

APPENDIX

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APPENDIX A

Michigan Supreme Court
Lansing, Michigan

Syllabus

Chief Justice:

Elizabeth T. Clement

Justices:

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:

Kathryn L. Loomis

PEOPLE v NEILLY

Docket No. 165185. Argued on application for leave to appeal March 14, 2024. Decided July 8, 2024.

In 1993, William E. Neilly was convicted by a jury in the Kalamazoo Circuit Court of first-degree felony murder, felon in possession of a firearm during the commission of a felony, and conspiracy to commit armed robbery. Defendant was 17 years old when he and multiple codefendants attempted to rob the victim while armed, resulting in the victim's death. The court, Richard Ryan Lamb, J., sentenced defendant to

the then-mandatory term of life imprisonment without parole (LWOP); the judgment of sentence did not include an order of restitution. The United States Supreme Court subsequently held in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016), that mandatory LWOP sentences for defendants who committed crimes when under the age of 18 years old are unconstitutional and that the new rule applied retroactively; as a result, defendant was entitled to be resentenced as outlined by the Legislature in MCL 769.25a. On resentencing, the court, Pamela L. Lightvoet, J., sentenced defendant to 35 to 60 years in prison instead of LWOP. The trial court also ordered defendant to pay \$14,895.78 in restitution to the victim's family for funeral expenses; the restitution was joint and several with his codefendants. Defendant appealed the restitution order, arguing that it violated the Ex Post Facto Clauses of the United States and Michigan Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10, because the trial court ordered restitution under the current restitution statutes—MCL 780.766(2) of the Crime Victim's Rights Act, MCL 780.751 *et seq.*; and MCL 769.1a(2), the general restitution statute—rather than the former restitution statutes in effect when he was originally sentenced for the convictions in 1993—MCL 780.766(2), as amended by 1988 PA 21, and MCL 769.1a(1), as amended by 1985 PA 89. In an unpublished per curiam opinion issued on November 10, 2022 (Docket No. 359043), the Court of Appeals, SAWYER, P.J., and MARKEY and SWARTZLE, JJ., rejected defendant's argument, reasoning that because restitution is a civil remedy and not punishment, its imposition did not result in an

increase in punishment in violation of the Ex Post Facto Clauses. Defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 511 Mich 978 (2023).

In a unanimous opinion by Chief Justice CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

Restitution imposed under MCL 780.766 and MCL 769.1a is a civil remedy, not a criminal punishment. Because restitution is a civil remedy, application of the restitution statutes to defendants whose criminal acts predate enactment of the restitution statutes does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions. When defendant was resentenced following the *Miller* and *Montgomery* decisions, the trial court ordered restitution under the current restitution statutes instead of those in effect when defendant was originally convicted. Because restitution imposed under the current statutes is not a criminal punishment, the trial court's application of those statutes to defendant during resentencing did not violate ex post facto prohibitions. Accordingly, the trial court's restitution order was affirmed.

1. Article 1, § 24(1) of Michigan's 1963 Constitution provides that crime victims shall have the right to restitution as provided by law. Defendant was originally sentenced under the former restitution statutes, which stated that the imposition of restitution was *discretionary*, not mandatory; when imposing restitution under those statutes, courts merely had to consider the amount of loss sustained by a victim while also considering the defendant's

financial resources and earning ability, as well as the defendant's needs and those of the defendant's dependents. In contrast, the current restitution statutes, MCL 780.766 and MCL 769.1a, both provide that the imposition of restitution is mandatory—specifically that a trial court “*shall order*” a defendant to make full restitution to any victim of the defendant's course of conduct. Further, a trial court is required only to consider the amount of loss sustained by a victim in determining whether to award restitution; there is no requirement that a court consider the defendant's financial resources. Current MCL 769.1a(5) and MCL 780.766(4)(f) specifically allow for the inclusion of the payment of funeral costs in a trial court's restitution order.

