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Does the Sixth Amendment Apply to Restitution? Two Justices Say the Answer May Be Yes

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Over the past 20 years, the Sixth Amendment right to a jury trial has been extended to sentencing. Beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the U.S. Supreme Court has held that a criminal defendant may not be subjected to an increased term of imprisonment or a fine unless the facts that support the increase have been presented to a jury and proven beyond a reasonable doubt. In recent years, defendants have argued that the reasoning of *Apprendi* applies to restitution, which trial judges currently may impose based solely on post-conviction, judicial fact finding. While federal appellate courts have uniformly rejected efforts to extend *Apprendi* to restitution, in January 2019, two justices of the Supreme Court, Justices Gorsuch and Sotomayor, dissented from a denial of certiorari, maintaining that the Supreme Court should take up the issue. See *Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J.).

In this article, we begin with a discussion of the Supreme Court cases extending the Sixth Amendment's jury-trial right to sentencing and then consider the increased significance and magnitude of restitution in federal criminal sentencing, especially in white-collar cases. Then we analyze Justice Gorsuch's dissent from denial of certiorari in *Hester,* which builds upon the reasoning in dissents in the circuit courts urging for application of *Apprendi* to restitution.

'Apprendi' and the Sixth Amendment. The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. XI. Nearly two decades ago, in *Apprendi*, the Supreme Court held that the Sixth Amendment requires a jury—not a judge—to find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. The *Apprendi* court struck down a state hate-crime law that permitted judges, upon finding certain facts, to impose an "extended term" of imprisonment above an applicable 10-year statutory maximum. Id. at 497.

Four years later, in *Blakely v. Washington*, the court invalidated a similar state statute which allowed judges to impose sentences above statutorily prescribed ranges upon a finding of "substantial and compelling reasons." 542 U.S. 296, 305 (2004). The court clarified that, for *Apprendi* purposes, "statutory maximum" means "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). Under that analysis, a judge who "inflicts punishment that the jury's verdict alone does not allow" runs afoul of the Sixth Amendment. Id. at 304. In *United States v. Booker*, 543 U.S. 220, 243-44 (2005), again relying on *Apprendi*, the court held that the federal Sentencing Guidelines were unconstitutional to the extent they were construed as mandatory based on facts determined by judges, thus resulting in the present "advisory" Sentencing Guidelines.

More recently, the court extended the *Apprendi* doctrine to imposition of fines. In *Southern Union Co. v. United States*, the court stated that there was "no principled basis" to distinguish imprisonment from a fine for purposes of *Apprendi*, noting that *Apprendi* and its progeny "broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'—terms that each undeniably embrace fines." 567 U.S. 343, 350 (2012) (alterations in original).

Federal Restitution Statutes and the Increasing Prevalence of Restitution

Orders. The Mandatory Victim Restitution Act of 1996 (MVRA) requires courts to order restitution for any offense "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss," 18 U.S.C. §3663A(c)(1)(B)—in effect, making restitution mandatory for many white-collar criminal offenses. See Elkan Abramowitz & Jonathan Sack, *Victims' Rights and White-Collar Defense*, N.Y.L.J. (July 11, 2017). Restitution orders have ballooned in number and size since the MVRA took effect. Between 2014 and 2016 alone, federal courts ordered 33,158 defendants to pay a total of $33.9 billion in restitution. See U.S. Gov't Accountability Off., GAO-18-203, *Federal Criminal Restitution* 16 (2018). Courts most commonly order restitution for defendants convicted of traditional white-collar offenses, such as fraud and embezzlement. See id. at 43, App'x I (restitution ordered in 86 percent of embezzlement cases and 74 percent of fraud cases).

Importantly, the MVRA does not set forth a statutory maximum amount of restitution for any particular offense. Rather, the law provides that, upon a defendant's conviction for a qualifying offense, a court "shall order restitution to each victim *in the full amount of each victim's losses* as determined by the court." 18 U.S.C. §3664(f)(1)(A) (emphasis added). To determine the amount of a victim's losses, courts rely on information contained in presentence reports prepared by the Probation Department. See id. §3664(a). Prior to the passage of the MVRA, courts typically could consider a defendant's ability to pay in deciding whether to assess restitution. Now, the law requires courts to fashion restitution orders "without consideration of the economic circumstances of the defendant." Id. §3664(f)(1)(A). This has resulted in a dramatic increase in the amount of uncollectable criminal debt, which, as of 2016, totaled more than $100 billion. See GAO-18-203, at 25.

Imposition of restitution orders can have life-altering consequences for defendants. Enforcement actions to collect unpaid restitution may include property liens, asset forfeiture, and garnishment of wages. Id. at 12. Additionally, nonpayment of restitution "can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 139 S. Ct. 509 (Gorsuch, J.).

Dissent From Denial of Certiorari in 'Hester'. Citing *Southern Union*, defendants have argued that the *Apprendi* doctrine should apply to restitution because an order of restitution is "similar" to a criminal fine. See, e.g., *United States v. Bengis*, 783 F.3d 407, 412 (2d Cir. 2015). No federal appellate court has yet adopted this position, however. In *Bengis*, the Second Circuit held that restitution is not subject to *Apprendi* because, unlike the penalty statutes at issue in *Southern Union*, the MVRA does not have a "determinate statutory maximum that a district court can exceed." Id. at 412-13.

On more than one occasion, defendants have unsuccessfully petitioned the Supreme Court to decide whether *Apprendi* applies to restitution orders. See, e.g., *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013), cert. denied, 571 U.S. 1025 (2013); *United States v. Day*, 700 F.3d 713 (4th Cir. 2012), cert. denied, 569 U.S. 959 (2013). In January 2019, however, Justices Gorsuch and Sotomayor signaled that the issue is sufficiently close that, in their view, the full Supreme Court should consider extending *Apprendi* to restitution. See *Hester*, 139 S. Ct. 509. (Gorsuch, J.)

