilitative and deterrent purposes of sentencing.").

The fifth factor also favors the defendant because "the behavior to which [restitution] applies is already a crime[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). The fact that a statute applies only to behavior that is already and exclusively criminal supports a conclusion that its effects are punitive. *Smith*, 538 US at 105. Here, as discussed above, only a criminal conviction will trigger the obligation to pay restitution.

As for the sixth factor, while restitution serves to make victims whole, that is not a purely non-punitive goal. *Mendoza-Martinez*, 372 US at 168-169. This Court has previously interpreted the restitution statutes as "intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders." *Peters*, 449 Mich at 526. "The compensatory nature of restitution is . . . specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct." *Grant*, 455 Mich at 230. But if compensation was the Legislature's only aim, that goal would be much more easily achieved by using taxpayer money. Indeed, the complainants in this case would have a far greater chance at recovering their

$158,180.44 from the State than they will from an indigent defendant spending the next 12 to 25 years in prison.

The most prominent feature of any restitution scheme is not who receives compensation, but rather who is required to pay and why. As the U.S. Supreme Court has recognized, "the criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole." *Kelly*, 479 US at 52. Restitution orders serve punish and rehabilitate the defendant. Because crime victims have no control over whether restitution is paid or how much is paid, the order operates for the benefit of the State and not for the pecuniary benefit of the victim, as crime victims have no control over the amount of restitution paid, if any. *Id.* at 53.

Thus, restitution's compensatory goals cannot be isolated from its punitive goals. As the Iowa Supreme Court has recognized, restitution serves two purposes. *State v Kluesner*, 389 NW2d 370, 372 (Iowa 1986). Not only does it serve to protect the public by compensating victims, but it also serves to rehabilitate the defendant. *State v Izzolena*, 609 NW2d 541, 548 (Iowa 2000). "Restitution goes beyond revenue recovery and is designed to instill responsibility in criminal offenders." *Id. See also State v Applegate*, 976 P2d 936, 938 (Kan 1999) ("Restitution is not merely victim compensation but also serves the functions of deterrence and rehabilitation of the guilty."). Thus, because the Legislature has subordinated the goal of victim compensation to the goals of deterrence, retribution, and rehabilitation, this factor favors a finding that restitution is non-punitive.

Only the seventh and final factor is not implicated here: "whether [restitution] appears excessive in relation to the alternative purpose assigned[.]" *Mendoza-Martinez*, 372 US at 169 (citation omitted). Restitution orders "must be based on the victim's loss" and, therefore, can never exceed what is needed to compensate the victim. *People v Heil*, 79 Mich App 739, 748;

262 NW2d 895 (1977). But this fact underscores the both the punitive nature of restitution and its deterrent effect: the greater the victim's loss, the greater the defendant's penalty.

In sum, the Legislature intended restitution as punishment, and restitution has a punitive effect. The trial court erred in characterizing restitution as non-punitive. (29a). And because restitution is a criminal penalty, the procedural protections of the Sixth and Fourteenth Amendments apply.

II. MICHIGAN'S STATUTORY RESTITUTION SCHEME IS UNCONSTITUTIONAL INSOFAR AS IT PERMITS THE TRIAL COURT TO ORDER RESTITUTION BASED ON UNCHARGED CONDUCT THAT WAS NEVER SUBMITTED TO A JURY OR PROVEN BEYOND A REASONABLE DOUBT.

Introduction

Over the defendant's objection, the trial court required Mr. McKinley to pay restitution for uncharged crimes established by hearsay admitted through the officer-in-charge at a post-trial hearing. (14a-19a, 24a-26a). The defense maintained that "the current state of the law would require . . . some proof beyond a reasonable doubt." (25a-26a). The prosecutor argued, however, that, "As far as the burden of proof, it's by the preponderance of the evidence. I've met that burden of proof. I don't think I have to show this Court beyond a reasonable doubt that this Defendant was involved in those other incidents." (27a-28a).

The trial court ultimately sided with the prosecution, staying true to this Court's holding in *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997). The *Gahan* Court found that where a defendant's "course of conduct" includes both charged and uncharged crimes, "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *Id.* at 272. The *Gahan* Court also held that the uncharged conduct need not be proven beyond a reasonable doubt "because a sentencing scheme that requires proof by only a preponderance of the evidence passes constitutional muster." *Id.* at 275.