2. The Ex Post Facto Clauses of the United States and Michigan Constitutions prohibit the respective governments from passing ex post facto laws. The Ex Post Facto Clauses forbid the retroactive application of a law if the law does any of the following: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence. Relevant here, defendant argued that the trial court's award of restitution under the current statutes violated the Ex Post Facto Clauses because application of the statutes increased the punishment for his crimes. To successfully challenge application of a statute on the basis that it increases the punishment for a crime, a defendant must first prove that the statute imposes a criminal punishment rather than a civil remedy. To make this determination, a court must first consider whether the Legislature intended

the statute as a criminal punishment or as a civil remedy. There is no further inquiry if the Legislature intended the statute to be a criminal punishment because retroactive application of the statute would violate ex post facto prohibitions. If a statute imposes a disability to reprimand the wrongdoer, it is likely that the Legislature intended it to be criminal punishment. In contrast, if a statute imposes a disability to further a legitimate governmental purpose, the Legislature likely intended the statute as a civil remedy. If a court determines that the Legislature intended the statute to be a civil remedy, the court must then consider whether the statutory scheme is so punitive either in purpose or effect that it negates the state's intention to deem it civil. To address this question, Michigan courts consider the nonexhaustive factors set forth in *Kennedy v Mendoza-Martinez*, 372 US 144 (1963): (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether the sanction comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—i.e., 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. In making this determination, a party challenging the statute must provide the clearest proof that the statutory scheme is so punitive either in purpose or effect that it negates the state's intent to deem it civil.

3. Given this legal framework, the Court first considered whether the Legislature intended the restitution statutes as a criminal punishment or as a civil remedy. Although MCL 769.1a and MCL 780.766 do not expressly characterize restitution as a criminal punishment or a civil remedy, the purpose of restitution is to enable victims to be compensated fairly for their suffering rather than to impose additional punishment on offenders; in fact, the statutes effectively shift the burden of losses arising from criminal conduct from the crime victim to the perpetrators of the crimes, making the statutes remedial in nature. The fact that an order of restitution imposes some financial pain on defendants to effectuate this goal does not render restitution penal because the focus of the current restitution statutes is squarely on the victims' losses rather than on further punishment of the defendants. Because of this, two defendants who have committed a crime of the same severity may be ordered to pay restitution in wholly different amounts because of the differences in actual costs to their victims. While the word "penalty" is used in both MCL 769.1a(2) and MCL 780.766(2)—i.e., directing a trial court to order restitution "in addition to or in lieu of any *other* penalty authorized by law"—the Legislature's characterization of restitution as a "penalty" is not dispositive of whether the Legislature intended restitution to be a civil remedy or a criminal punishment. Instead, because compensating victims for the actual costs of their suffering was the Legislature's goal in enacting the restitution statutes, and because, standing alone, the Legislature's characterization of restitution as a "penalty" is not sufficient to find that the Legislature intended the

statutes to be criminal punishment, the Legislature intended the statutes to create a civil remedy. Given that the restitution statutes impose a civil remedy, it was necessary to consider the *Mendoza-Martinez* factors to determine whether the statutory scheme is so punitive either in purpose or effect as to negate the Legislature's intention to deem it civil. In that regard, restitution has historically been considered an equitable, remedial measure designed to prevent the unjust enrichment of wrongdoers; contrary to defendant's argument, restitution is not analogous to criminal fines. Although the restitution statutes impose some affirmative disability or restraint—specifically, by requiring restitution as a condition of parole or probation, and the trial court or parole board may revoke a defendant's probation or parole if the defendant does not comply with the restitution order—the punitive effect is somewhat lessened by the statutory protections that significantly narrow the circumstances in which imprisonment may be imposed. Indeed, while the restitution statutes overall involve an affirmative disability or restraint, the protections afforded to defendants in the statutes and the indirect nature of the disability or restraint minimize the resultant punitive effect. Consideration of two factors—whether the restitution statutes come into play only on a finding of scienter, and whether the behavior to which the restitution statutes apply is already a crime—are generally unhelpful and carry minimal weight because the sanction of restitution always involves a crime and nearly always requires a finding of scienter. Operation of the restitution statutes does not promote the traditional aims of punishment, i.e., retribution and deterrence, because

