

ORIGINAL

STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
STEPHEN L. BORRELLO, P.J., MICHAEL J. KELLY and MARK T. BOONSTRA, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

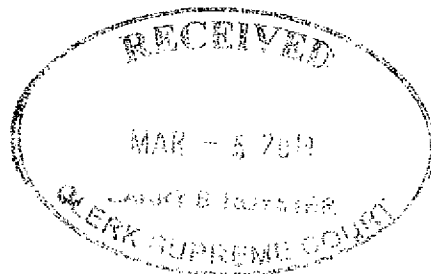
Supreme Court
No. 147391

MATTHEW CHARLES McKINLEY,
Defendant-Appellant.

Court of Appeals No. 307360
Circuit Court No. 2011-0012060-FH

BRIEF ON APPEAL – APPELLEE

DAVID E. GILBERT
Calhoun County Prosecuting Attorney



BY: MARC CROTTEAU (P69973)
Assistant Prosecuting Attorney
161 East Michigan Avenue
Battle Creek, MI 49014-4066
(269) 969-6980

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STATEMENT OF APPELLATE JURISDICTION
AND GROUNDS FOR APPEAL

Plaintiff-Appellee, the People of the State of Michigan, agree that Defendant-Appellant's statement of appellate jurisdiction is substantially complete and accurate.

COUNTER-STATEMENT OF QUESTIONS

I. WHETHER MICHIGAN'S RESTITUTION SCHEME IS DESIGNED TO SECURE THE RIGHTS OF CRIME VICTIMS, RATHER THAN PUNISH DEFENDANT'S?

The Court of Appeals answers "Yes."

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

II. WHETHER THE ANALYSIS DEVELOPED IN *APPRENDI* AND ITS PROGENY APPLIES TO MICHIGAN'S RESTITUTION SCHEME?

The Court of Appeals answers "Yes."

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

COUNTER-STATEMENT OF FACTS

The People agree that Defendant's statement of facts is substantially complete and accurate. Any additional facts will be set forth below as they relate to this matter.

INTRODUCTION

This Court has ordered the parties to address two related issues in their briefs: (1) whether an order of restitution is equivalent to a criminal penalty, and (2) whether Michigan's restitution scheme is unconstitutional insofar as it allows the trial court to order restitution based on facts that were not submitted to the jury for proof beyond a reasonable doubt. As will be demonstrated below, the answer to the first question necessarily answers the second.

The single question that will determine whether Defendant's argument has merit is the underlying nature of restitution in Michigan: if restitution is not punishment, then Defendant loses and no further analysis is required; if restitution is punishment, then Defendant's argument can proceed. Defendant acknowledges this in his brief. "The constitutional issues raised in this case require a threshold determination of whether a criminal restitution order constitutes punishment." Defendant's Brief on Appeal, at 7. In Michigan, restitution is a right of victims, not a criminal penalty. Because of that fact Defendant's constitutional analysis based on *Apprendi* and its progeny does not apply; our State's restitution scheme does not violate the Constitution when it allows judges to set restitution amounts based on facts that are not proven to the jury.

ARGUMENT

I. MICHIGAN'S RESTITUTION SCHEME IS DESIGNED TO SECURE THE RIGHTS OF CRIME VICTIMS, RATHER THAN PUNISH DEFENDANTS.

Standard of Review:

Questions of constitutional law, such as is presented here, are reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

Discussion:

Defendant's entire argument is founded on the notion that restitution in Michigan is designed as a punishment. If he succeeds in proving that premise, then he gets to apply the line of reasoning developed in *Apprendi v New Jersey*,¹ and expanded in the line of cases stemming from *Apprendi*, most notably *Alleyne v United States*² and *Southern Union Co v United States*.³ Because Michigan's restitution scheme is not designed to punish defendants, however, that argument will necessarily fail.