Here, the trial court recognized the possibility that part of its restitution order might be vacated. (23a-24a). Accordingly, it divided its order into separate amounts so that "the Court of Appeals will have before it the specific amount that needs to be stricken." (24a). The trial court ordered Mr. McKinley to pay $63,749.44 to the victims of the charged crimes, and $94,431 to

the victims of the uncharged crimes. (23a-24a, 30a-31a). This Court granted leave to appeal to reconsider *Gahan* in light of the United States Supreme Court's more recent opinions in *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (1999), and *Southern Union Co v United States*, __ US __; 132 S Ct 2344; 183 L Ed 2d 318 (2012).

Issue Preservation

The Court of Appeals correctly analyzed this as a preserved constitutional question because Mr. McKinley objected to the imposition of restitution for crimes which were never charged, submitted to a jury, or proven beyond a reasonable doubt. (25a-27a, 42a). A defendant is entitled to relief from a preserved constitutional error unless the prosecution establishes beyond a reasonable doubt that the error was harmless. *Chapman v California*, 386 US 18, 22-23; 87 S Ct 824; 17 L Ed 2d 705 (1967). *See also Washington v Recueno*, 548 US 212, 221–222; 126 S Ct 2546; 165 L Ed 2d 466 (2006) (holding that *Apprendi* errors are subject to harmless error review).

Standard of Review

This issue presents questions of constitutional law and statutory construction that are subject to *de novo* review. *Cole*, 491 Mich at 330.

Analysis

A. <u>Any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be submitted to a jury and proven beyond a reasonable doubt.</u>

Both the United States and Michigan Constitutions bar deprivations of liberty or property without due process of law. US Const, Am V, XIV; Const 1963, art 1, § 17. These provisions "protec[t] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed

2d 368 (1970). Additionally, criminal defendants are entitled to a fair trial by an impartial jury. US Const, Am VI, XIV; Const 1963, art 1, § 20; *Duncan v Louisiana,* 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Tyburski,* 445 Mich 606, 618; 518 NW2d 441 (1994). "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." *Apprendi*, 530 US at 477 (quoting *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310, 132 L Ed 2d 444 (1995)).

1. *The* Apprendi *Rule: Distinguishing Elements from Sentencing Factors*

In *Apprendi*, the Supreme Court addressed the difficult problem of applying these constitutional protections to sentencing schemes which did not exist at the time of the Framing. *Apprendi*, 530 US at 478. At common law, judges had "very little explicit discretion in sentencing" because felonies were "sanction-specific," providing "a particular sentence for each offense." *Id.* at 479. When a jury handed down a guilty verdict, the judge simply imposed the sentence required by law. *Id.*

The century which followed the Framing saw a "shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Id.* at 481. In 1949, the Supreme Court upheld the use of judge-found facts in setting a sentence "*within limits set by law.*" *Id.* (quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949) (emphasis supplied by *Apprendi* Court). A few decades later, it coined the term "sentencing factor" to distinguish such facts from elements. *McMillan v Pennsylvania*, 477 US 79, 85-86; 106 S Ct 2411; 91 L Ed 2d 67 (1986). The *McMillan* Court held that while elements had to be submitted to a jury and proven beyond a reasonable doubt, sentencing factors did not. *Id.* at 91-93.

The *McMillan* Court acknowledged its "inability to lay down any 'bright line' test" for differentiating between elements and sentencing factors. *Id.* at 91. This was largely due to the absence of pre-Founding statutes employing this distinction, given "the norm of fixed sentences in cases of felony." *Jones v United States*, 526 US 227, 244-245; 119 S Ct 1215; 143 L Ed 2d 311 (1999) (citing sources describing the practices in both England and the colonies). "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 US at 478. But despite the absence of Founding-era authority, the *McMillan* Court recognized at least some limitation on the State's power to relieve itself of its burden of proof by relabeling elements as sentencing factors. *McMillan*, 477 US at 91.