of the other potential consequence of criminal punishment such as fines and incarceration—particularly, the severity of the defendant’s crimes outside the limited perspective of what harm they caused. Importantly, the restitution statutes have a rational connection to a nonpunitive purpose: compensating victims for losses suffered as a result of the defendant’s crimes. Finally, the restitution statutes are not applied excessively because restitution orders are linked to the amount of provable damages suffered or expected to be suffered by a limited class of victims and the amount is tailored to the specific injury caused by the specific defendant. Additional statutory provisions ensure that the statutes are not unduly severe. Relevant to this analysis, although the current restitution statutes no longer require a trial court to consider a defendant’s ability to pay when setting the restitution amount, the ability to pay is considered when deciding whether a defendant’s probation or parole should be revoked because of a failure to pay. Therefore, taken as a whole, while the imposition of the current restitution statutes has some punitive effect, that effect is not sufficient to overcome the demonstrated legislative intent that restitution is a civil remedy. Because restitution imposed under MCL 780.766 and MCL 769.1a is a civil remedy, not a criminal punishment, application of the restitution statutes to defendants whose criminal acts predate enactment of the restitution statutes does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions. Accordingly, the trial court’s order directing defendant to pay restitution under the current statutes did not violate the Ex Post Facto

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Clauses of the United States and Michigan Constitutions because the order did not constitute a retroactive increase in punishment.

Affirmed.

Michigan Supreme Court
Lansing, Michigan

OPINION

Chief Justice:

Elizabeth T. Clement

Justices:

Brian K. Zahra
David F. Viviano
Richard H.
Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden

FILED July 8, 2024

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWARD NEILLY,

Defendant-Appellant.

No.

165185

BEFORE THE ENTIRE BENCH

CLEMENT, C.J.

At issue in this case is whether the trial court violated federal and state constitutional prohibitions

on ex post facto laws when, during defendant's resentencing proceedings, it ordered defendant to pay restitution pursuant to the current restitution statutes rather than the statutes in effect at the time of defendant's crimes. We hold that because restitution imposed under the current statutes does not constitute punishment, no such violation occurred here.

I. FACTS & PROCEDURAL HISTORY

The factual background of this case is not in issue. Briefly—in 1993, when defendant, William E. Neilly, was 17 years old, he participated with multiple codefendants in an attempted armed robbery that resulted in the killing of 17-year-old Christopher Ricketts. As a result of his involvement, defendant was convicted of first-degree felony murder, conspiracy to commit armed robbery, and two counts of felony-firearm. The trial court sentenced him to the then-mandatory term of life imprisonment without parole (LWOP). The trial court did not order restitution.

Years later, the United States Supreme Court decided *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016), which determined that mandatory LWOP sentences for defendants under 18 years old are unconstitutional and that this new rule applied retroactively. In response, the Michigan Legislature created a statutory procedure to handle the resentencing of persons like defendant who had already been sentenced to such a mandatory LWOP term. See MCL 769.25a.

On resentencing, the prosecutor declined to seek the reimposition of LWOP and instead agreed to a term-of-years sentence of 35 to 60 years' imprisonment. The victim's mother also requested that defendant pay restitution in the amount of \$14,895.78 to compensate the victim's family for funeral expenses. The trial court ultimately imposed the agreed-upon sentence and ordered defendant to pay the requested restitution "joint and several with co-defendants."¹

Defendant appealed the restitution order in the Court of Appeals, arguing that it violated the Ex Post Facto Clauses of the United States and Michigan Constitutions. *People v Neilly*, unpublished per curiam opinion of the Court of Appeals, issued November 10, 2022 (Docket No. 358043). Specifically, defendant argued that because restitution was ordered under the current restitution statutes rather than the previous version of the restitution statutes that were in effect when he committed his crimes, the trial court had improperly increased the punishment for his crimes. Among other differences, the former restitution statutes provided that the imposition of restitution was discretionary, rather than mandatory, as the restitution statutes now provide. Compare MCL 780.766(2), as amended by 1988 PA 21 (providing that the trial court "may order" restitution), and MCL

¹ The codefendants' original judgments of sentence, like defendant's, did not include any restitution order. The codefendants have not received a *Miller* resentencing hearing like defendant, and there is no indication that they have received resentencing hearings for any other reason. Accordingly, defendant is currently the only responsible party whose judgment of sentence includes a restitution order.

769.1a(1), as amended by 1985 PA 89 (providing that the trial court “may order” restitution), with current MCL 780.766(2) (providing that the trial court “shall order” restitution), and current MCL 769.1a(2) (providing that the trial court “shall order” restitution). The Court of Appeals rejected this argument and affirmed defendant’s sentence, reasoning that because restitution is a civil remedy and not punishment, its imposition did not result in an increase in punishment and violate the Ex Post Facto Clauses. *Neilly*, unpub op at 3-5.