As will be discussed in more depth below, the underlying holding in *Apprendi*, et cetera, is that criminal defendants have a constitutional right to have facts which tend to increase the potential punishments that might be inflicted upon them proven to a jury beyond a reasonable doubt. Defendant is certainly correct that, in some states, restitution is used as part of the protocol used to meet the punishment goals of the state. In Michigan, however, it is not. Our state constitution and our case law both demonstrate, quite clearly, that restitution is a right of

¹ *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

² *Alleyne v United States*, ___ US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013).

³ *Southern Union Co v United States*, 132 S Ct 2344, 2350; 183 L Ed 2d 318 (2012).

crime victims. Because restitution is not a punishment in Michigan, the constitutional analysis never reaches the questions raised by *Apprendi*.

A. The Michigan Constitution and Case Law Demonstrate That Restitution Is Derived From the Rights of Crime Victims.

In Michigan an order of restitution is a right that attaches to the victims of crime. This is made explicit by the state Constitution, which states, "Crime victims . . . shall have the following rights The right to restitution." Const 1963, Art 1, § 24(1). Defendant's attempts to construe restitution as punishment founder on this rock. "Where a statute is clear and unambiguous, judicial construction or interpretation is precluded." *People v Jones*, 190 Mich App 509, 512; 476 NW2d 646 (1991). The language of Art 1, § 24(1) is clear and unambiguous: restitution flows from the rights of crime victims.

Michigan case law further underscores that restitution is not designed as a punishment of defendants, but rather flows from the rights of victims. In particular, *People v Peters* considered this exact issue in the context of whether an order of restitution should abate after the death of the defendant. *People v Peters*, 449 Mich 515; 537 NW2d 160 (1995). The *Peters* Court reasoned that the Crime Victim's Right Act was enacted to preserve a crime victim's right to restitution. *Id.* at 523 and 526. "These laws underscore the rights of crime victims and the compensatory nature of restitution in Michigan." *Id.* at 524. *Peters* addressed and discarded the argument that the unpleasant impact of restitution makes it a criminal penalty. "There is no doubt that an order of restitution would cause this defendant financial pain, but financial pain does not automatically render the order primarily penal." *Id.* at 526.

This Court continued the same reasoning two years later in *People v Grant*, 455 Mich 221; 565 NW2d 389 (1997). *Grant* again noted that restitution is a statutory and constitutional

right afforded to victims. *Id.* at 229-30. The *Grant* Court quoted from *Peters*, saying, “[t]he compensatory nature of restitution is, therefore, specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct.” *Id.* at 530 (internal quotes omitted). In that vein, it is very important to take note of footnote 10 in *Grant*, in which this Court specifically contrasted the goals of restitution with those of punishment.

However, a legislative enactment that requires 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 (citing to *People v Schultz*, 435 Mich 517, 531-32; 460 NW2d 505 (1990).]

While this language is in a footnote, it is strongly supportive of the overall analysis of restitution as being separate from punishment.

Looked at from the other direction, from the standpoint of sentencing rather than of restitution, Michigan precedents further demonstrate that restitution is not a criminal penalty. “Four factors may be taken into consideration to determine the appropriateness of a sentence: rehabilitation, deterrence, the protection of society, and punishment.” *People v Schultz*, 435 Mich 517, 531-32; 460 NW2d 505 (1990) (discussing the Legislature’s sentencing scheme in the context of a narcotics case). To be sure, *Schultz* did not directly address restitution. However, the *Schultz* Court conducted a broad discussion of the goals of sentencing, and restitution is not included in the list of the factors to be considered in determining a just sentence. Nor is there any reference to addressing the rights of victims to compensation. This is further evidence that restitution, in Michigan, does not stem from the theories of punishment that undergird the setting of the defendant’s penalty for his crime.

The conclusion that restitution is a right of the victim, rather than a punishment for the defendant has since been further developed by the Court of Appeals. Take, for instance, *People v Gubachy*:

“The [crime victim’s rights act] was not intended to be narrowly construed merely as a special-purpose replevin action: the focus is consistently not on what a defendant took, but what a victim lost because of the defendant’s criminal activity. No other interpretation is consistent with purpose of the act and its specific provisions.” [272 Mich App 706, 713; 728 NW2d 891 (2006).].