The Court finally defined the scope of this limitation in *Apprendi.* The defendant in that case received a sentence of 12 years' imprisonment under a New Jersey statute that increased the maximum term from 10 years to 20 years if the judge found by a preponderance of evidence that the crime was committed with racial bias. *Apprendi*, 530 US at 470. While the State labeled racial bias as a sentencing factor, the *Apprendi* Court held that it more closely resembled what was historically regarded as an element because it increased the punishment beyond what was authorized by the jury's verdict alone. *Id.* at 483.

Accordingly, the *Apprendi* Court articulated a bright-line rule: "any fact" other than the fact of 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." *Id.* at 490. Its "core concern" related to legislative attempts to "'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." *Oregon v Ice*,

555 US 160, 170; 129 S Ct 711; 172 L Ed 2d 517 (2009) (quoting *Apprendi*, 530 US at 490). The *Apprendi* Court emphasized that while States are certainly free to modernize their sentencing schemes, "practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt." *Apprendi*, 530 US at 483.

2. Defining What Constitutes a 'Statutory Maximum"

The "statutory maximum" for purposes of *Apprendi* rule "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004) (emphasis in original). *See also Cunningham v California*, 549 US 270, 275; 127 S Ct 856; 166 L Ed 2d 856 (2007); *United States v Booker*, 543 US 220, 228; 125 S Ct 738; 160 L Ed 2d 621 (2005). When further fact-finding is required to increase a sentence beyond the statutory maximum, those facts must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 303. While sentencing courts may exercise discretion within statutory limits, they may not "inflic[t] punishment that the jury's verdict alone does not allow." *Id.* at 304.

The Supreme Court has applied this definition of "statutory maximum" in several cases since *Apprendi*. The Court addressed Arizona's death penalty statute in the pre-*Blakely* case of *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). That statute did not authorize a sentence of death based solely on a jury's verdict of guilt. *Id.* at 595-596. Rather, a finding of at least one aggravating circumstance had to be found before death could be imposed. *Id.* at 536 US at 595-596. The *Ring* Court held that because Arizona made this heightened punishment contingent on a particular finding of fact, that fact could only be found by a jury beyond a reasonable doubt. *Id.* at 602. "A defendant may not be 'expose[d] . . . to a penalty

exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* (quoting *Apprendi*, 530 US at 483).

In *Blakely*, a Washington statute exposed the defendant to the possibility of up to ten years in prison for his crime of second-degree kidnapping with a firearm. *Blakely*, 542 US at 298-299. But under Washington's sentencing guidelines, the defendant could not receive a sentence above a "standard range" of 49 to 53 months absent additional fact-finding. *Id.* at 299–300. The *Blakely* Court held that the latter statute set the relevant "statutory maximum" for *Blakely* purposes because it was "the maximum sentence a judge may impose ***solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.***" *Id.* at 303 (emphasis in original). The *Blakely* Court explained, "The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator). *Id.* at 304.

In *Booker*, the Court applied these principles to the federal sentencing guidelines. The jury's findings of fact corresponded to a sentencing range of 210 to 262 months' imprisonment, which the judge could not exceed absent additional fact-finding. *Booker*, 543 US at 227, 233–234. The Court, in an opinion written by Justice Stevens for a five-Justice majority, found "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]." *Id.* at 233.

In *Cunningham*, the Court analyzed California's Determinate Sentencing Law ("DSL') under the rule of *Apprendi*. The DSL provided the judge in that case with three sentencing options: "a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years." *Cunningham*, 549 US at 275. But the DSL also required the judge to

impose the middle term absent additional facts in aggravation or mitigation. *Id.* at 277. The Court held that the middle term constituted the relevant "statutory maximum" for *Apprendi* purposes. *Id.* at 274. Therefore, any facts justifying an upper term had to be found by a jury beyond a reasonable doubt. *Id.* at 288.

3. Ice: *Analyzing Multiple Crimes One at a Time*

There are, of course, limits to *Apprendi*'s reach. In *Oregon v Ice*, 555 US 160, 164; 129 S Ct 711; 172 L Ed 2d 517 (2009), the jury found the defendant guilty of six discrete crimes. *Id.* at 65. This verdict reflected the jury's conclusion that the prosecution had proven each element of the charged crimes beyond a reasonable doubt. *See id.* At sentencing, the court fashioned six individual sentences, each falling within the range authorized by the jury's verdict. *Id.* But it also ran four of those sentences consecutively to one another, invoking an Oregon statute which gave judges the discretion to impose consecutive sentences if they made certain factual findings. *Id.* at 164. This increased the defendant's aggregate sentence by more than twenty years. *Id.* at 166, fn 5.