Defendant sought leave to appeal in this Court, and in lieu of granting the application, this Court directed oral argument as to

(1) whether restitution constitutes punishment for purposes of the Ex Post Facto Clauses of the United States Constitution, US Const, art I, § 10, and the Michigan Constitution, Const 1963, art 1, § 10; (2) whether application of the current versions of the restitution statutes rather than the statutes in effect when the defendant was convicted “disadvantage[d]” him for purposes of the Ex Post Facto Clauses, *Weaver v Graham*, 450 US 24, 29 (1981); see also *People v Lueth*, 253 Mich App 670, 693 (2002); and (3) if there is an Ex Post Facto Clause violation, what is the appropriate remedy? [*People v Neilly*, 511 Mich 978 (2023) (alteration in original).]

II. LEGAL BACKGROUND

This Court reviews for an abuse of discretion a trial court’s restitution order. *In re McEvoy*, 267 Mich App

55, 59; 704 NW2d 78 (2005). To the extent that the question of restitution involves statutory interpretation and questions of law, our review is de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018).

The Michigan Constitution provides that “[c]rime victims . . . shall have” the right to restitution, “as provided by law[.]” 1963 Const, art 1, § 24(1). See also 1963 Const, art 1, § 24(2) (stating that the Legislature “may provide by law for the enforcement of this section”). Both MCL 780.766, enacted as a portion of the Crime Victim’s Rights Act (CVRA),² and MCL 769.1a, the “general restitution statute,” govern the award of restitution in Michigan. *People v Garrison*, 495 Mich 362, 367; 852 NW2d 45 (2014). Both statutes currently provide that a sentencing court “shall order” a defendant to “make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction” MCL 769.1a(2); MCL 780.766(2).³ Where a victim has been killed as a result of the defendant’s actions, both statutes specifically provide for the inclusion of payment of funeral costs in the trial court’s restitution order. See MCL 769.1a(5); MCL 780.766(4)(f).⁴ Further, MCL 780.767(1) provides that,

² MCL 780.751 *et seq.*

³ Victims include any “individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission” of the crime. MCL 769.1a(1)(b); MCL 780.766(1).

⁴ More specifically, MCL 769.1a(5) provides that the trial court “may require” that the defendant pay the “cost of actual funeral and related services.” MCL 780.766(4), on the other hand,

“[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense.”

These current restitution statutes are less favorable to defendants than previous versions that were in effect at the time of defendant’s crimes. As stated earlier, the former restitution statutes provided that the imposition of restitution was discretionary, rather than mandatory. Further, while current MCL 780.767(1) provides only that the court shall consider the amount of loss sustained by a victim in determining whether to award restitution, former MCL 780.767(1), as amended by 1985 PA 87, required the trial court to also consider “the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant’s dependents, and such other factors as the court considers appropriate.”

Defendant argues that the trial court’s use of the current statutes at his resentencing has increased his punishment in violation of the Ex Post Facto Clauses of the Michigan and United States Constitutions. See US Const, art I, § 10 (providing that “no state shall . . . pass any . . . ex post facto Law”); Const 1963, art 1, § 10 (providing that “no . . . ex post facto law . . . shall

provides that when a victim is injured, the trial court “shall require” that the defendant pay one or more, as applicable, of the enumerated costs and losses, of which the payment of funeral costs is one.

be enacted”).⁵ The Ex Post Facto Clauses forbid “the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence.” *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014).

At issue here is the third type of a violation of ex post facto provisions, i.e., when a law allegedly increases the punishment for a crime. To successfully challenge a statute’s application on this ground, a defendant must first prove that the statute imposes a criminal punishment rather than a civil remedy. See *People v Betts*, 507 Mich 527, 542-543; 968 NW2d 497 (2021). The analysis regarding whether a statute imposes a criminal punishment is a two-step inquiry that begins with the question whether the Legislature intended the statute as a criminal punishment or as a civil remedy. *Id.* at 542. If the Legislature intended the statute to be a criminal punishment, there is no further inquiry because retroactive application of the statute would violate ex post facto prohibitions. *Id.* at 543. However, if the Legislature intended the statute to be a civil remedy, the inquiry continues, *id.*, and the reviewing court must then consider “whether the statutory scheme is so punitive either in purpose or effect so as to negate the State’s intention to deem it

⁵ Because the language of these constitutional provisions is substantially similar and because we see no reason to do otherwise in this case, we interpret these constitutional provisions coextensively. See *In re Certified Question*, 447 Mich 765, 776 & n 13; 527 NW2d 468 (1994).

civil,” *Earl*, 495 Mich at 38 (quotation marks, citation, and brackets omitted). To aid in that analysis, this Court has adopted from the United States Supreme Court the following nonexhaustive factors to be considered (i.e., “the *Mendoza-Martinez* factors”):

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. [*Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963) (citations omitted). See also *Earl*, 495 Mich at 43-44.]