See also *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2011) (“Article 1, § 24 of the Michigan Constitution provides that crime victims have the right to restitution.”); *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008) (following *Grant*); *People v Williams*, 244 Mich App 249, 253; 625 NW2d 132 (2001) (quoting *Peters*).

Nor does the mere fact that a restitution order is entered during the sentencing phase of a criminal case make it a criminal penalty. MCL 780.766(2); MCL 769.1a(2). In order to secure rights of the crime victims, the trial court is required to order defendants to pay full restitution. *Id.* The restitution order must be entered at some point in the process, and the sentencing hearing is an efficient time for the court to consider the issue. The rights of crime victims are still the driving force behind restitution.

This Court, in its order granting leave, pointed the parties at *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997) as a potential source of useful precedent. *Gahan* addresses a set of facts comparable to those in the case at bar, in which Gahan was convicted of one incident in a pattern of similar incidents, and restitution was ordered for the remaining incidents. *Id.* at 267-68. The *Gahan* opinion addresses two main issues: (1) whether a defendant can be ordered to pay restitution to all victims of his course of conduct, or whether restitution is limited to the offenses for which he is convicted; and (2) whether the CVRA provides defendants in Gahan’s

position with sufficient due process. *Id.* at 270-73 and 273-77, respectively. Unlike *Peters* and *Grant*, the opinion in *Gahan* does not directly address the fundamental issue in this appeal, whether restitution constitutes a criminal penalty. While the *Gahan* Court does refer to restitution as a “sentencing scheme” in passing, *id.* at 275, that is merely dicta and not the holding of the case.

B. Defendant’s Analysis of Restitution in Michigan Is Incorrect. His Analysis of Restitution In Other States Is Interesting, But Not Useful To Decide the Nature of Restitution In Michigan.

Defendant’s historical review of the development of restitution is fascinating to read. Ultimately, however, the progression from the Code of Hammurabi to medieval England and beyond tells us less about the nature of restitution in Michigan than does our state constitution and case law. While he is correct that restitution is punitive in nature in some states, he overstates the value of that information in determining the nature of restitution in Michigan. Defendant also misinterprets the nature of Michigan’s restitution scheme. His history of restitution in Michigan does not show that it was ever explicitly a criminal penalty. In fact, the development of Michigan’s restitution scheme over time has resulted in an increasingly victim-centric system, culminating in the present establishment in which the state constitution and mandatory orders of full restitution specifically protect the rights of crime victims.

Defendant’s analysis of Michigan’s restitution scheme is significantly flawed. He notes that the language of the CVRA refers to restitution “in addition to or in lieu of any other penalty,” MCL 780.766(2) and MCL 769.1a(2), but ignores the fact that both *Peters* and *Grant* addressed this language and concluded that restitution was a right of victims, rather than a criminal penalty. See, e.g., *Peters*, 449 Mich at 523-24. Nor does Defendant address the more recent cases such as *Gubachy* that continue the reasoning of *Peters* and *Grant*. Most importantly,

Defendant fails to address Art 1, §24 of our constitution, which states as clearly as possible that restitution flows from the rights of victims.

Defendant relies heavily on this Court's 1952 *Teasdale* decision in his brief, although it is not clear whether he is asserting that *Teasdale* demonstrates restitution was a punishment at the time. *People v Teasdale*, 335 Mich 1; 55 NW2d 149 (1952) (interpreting the then-current probation statute). The People suggest that *Teasdale* announced—albeit in dicta—that restitution was not an instrument of the punishment process. The decision was based on the premise that an order of probation was not a punishment of a defendant, and therefore neither were the imposition of costs and restitution as conditions of probation. *Id.* at 5-6 (“Probation implies a withholding of punishment rather than prescribing it.”). With regard to restitution, the *Teasdale* Court said “[t]he theory of the [probation] statute clearly is that if the law violator is *not punished* he may properly any [sic] be required, as evidence of good faith on his part, to compensate one who has sustained a pecuniary loss because of the unlawful act” *Id.* at 6 (emphasis added). Because *Teasdale* was not decided on the basis of the nature of restitution it is not entirely clear what this Court thought of the issue in 1952. However, the conclusion that *Teasdale* showed restitution was not a criminal penalty is entirely consistent with the current state of the law. Regardless of the nature of restitution in 1952, the amendment to the Michigan Constitution adding Art 1, § 24 has made very clear that restitution is now a right of victims.