The defendant appealed, contending that *Apprendi* required a jury determination of the facts required to impose consecutive sentences under Oregon law. *Id.* at 166. The Oregon Supreme Court agreed, reasoning that the imposition of consecutive sentences implicated *Apprendi* because it increased "the quantum of punishment" imposed. *Id.* (quoting *State v Ice*, 170 P3d 1049, 1058 (Ore 2007). The dissent, on the other hand, viewed *Apprendi* as applying only to sentencing enhancements for a "single offense." *Ice*, 170 P3d at 1060 (Kistler, J., dissenting). It explained that "*Apprendi* answers the question what are the elements of a single offense that the state must prove beyond a reasonable doubt. It does not answer the separate

question of how a trial court should aggregate multiple sentences when a jury has found a defendant guilty of multiple offenses." *Id.* (Kitstler, J.).

The U.S. Supreme Court ultimately adopted this view. Consecutive sentencing, it reasoned, did not implicate "*Apprendi*'s core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a ***specific statutory offense.*** *Ice*, 555 US at 490 (quoting *Apprendi*, 530 US at 490) (internal quotation marks omitted in original) (emphasis added). As the *Ice* Court found, the key distinction between its case and the other cases in the *Apprendi* line is that all of the previous decisions "involved sentencing for a discrete crime, not—as here—for multiple offenses different in character or committed at different times." *Id.* at 717. Because the question of consecutive sentencing had historically been left to judges, the Court found no *Apprendi* error. After all, each of the individual crimes had already been submitted to a jury and proven beyond a reasonable doubt.

4. Southern Union: *Extending* Apprendi *to Monetary Penalties*

The United States Supreme Court has recently confirmed that the *Apprendi* rule applies to economic penalties. *Southern Union Co v United States*, __ US __; 132 S Ct 2344; 183 L Ed 2d 318 (2012). While the majority did not directly address orders of restitution, it did consider the impact of the Sixth Amendment upon punitive fines. *Id.* at 2348-49. The Court found that there is "no principled basis under *Apprendi* for treating criminal fines differently" than sentences of imprisonment or death. *Id.* at 2350.

The *Southern Union* case involved a violation of the Resource Conservation and Recovery Act ("RCRA"), 42 USC § 6928(d). *Id.* at 2349. The relevant portion of the RCRA identified several possible penalties for violating its provisions, including "'a fine of not more

than $50,000 for each day of violation.'" *Id.* (quoting § 6928(d)).[4] A jury convicted the corporate defendant of violating the RCRA, but it was unclear whether the jury had found one day of violation or 762 days of violations. *Id.* The trial judge interpreted the jury's verdict as finding a 762-day violation and fined the defendant accordingly. *Southern Union*, 132 S Ct at 2349. The intermediate appellate court, on the other hand, interpreted the jury's verdict as finding only a one-day violation. *Id.* But it upheld the fine, reasoning that it did not matter whether the jury found a one-day or 762-day violation because "*Apprendi* does not apply to criminal fines." *Id.*

The Supreme Court reversed, finding that *Apprendi* does apply to fines and remanding for further proceedings consistent with that conclusion. *Id.* at 2357. The Court reiterated that judges may not "'inflic[t] punishment that the jury's verdict alone does not allow." *Id.* at 2350 (quoting *Blakely*, 542 US at 304). Thus, if the amount of a fine is calculated by reference to a particular set of facts, those facts must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 2350.

Applying this rule, the Court reasoned that if the jury found only a one-day violation, then punishment for 762 days of violation would exceed the "statutory maximum." *Southern Union*, 132 S Ct at 2352. The Court declined to treat fines any differently than death sentences or terms of imprisonment because "[i]n stating *Apprendi*'s rule, we have never distinguished one form of punishment from another." *Id.* at 2351. "Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal "sentence[s]," "penalties," or "punishment[s]" — terms that each undeniably embrace fines." *Id.* (citing *Blakely*, 542 US at 304; *Apprendi*, 530 US at 490; and *Ring*, 536 US at 589).