In considering these factors to determine whether a statute “has the purpose or effect of being punitive,” *Earl*, 495 Mich at 44, the Legislature’s manifest intent to create a civil regulation will be rejected only when “a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil,” *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997) (quotation marks, citation, and brackets omitted).

III. APPLICATION

As stated, to determine whether restitution is punishment for purposes of the Ex Post Facto Clauses,

this Court must first consider whether the Legislature intended restitution as a criminal punishment or as a civil remedy. *Betts*, 507 Mich at 542. If a statute imposes a disability for the purpose of reprimanding the wrongdoer, the Legislature likely intended the statute as criminal punishment. *Earl*, 495 Mich at 38-39. On the other hand, if a statute imposes a disability to further a legitimate governmental purpose, the Legislature likely intended the statute as a civil remedy. *Id.* at 39.

Neither MCL 769.1a nor MCL 780.766 expressly characterizes restitution as a criminal punishment or a civil remedy. However, this Court and others have previously recognized that the purpose of restitution is “to enable victims to be compensated fairly for their suffering at the hands of convicted offenders,” rather than to impose additional punishment on offenders. *People v Peters*, 449 Mich 515, 526; 537 NW2d 160 (1995). See also *People v Garrison*, 495 Mich 362, 368; 852 NW2d 45 (2014) (“The Legislature’s statutory direction to order defendants to pay complete, entire, and maximum restitution effectuates this goal of fair compensation.”); *People v Allen*, 295 Mich App 277, 282; 813 NW2d 806 (2012) (“[W]ith the [CVRA, which includes MCL 780.766,] the Legislature plainly intended to shift the burden of losses arising from criminal conduct—as much as practicable—from the crime victims to the perpetrators of the crimes; thus, it is remedial in character”) (quotation marks and citation omitted); *United States v Arutunoff*, 1 F3d 1112, 1121 (CA 10, 1993) (noting that the purpose of a federal restitution statute “is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible,

are made whole for their losses”); *United States v Newman*, 144 F3d 531, 538 (CA 7, 1998) (reasoning that restitution “is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others’ expense”).

The fact that the imposition of restitution imposes some financial pain on defendants to effectuate this goal does not render restitution penal because the focus of the current restitution statutes remains “on the victims’ losses” rather than on further punishment of the defendants. *People v Foster*, 319 Mich App 365, 389; 901 NW2d 127 (2017). See also *Peters*, 449 Mich at 526. Restitution under MCL 769.1a and MCL 780.766 is tailored to the harm suffered by the victim rather than the defendant’s conviction or judgment of sentence. Specifically, a restitution award may require the defendant to pay the victim of the crime the fair market value of property damaged or destroyed, MCL 769.1a(3)(b), MCL 780.766(3)(b); the actual costs of medical services and devices, MCL 769.1a(4)(a), MCL 780.766(4)(a); the actual costs of physical and occupational therapy and rehabilitation, MCL 769.1a(4)(b), MCL 780.766(4)(b); the actual after-tax income loss, MCL 769.1a(4)(c), MCL 780.766(4)(c); the actual psychological and medical treatment for the victim’s family, MCL 769.1a(4)(d), MCL 780.766(4)(d); the actual cost of homemaking and child care expenses, MCL 769.1a(4)(e), MCL 780.766(4)(e); the actual costs of funeral services, MCL 769.1a(5), MCL 780.766(4)(f); the parent’s or guardian’s loss of a tax deduction or tax credit if the victim dies, MCL 780.766(4)(g); or actual income loss by the victim’s spouse, parent, sibling, child, or

grandparent if they left their employment to care for the victim, MCL 780.766(4)(h). These possibilities are all tied to definable, specific costs and losses suffered by the victims of a defendant's crimes. Accordingly, two defendants who have committed a crime of the same severity may be ordered to pay restitution in wholly different amounts because of the differences in actual costs to their victims. A defendant whose victim suffered serious psychological injury and who was the primary caretaker of a family will likely pay more in restitution than a defendant whose victim suffered only a minor injury, despite both defendants being convicted of the same offenses. Conversely, two defendants who have committed crimes of different severity may be ordered to pay restitution in a similar amount because their victims suffered similar actual costs despite the differing severity of the crimes.