The fact that approximately twenty states, as listed in Defendant's brief, have characterized restitution as being punitive in nature in their specific jurisdictions cannot overcome the fact that restitution is not punitive in Michigan. The Michigan Constitution and precedents are just as clear as those in the states Defendant lists. Ours show a restitution scheme

founded on victim-centered, rather than punishment-centered principles; as a result, those states have little persuasive value with regard to Michigan.

The situations in the states Defendant lists are quite different from what we have here in our state. Unlike Michigan those states generally do not see restitution as a right that attaches to crime victims. That is an important distinction. There are only two states on Defendant's list that both view restitution as penal in nature and have restitution enshrined in the state constitution: Alaska and Oregon. See *Ortiz v State*, 173 P3d 430 (Alaska App, 2007), and Alaska Const, Art I, § 24; see also *State v N.R.L.*, 249 Or App 321, 277 P3d 564 (2012), and Oregon Const, Art I, § 42(1)(d).

To take one particular example, Maryland's restitution scheme is not primarily geared to the rights of victims. It is very specifically "designed to effectuate the penological goals of retribution and deterrence, and especially rehabilitation." *McDaniel v State*, 205 Md App 551, 558; 45 A3d 916 (2012) (internal quotes omitted). This is a very different basis from what we have in Michigan. In Michigan, the court *shall* order defendants to pay full restitution to victims. MCL 780.766(2); MCL 769.1a(2). In Maryland, by way of contrast, "[t]he objectives of restitution do not include that the victim must be made whole by the full reimbursement of the victim's loss." *Id.*

Contrast the language of our state Constitution and case law with that of Maryland, where restitution is explicitly a criminal penalty. If, contrary to the language of Art 1, §24 and of *Peters*, et cetera, restitution in Michigan were aimed at accomplishing the punitive goals of the State's sentencing scheme, then full, mandatory restitution would not be important. Similarly, contrast the language of *Teasdale*, in 1952, with that of *Peters*, from 1995, interpreting restitution after the passage of Art. 1, §24(1). "These laws underscore the rights of crime victims and the

compensatory nature of restitution in Michigan.” *Peters*, 449 Mich 524. *Teasdale* was—at best—unclear as to whether restitution was a punishment; *Peters*, and the cases following it, have made very clear that restitution instead flows from the rights of victims.

The language of Art 1, §24 of our Constitution is quite clear: restitution is a right of crime victims. The language of this Court’s precedents is also very clear: restitution is a right of crime victims. It is not intended as a part of a defendant’s penalty for committing his particular crime, but rather to make his victims whole again. As a result, the analysis developed in *Apprendi* and its progeny is not applicable to restitution in Michigan because, as will be demonstrated below, *Apprendi* focuses on the punishment that might be inflicted on a defendant.

ARGUMENT

II. THE ANALYSIS DEVELOPED IN *APPRENDI* AND ITS PROGENY APPLIES TO CRIMINAL PENALTIES ONLY. BECAUSE MICHIGAN'S RESTITUTION SCHEME IS NOT A CRIMINAL PENALTY, BUT INSTEAD FLOWS FROM THE RIGHTS OF CRIME VICTIMS, *APPRENDI* IS BESIDE THE POINT.

Standard of Review:

Questions of constitutional law, such as is presented here, are reviewed de novo.

Armstrong, 490 Mich at 289.