[4] The statute also authorized imprisonment not to exceed two years or, for certain violations, five years. 42 USCA § 6928(d)(7)(B).

5. The *Alleyne* Reformulation: Shifting Focus from "Statutory Maximum" to "Range of Prescribed Penalties"

Most recently, the Supreme Court modified the rule of *Apprendi* as requiring a jury determination of all facts which set the lower and upper limits of potential punishment. er this new formulation, the procedural protections of the Sixth and Fourteenth Amendments now apply to facts which trigger a mandatory minimum sentence. *Id.* Taken together, *Apprendi* and *Alleyne* now stand for the proposition that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime[,]" which must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 2160.

To reach this result, the *Alleyne* Court overruled its prior decisions in *McMillan*, *supra*, and *Harris v United States*, 536 US 545, 557; 122 S Ct 2406; 153 L Ed 2d 524 (2002). The sentencing judges in both of those cases had found, by a preponderance of the evidence, facts that triggered a mandatory minimum. *McMillan*, 477 US at 81; *Harris*, 536 US at 550-551. In *McMillan*, a case which pre-dates *Apprendi*, the Court had labeled these triggering facts as mere "sentencing factors," not elements which had to be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 91-93. In *Harris*, decided two years after *Apprendi*, the Court found no conflict between *McMillan* and *Apprendi*, because latter case applied only to "facts extending the sentence beyond the statutory maximum." *Harris*, 536 US at 566-567.

In *Alleyne*, however, the Court concluded that "*Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*." *Alleyne*, 133 S Ct at 2158. In that case, the jury found facts subjecting the defendant to a mandatory minimum prison term of five years. *Id.* at 2155. But the judge made additional factual findings that increased the mandatory minimum to seven years and imposed that term. *Id.* at 2155-2156.

The *Alleyne* Court held that these additional facts should have been submitted to a jury and proven beyond a reasonable doubt. *Id.* at 2163. "Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range ***is*** the penalty affixed to the crime . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* at 2160 (internal citations omitted) (emphasis in original).

B. After *Apprendi*, *Southern Union*, and *Alleyne*, the prosecution must submit to a jury and prove beyond a reasonable doubt any fact that exposes the defendant to restitution beyond what is authorized by the jury's verdict alone.

Mr. McKinley stands convicted of maliciously destroying the property of four victims under MCL 750.377a(1)(a)(i). The jury found beyond a reasonable doubt that the four victims incurred replacement costs exceeding $20,000. (9a). But the jury did not pass upon exact measure of replacement costs, nor did it consider the fair market value of the stolen property. (35a). Worse, the jury never considered whether Mr. McKinley was guilty of uncharged crimes against eight other victims. (29a-30a). Yet the trial court's restitution order requires Mr. McKinley to pay all twelve victims a total of $158,180.44. (9a-10a).

By predicating its restitution order on untried facts, the trial court erred. Restitution, like all forms of punishment, is subject to the rule of *Apprendi* and its progeny. Under Michigan's statutory restitution scheme, the lower and upper limits of potential punishment are set by the defendant's "course of conduct." Thus, that conduct must be submitted to a jury and proven beyond a reasonable doubt.

1. *Restitution, like all forms of punishment, is subject to* Apprendi *and its progeny.*

Here, as in *Southern Union* and the other cases in the *Apprendi* line, the trial court "inflic[ted] punishment that the jury's verdict alone does not allow." *Southern Union*, 132 S Ct at 2350. While *Southern Union* only addressed *Apprendi*'s applicability to fines, its logic extends to restitution orders. Restitution, like a fine or a prison term, is a form of punishment. *See* Argument I, *infra*. The *Southern Union* Court made it clear that "[i]n stating *Apprendi*'s rule, we have never distinguished one form of punishment from another." *Id.* at 2351.

Like a fine, restitution is "inflicted by the sovereign for the commission of offenses." *Southern Union*, 132 S Ct at 2350. Michigan's restitution statute applies only to "a defendant convicted of a crime"; courts are forbidden from imposing restitution obligations upon acquitted defendants. MCL 769.1a(2); MCL 780.766(2). Even the *Southern Union* dissenters alluded to the eventuality that *Apprendi* would apply to all monetary penalties, including restitution. *Southern Union*, 132 S Ct at 2363 (Breyer, J., dissenting). Because the concept of punishment "undeniably embrace[s]" restitution, *Apprendi* forbids the imposition of restitution based on facts not submitted to the jury or proven beyond a reasonable doubt.