The following example illustrates the point. One defendant attempts to shoot and kill the victim, but misses. The victim does not suffer physical injury but attends counseling for six weeks after the event. Another defendant throws a brick at a window of an unoccupied home. Although the first defendant has committed attempted murder and the second defendant has committed trespass, the restitution costs will be similar in both cases if the costs for the counseling and the window replacement are similar. That the amount of restitution is not dependent on the severity of the crime demonstrates that the intent of the statutes is to provide a civil remedy for victims'

injuries rather than to provide a criminal punishment for defendants.⁶

⁶ In reaching this conclusion, we find useful an analogy to California's two restitution statutes. One statute establishes what are referred to as "restitution fines," which are mandatory even in the absence of a victim, and the amount of fine imposed is determined by reference to the length of the defendant's term of imprisonment. *People v Hanson*, 23 Cal 4th 355, 362; 1 P3d 650 (2000). Because the focus of this restitution fine is on the defendant's crime and is not based on the actual harm suffered by the victim, the California courts recognize these restitution fines as criminal punishment. *Id.* On the other hand, the second restitution statute establishes what is referred to as "victim restitution," which is tailored to the specific harm caused to the victim and provides that the order "shall be enforceable as a civil judgment." *People v Harvest*, 84 Cal App 4th 641, 647; 101 Cal Rptr 2d 135 (2000) (quotation marks and citations omitted). Because the victim-restitution statute is focused on the losses suffered by the victim, the California courts recognize "victim restitution" as a civil remedy for which "subsequent enforcement efforts may occur outside the context of the criminal law." *Id.*

While MCL 769.1a and MCL 780.766 are not perfectly analogous to California's victim-restitution statute, they are undoubtedly more similar to that statute than to California's restitution-fines statute. Like California's victim-restitution statute, MCL 769.1a and MCL 780.766 do not require restitution in the absence of a victim; instead, the amount imposed is related to the amount of loss suffered or that will be suffered by the victim, and restitution orders are enforceable in the same manner as a civil judgment, MCL 780.766(13). These characteristics support the goal of compensating the victim. The characteristics of California's restitution-fines statute, on the other hand—including imposing payment without a victim and calculating payment without reference to the actual loss suffered or to be suffered—indicate that the California legislature's primary goal in enacting the restitution-fines statute was punishment of the defendant rather than compensation of the victim.

Despite this recognized purpose of restitution, defendant argues that the Legislature intended the restitution statutes as punishment because the statutes refer to restitution as a “penalty.” Specifically, both MCL 769.1a(2) and MCL 780.766(2) provide that the trial court shall order restitution “in addition to or in lieu of any other penalty authorized by law” According to defendant, the Legislature’s use of the language “*other* penalty,” *id.* (emphasis added), indicates that the Legislature envisioned restitution as a penalty, which is equivalent to punishment. Defendant’s argument garners some support in lay dictionaries defining “penalty” as “punishment.” See, e.g., *Random House Webster’s College Dictionary* (1995) (defining “penalty” as “a punishment imposed or incurred for a violation of law or rule”).

But the two-step inquiry to determine whether a sanction constitutes a “punishment” under the Ex Post Facto Clauses involves more than merely looking at whether the sanction is a “penalty,” and the two terms have not always been treated as equivalent. For example, both our Legislature and our courts have referred to “civil penalties” and “criminal penalties,” demonstrating that the term “penalty” does not carry with it an exclusive allegiance. Compare MCL 333.26424 (referring to “civil penalty”); *People v Duranseau*, 221 Mich App 204, 206; 561 NW2d 111 (1997) (same); *People v Parker*, 275 Mich App 213, 218; 738 NW2d 257 (2007) (same), with MCL 257.204b(2) (specifically referring to “a criminal penalty”); *People v Kevorkian*, 447 Mich 436, 446; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.) (same). Moreover, both Michigan courts