In *Hester*, Justice Gorsuch wrote that restitution may be subject to the Sixth Amendment in light of *Blakely*'s definition of "statutory maximum," which refers to "the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." Id. (citing *Blakely*, 542 U.S. at 303). Justice Gorsuch pointed out that the "statutory maximum" for restitution "is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss." Id. (emphasis in original). Thus, just as a jury must find any facts underlying an increased prison sentence or fine, Justice Gorsuch stated that "it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order." Id. Justice Gorsuch concluded that this question is worthy of the Supreme Court's review in light of the explosion of restitution orders since the passage of the MVRA, as well as the harsh consequences defendants may face for failure or inability to pay restitution. Id.

Although the government argued that the Sixth Amendment does not apply to restitution because it is not a criminal penalty, Justice Gorsuch found that argument at odds with recent Supreme Court decisions holding that restitution is a "penalty" imposed on a defendant as part of his criminal sentence. Id. (citing *Paroline v. United States*, 572 U.S. 434, 456 (2014)). Justice Gorsuch noted that the government's arguments were irreconcilable with the Sixth Amendment's original meaning, citing larceny cases from the 1800s in which state courts held that a jury had to find the value of stolen property before a judge could order restitution. Id. (citing cases).

Concurring in the denial of certiorari, Justice Alito stated that *Apprendi* and

its progeny represent "a questionable interpretation of the original meaning of the Sixth Amendment." Id. (Alito, J.) In Justice Alito's view, accepted sentencing practice at the time of the adoption of the Sixth Amendment gave trial judges the discretion to make factual findings in order to select an appropriate criminal sentence from within a prescribed statutory range. *Gall v. United States*, 552 U.S. 38, 64-66 (2007) (Alito, J., dissenting).

Majority and Dissenting Opinions in the Circuits. As restitution orders have become larger and more pervasive, the circuit courts have wrestled with whether to extend *Apprendi* to restitution. For example, in *United States v. Leahy*, the Third Circuit, sitting en banc, issued a divided decision holding that *Apprendi* does not bar a judge from determining facts necessary to establish the amount of a restitution order. 438 F.3d 328, 337 (3d Cir. 2006) (en banc).

The *Leahy* majority held that *Apprendi* does not apply to restitution because "the restitution amount authorized by a guilty plea or jury verdict—the full amount of loss—may not be exceeded by a district court's restitution order." Id. In other words, the majority held that post-conviction judicial fact finding merely provides "definite shape to the restitution penalty born out of the conviction" by setting the amount a defendant must pay. Id. Additionally, the majority distinguished restitution from the increased prison sentences challenged in *Apprendi*, *Blakely*, and *Booker*, describing restitution as "a restorative remedy" that, while punitive, "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." Id. at 338.

In a dissent joined by four other judges, Judge McKee took positions similar to those of Justice Gorsuch in *Hester*. Specifically, Judge McKee criticized the *Leahy* majority's reasoning for (i) "pirouetting" around *Blakely*'s definition of "statutory maximum" and (ii) "putting a favorable 'spin' on restitution" as not a serious enough punishment to evoke Sixth Amendment protection. Id. at 341 (McKee, J., dissenting). Judge McKee emphasized that, in *Blakely*, the Supreme Court defined "statutory maximum" as the maximum punishment a judge may impose "*without* any additional findings." Id. at 343 (emphasis in original). In Judge McKee's view, the fact that the MVRA authorizes restitution "in the full amount of the victim's loss" does not end the *Apprendi* inquiry. Rather, because a judge must make an additional factual finding in order to impose restitution in any amount above zero dollars, Judge McKee concluded that *Apprendi* applies. Id. Regarding the majority's characterization of restitution as a "restorative remedy" outside the realm of Sixth Amendment protections, Judge McKee underscored contrary Supreme Court precedents which establish that the purpose of restitution "is not [to compensate the victim], but to mete out appropriate criminal punishment." Id. at 342 (alteration in original) (quoting *Pasquantino v. United States*, 125 S. Ct. 1766, 1777 (2005)). Other circuit judges have dissented on similar grounds. See, e.g., *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (Bye, J., dissenting).

Even unanimous decisions holding that *Apprendi* does not apply to restitution orders have noted the tension between that conclusion and the Supreme Court's extension of *Apprendi*to criminal fines in *Southern Union*. For example, in *United States v. Green*, the Ninth Circuit stated that *Southern Union* "provides reason to believe *Apprendi* might apply to restitution," commenting that precedents to the contrary may not be "well-harmonized" with the Supreme Court's evolving Sixth Amendment jurisprudence. 722 F.3d at 1150-51.

Conclusion. Before the Supreme Court issued its decision in *Booker*, every court that decided the issue held that *Apprendi* did not apply to the federal Sentencing Guidelines. See *Leahy*, 438 F.3d at 345 & n.16 (McKee, J., dissenting) (collecting cases). Armed with Justice Gorsuch's reasoning in *Hester*, at least one criminal defendant convicted of mail and wire fraud has already sought en banc review of the Ninth Circuit's line of cases holding that *Apprendi* does not apply to restitution. See Appellant's Opening Br. at 11, *United States v. George*, No. 18-50268 (9th Cir. Jan. 14, 2019), 2019 WL 262034, at *11. The dissent from denial of certiorari in *Hester* is an important reminder for counsel to preserve legal issues and advance arguments, particularly when they build on existing doctrine, even when similar arguments have failed in the past. Sometimes the law changes in unexpected ways.

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