2. *Under Michigan's statutory restitution scheme, the lower and upper limits of potential punishment are set by the defendant's "course of conduct."*

Over the years, other jurisdictions have voiced three objections to applying *Apprendi* principles to restitution orders. The first—that *Apprendi* simply does not apply to financial penalties—has been obviated by *Southern Union*. *See, e.g., Southern Union*, 132 S Ct at 2357-2359 (Breyer, J., dissenting). The second basis for refusing to apply *Apprendi* to restitution is that "restitution is not a criminal penalty." *United States v Wolfe*, 701 F3d 1206, 1217 (CA 7, 2012). *See also People v Pangan*, 213 Cal App 4th 574, 585 (Cal App 2013) (holding that direct

victim restitution is non-punitive). This rationale is not applicable in Michigan for the reasons discussed in Argument I, *supra*.

The third and most common objection is that "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." *United States v Day*, 700 F3d 713, 732 (CA 4, 2012) (emphasis removed). *See, e.g., United States v Green*, 722 F3d 1146, 1150 (CA 9 2013); *Smith v State*, 990 NE2d 517, 521-522 (Ind Ct App 2013). This was the rationale adopted by the Court of Appeals below. (41a).

While it is true that restitution is variable, it is not without limits. At the floor, judges now have no discretion to impose anything less than "full restitution to any victim of the defendant's course of conduct," regardless of the defendant's ability to pay. 1996 PA 560 (amending MCL 769.1a(2)); 1996 PA 562 (amending MCL 780.766(2)). At the ceiling, restitution is limited to losses caused by "the defendant's course of conduct that gives rise to the conviction." MCL 769.1a(2); MCL 780.766(2). For property crimes, restitution cannot exceed the value of the affected property. MCL 769.1a(3); MCL 780.766(3). Thus, a defendant's course of conduct will set both the mandatory minimum for *Alleyne* purposes and the statutory maximum for *Blakely* purposes.

In one sense, this case is much easier than the typical *Apprendi* case. *Apprendi* and its progeny "tur[n] on the seemingly simple question of what constitutes a 'crime.'" *Apprendi*, 530 US at 499 (Thomas, J., concurring). Answering this question requires an understanding of the relatively nuanced distinctions between "elements," "sentencing factors," and "functional equivalent[s]" of elements." *Id.* US at 494 n 19 (Stevens, J., writing for the majority). The *Apprendi* Court took a single New Jersey statute and found what were essentially two separate

crimes—possession of a firearm with a generically unlawful purpose, and possession of a firearm with a racially biased purpose. *Id. Apprendi*, 530 US at 470, 483. Similarly, the *Blakely* Court found that when Washington's kidnapping statute was considered alongside its sentencing guidelines, there were essentially two different versions of kidnapping—one with "deliberate cruelty" and one without. *Blakely*, 542 US at 300.

Here, in contrast, all of the conduct which triggered Mr. McKinley's restitution obligation fits within the elements of MDOP under MCL 750.377a(1)(a)(i). Thus, this case implicates "*Apprendi*'s core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a ***specific statutory offense.*** *Ice*, 555 US at 490 (quoting *Apprendi*, 530 US at 490) (internal quotation marks omitted in original) (emphasis added). The jury found beyond a reasonable doubt that he committed this crime against the four named complainants. The judge found by a preponderance of the evidence that he committed eight uncharged versions of the same crime. The sentencing court was unquestionably without power to impose separate terms of incarceration for these uncharged crimes. It follows, then, that it was without power to impose restitution based on these uncharged crimes.

The more difficult question is whether *Apprendi* also requires questions of valuation to be submitted to a jury and proven beyond a reasonable doubt. The jury's verdict reflects only its conclusion that the replacement value of the stolen property exceeded $20,000. It did not evaluate the full extent of the losses suffered by the four named complainants. In his application for leave to appeal to this Court, Mr. McKinley wrote that because MCL 769.1a set "full restitution" as the statutory maximum, the judge was free to set restitution at that amount or lower. *See Defendant-Appellant's Application for Leave to Appeal*, at 38. This assertion,

however, fails to account for *Alleyene*, decided one week before the filing of the application. Because the extent of the victims' losses is a mandatory minimum, valuation is now a "functional equivalent" of an element to be found by the jury beyond a reasonable doubt. Because the jury's verdict authorizes only a $20,000 award, the trial court's restitution order does not withstand the rules of *Apprendi*, *Southern Union*, and *Alleyne*.