and federal courts have specifically referred to “civil penalties,” rather than “civil remedies,” within the context of ex post facto analyses as being the opposite category to “criminal punishment.” See, e.g., *Hudson v United States*, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997) (“Even in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further”) (quotation marks and citation omitted); *People v Adams*, ___ Mich App ___, ___ NW3d ___ (June 15, 2023) (Docket No. 359017); slip op at 3. Accordingly, while the word “penalty” may be used colloquially in a similar manner to that of “punishment,” “criminal punishment” under the Ex Post Facto Clauses is a legal concept distinct from the term “penalty.” As applied here, the Legislature’s characterization of restitution as a “penalty,” then, is not itself dispositive of whether the Legislature intended restitution to be a civil remedy or a criminal punishment.⁷

⁷ Defendant correctly argues that this Court has previously adopted similar reasoning in *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012). There, this Court held that the Legislature’s characterization of lifetime electronic monitoring as a “penalty”—through the similar statutory language “in addition to the penalty” and “in addition to any other penalty”—“indicates that the Legislature intended that lifetime electronic monitoring would itself be a penalty, in addition to the term of imprisonment imposed by the court.” *Id.* This Court relied on that language to conclude that lifetime electronic monitoring was criminal punishment. *Id.* at 335-336. But this Court also relied on the Legislature’s inclusion of lifetime electronic monitoring in the portion of the criminal sexual conduct statutes that also discussed the terms of imprisonment and fines for offenders and that the statutes specifically provided that the trial court “shall

Because the goal of the Legislature in enacting the restitution statutes was to compensate victims for the actual costs of their suffering, and because the Legislature’s characterization of restitution as a “penalty” is not sufficient standing alone to find that the Legislature intended these statutes to be criminal punishment, we conclude that the Legislature intended the statutes to create a civil remedy. Having so concluded, we must next determine “whether the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil.” *Earl*, 495 Mich at 38 (quotation marks, citation, and brackets omitted). To do so, we consider each relevant *Mendoza-Martinez* factor in turn. *Betts*, 507 Mich at 549-562.

First, we consider whether restitution has “been regarded in our history and traditions as a form of criminal punishment.” *Earl*, 495 Mich at 45. Restitution “has been considered an equitable,

sentence the defendant to lifetime electronic monitoring”—factors that are not present here. *Id.* (quotation marks and citation omitted). Without these additional circumstances and given the Legislature’s and the courts’ indiscriminate use of the term “penalty,” we are not persuaded the same reasoning applies here. Additionally, as noted above, in *Peters*, 449 Mich at 523-526, we held that restitution serves a primary “compensatory,” as opposed to “penal,” purpose. There, this Court considered “whether an order of restitution should abate on the death of [the] defendant,” which ultimately depended on whether the purpose of restitution was compensatory or penal. *Id.* at 523. Defendant has not explained how this Court could hold that restitution is punishment and yet remain consistent with *Peters*’s conclusion that restitution is compensatory. Nor has he argued that *Peters* should be overturned.

remedial measure designed to prevent the unjust enrichment of wrongdoers,” *Newman*, 144 F3d at 541, and equity “historically excludes punitive sanctions,” *Liu v Securities & Exch Comm*, 591 US 71, 74; 140 S Ct 1936; 207 L Ed 2d 401 (2020). Defendant nonetheless argues that this factor supports a finding that restitution is punitive because it is analogous to criminal fines, which have been historically considered punitive. But criminal fines—even as they existed decades and centuries ago—are demonstrably different than restitution. The state, not the victim or society, is the beneficiary of criminal fines. Cf. *People v Konopka (On Remand)*, 309 Mich App 345, 372-373; 869 NW2d 651 (2015) (noting that where an imposed cost is designed to benefit “the court’s operation rather than to punish convicted defendants,” the imposed cost is more likely to be civil). Further, criminal fines are based on the defendant’s criminal conduct, *Earl*, 495 Mich at 45, rather than the specific and actual harm suffered by the victim. These fundamental differences between criminal fines and restitution defeat defendant’s attempted analogy.⁸