A. *Apprendi* Applies Only to Criminal Penalties.

Apprendi v New Jersey was based on the idea that every fact tending to increase the maximum penalty for a crime is, necessarily, an element of the crime and must be submitted to the jury. *Apprendi*, 530 US at 490. “*Apprendi*’s core concern is to reserve to the jury the determination of facts that warrant punishment for a specific statutory offense.” *Southern Union Co v United States*, 132 S Ct 2344, 2350; 183 L Ed 2d 318 (2012) (internal quotes omitted).

This ruling was rooted in the sixth and fourteenth amendments to the United States Constitution. *Id.* at 476-77. In *Apprendi*, the penalty at issue was an increased prison sentence. *Id.* at 491.

That is clearly a punishment levied against the defendant.

Alleyne v United States extended *Apprendi*’s holding to encompass mandatory minimum sentences, reasoning that increasing the bottom end of a punishment range also increases the punishment inflicted on the defendant. *Alleyne v United States*, ___ US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013). “Facts that increase the mandatory minimum sentence are therefore elements [of the crime] and must be submitted to the jury and found beyond a reasonable doubt.” *Id.* at 2158. Thus, *Alleyne* continues *Apprendi*’s focus on punishment as the heart of the analysis about what constitutes an element of a crime that must be proved to the jury. The Supreme Court

continued that same line of reasoning in *Southern Union Co v United States*, which applied the *Apprendi* analysis to fines as well as imprisonment. *Southern Union*, 132 S Ct at 2357. As in *Apprendi*, the ruling was focused on the punishment that could be inflicted on the defendant. *Id.* at 2351.

B. Because Michigan's Restitution Scheme Is Not A Punishment Inflicted on Defendants, the *Apprendi* Analysis is Not Applicable. Michigan's Restitution Scheme Is Constitutional As Presently Formulated.

Defendant's entire argument regarding the constitutionality of Michigan's restitution scheme is founded on the idea that restitution is a punishment inflicted on defendants. If restitution is designed to punish defendants for their criminal behavior, then Defendant can apply his *Apprendi* analysis, and argue that Michigan's restitution scheme, by increasing a defendant's potential punishment, fails to present an element of the crime to the jury. Defendant has pointed out a number of other states—notably Maryland—where an argument founded on *Apprendi* will carry great weight. However, as was discussed in detail in Section I, *supra*, restitution is not an instrument of punishment in Michigan, and Defendant's *Apprendi* analysis fails.

Because *Apprendi*, et cetera do not apply to restitution in Michigan our state's restitution scheme, as presently formulated, is constitutional. The fact that judges are required to determine the amount of restitution based on facts not proven to a jury is neither here nor there. It is worth noting that a defendant who will be subject to an order of restitution is not without rights. The trial court cannot arbitrarily pick a dollar value and assign it to him. He has the right to a hearing on the issue, in which the amount of restitution must be proven by a preponderance of the evidence. In short, defendants receive appropriate due process before restitution is ordered. See, e.g., *Gahan*, 456 Mich at 277.

Conclusion:

The question that will determine the outcome of this appeal is whether or not Michigan's restitution scheme is based on punishing defendants for their crimes, or whether—instead—it is predicated on validating the rights of crime victims. It is clear from both the Michigan Constitution and our case law that restitution flows from the rights of victims. Because *Apprendi* and its progeny apply only to instances of punishment, Defendant's *Apprendi* analysis is not applicable to the situation presently at bar. Michigan's restitution scheme is constitutional. Defendant's requested relief should be denied.


PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee, the People of the State of Michigan, respectfully request that this Honorable Court deny Defendant-Appellant's request for relief.

Respectfully submitted,

DAVID E. GILBERT (P41934)
Calhoun County Prosecuting Attorney

DATED: March 5, 2014

By: 
MARC CROTTEAU (P69973)
Assistant Prosecuting Attorney
161 East Michigan Avenue
Battle Creek, MI 49014-4066
(269) 969-6980