3. *This Court's decision in* Gahan *conflicts with* Apprendi *and* Southern Union

Gahan, which preceded *Apprendi*, considered the question of "whether 'course of conduct' should be given a broad or narrow construction." *Gahan*, 456 Mich at 271. The Court opted for a broad construction, holding that MCL 780.766(2) "authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction." *Id.* at 270.

The *Gahan* Court rejected the notion that its construction of the restitution statute "was constitutionally repugnant because the crimes by which the other victims were defrauded were not proven beyond a reasonable doubt." *Id.* at 273. It noted that "[t]he United States Supreme Court recently clarified that a sentencing court may consider other conduct, not proven beyond a reasonable doubt, but established by a preponderance of the evidence," and cited *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997). *Id.* at 276, fn 15. Relying on *Watts*, the Court reasoned that "a sentencing scheme that requires proof by only a preponderance of the evidence passes constitutional muster." *Id.* at 275.

The *Watts* decision, however, heavily relied upon the *McMillan* view that all sentencing factors—no matter how critical to the range of potential penalties—need only be proven by a preponderance of the evidence. *Watts* turned largely on the proper construction of the federal sentencing guidelines. *Id.* at 149. Specifically, the *Watts* Court considered whether a sentencing

court could consider acquitted conduct in applying the guidelines scheme in place at that time. *Id.* at 149. The Court answered this question affirmatively because the guidelines instructed judges to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction[.]" United States Sentencing Commission, Guidelines Manual § 1B1.3(a)(2) (Nov 1995). *Watts*, 519 US at 153-154. The *Watts* Court added that this construction withstood constitutional scrutiny, reiterating that "we have held that application of the preponderance standard at sentencing generally satisfies due process." *Id.* at 156 (citing, *inter alia*, *McMillan*, 477 US at 91-92).

Since *Gahan*, *Watts* has been severely limited by *Apprendi* and even more so by *Booker*'s invalidation of the mandatory federal sentencing guidelines. *See, e.g., Booker*, 543 US at 240, fn 4 (Stevens, J., writing for the majority on the merits question) ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases"). *See also United States v Gray*, 362 F Supp 2d 714, 721 (SD W Va, 2005) ("The reasoning in *Watts* . . . was drawn into serious question by the constitutional majority in *Booker*."); *United States v Pimental,* 367 F Supp 2d at 150-51 (D Mass, 2005) (characterizing Justice Stevens' language as questioning *Watts*' underlying proposition). The rule is now clear that facts found by a judge by a mere preponderance of the evidence may not be used to enhance a defendant's punishment beyond the relevant statutory maximum.

For all of these reasons, the restitution statute, as broadly construed by *Gahan*, is unconstitutional. But that does not mean that it cannot be salvaged. Indeed, "it is this Court's role to construe statutes to avoid unconstitutionality, if possible, by a reasonable construction of

the statutory language." *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 275; 731 NW2d 41 (2007) (citing *United States v Harriss*, 347 US 612, 618; 74 S Ct 808; 98 L Ed 989 (1954). This Court can fulfill this function by narrowing the restitution statute's reference to "course of conduct" to include only the facts as found by the jury. For all of these reasons, Mr. McKinley asks this Court to overrule *Gahan* and reduce the total restitution award from $158,180.44 to $20,000.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant Matthew McKinley asks this Honorable Court to find that restitution constitutes punishment subject to the procedural protections of the Sixth and Fourteenth Amendments. Mr. McKinley further asks this Court to overrule *Gahan* and hold that when a particular finding of fact is needed to increase the range of available restitution beyond what the jury's verdict authorizes, that fact must be submitted to a jury and proven beyond a reasonable doubt. Finally, Mr. McKinley asks this Court to reduce the total restitution award from $158,180.44 to $20,000.

Respectfully submitted,

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