⁸ Defendant argues that restitution is similar to criminal fines because restitution payments are sometimes paid to the state. See MCL 780.766(21). However, this is only true “[i]f a person or entity entitled to restitution under this section cannot be located, refuses to claim the restitution within 2 years after the date on which he or she could have claimed the restitution, or refuses to accept the restitution[.]” *Id.* Under these circumstances, the restitution is deposited in the crime victim’s rights fund, and “a person or entity entitled to that restitution may claim that restitution any time by applying to the court that originally ordered and collected it.” *Id.* Accordingly, any restitution payments made to the state are earmarked to serve the scheme’s

Second, we consider “[w]hether the sanction involves an affirmative disability or restraint[.]” *Mendoza-Martinez*, 372 US at 168. Under this factor, “we inquire how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” *Smith*, 538 US at 99-100. Here, we disagree with the conclusion of the Court of Appeals⁹ that the imposition of restitution involves no affirmative disability or restraint. Because restitution is required as a condition of parole or probation, the trial court or parole board may revoke a defendant’s probation or parole if the defendant has failed to comply with the restitution order. MCL 780.766(11); MCL 769.1a(11). In other words, a defendant may be imprisoned as a result of his failure to comply with the restitution order—and, as we have previously recognized, “[i]mprisonment is the ‘paradigmatic’ affirmative restraint[.]” *Betts*, 507 Mich at 554, quoting *Smith v Doe*, 538 US 84, 100; 123 S Ct 1140; 155 L Ed 2d 164 (2003). Cf. *Risner v Ohio Dep’t of Natural Resources*, 2017-Ohio-7988, ¶ 37; 98 NE3d 1104 (Ohio App, 2017) (finding that this factor did not support a holding of criminal punishment where the failure to pay restitution could result only in the revocation of a hunting license and not imprisonment). However, this punitive effect is somewhat lessened by the statutory protections offered to the defendant in such a situation. Specifically, the statutes allow the

purpose of compensating victims and are not collected or used for other purposes.

⁹ *Neilly*, unpub op at 4.

revocation of probation or parole only if “the defendant has not made a good faith effort to comply with the order,” and directs the trial court or parole board to “consider the defendant’s employment status, earning ability, and financial resources, the willfulness of the defendant’s failure to pay, and any other special circumstances that may have a bearing on the defendant’s ability to pay” when making that revocation determination. MCL 780.766(11); MCL 769.1a(11). Accordingly, while the restitution statutes pose a potential affirmative restraint of imprisonment, they also significantly narrow the circumstances in which imprisonment may be imposed.

Beyond the threat of imprisonment, the imposition of restitution poses other restraints. The United States Supreme Court has previously held that administratively imposed financial sanctions “do not involve an ‘affirmative disability or restraint,’ as that term is normally understood.” *Hudson*, 522 US at 104. We believe that restitution under MCL 769.1a and MCL 780.766 is distinguishable. A restitution order is considered a “lien against all property of the defendant,” MCL 769.1a(13); MCL 780.766(13), and thus can inhibit a defendant’s freedom to sell and acquire property until the restitution order is resolved. Restitution also may cause substantial economic disadvantage to a defendant, especially an imprisoned defendant with limited earning ability. As a result, the effects of restitution under our statutes may be felt more significantly than the administrative sanctions imposed in *Hudson*. See *Smith*, 538 US at 99-100. But any disability or restraint resulting from the imposition of restitution is generally more minor and indirect than the sanction of imprisonment. See *id.*

Overall, we hold that the restitution statutes involve an affirmative disability or restraint but that the protections afforded to the defendant in the statutes and the indirect nature of the disability or restraint minimize the resultant punitive effect.

Third and fourth, we consider “whether [the restitution statutes] come[] into play only on a finding of *scienter*,” and “whether the behavior to which [the restitution statutes] appl[y] is already a crime[.]” *Mendoza-Martinez*, 372 US at 168. Both this Court and the United States Supreme Court have found these factors “generally unhelpful,” *Earl*, 495 Mich at 48, and “of little weight,” *Smith*, 538 US at 105, as applied to sanctions imposed based on past criminal conduct because such sanctions always involve a crime and nearly always require a finding of *scienter*. The same is true here because restitution may only be ordered after a defendant has been convicted of a criminal offense. Accordingly, we similarly determine that these factors carry minimal weight in our analysis.¹⁰

Fifth, we consider “whether [the] operation [of the restitution statutes] will promote the traditional aims of punishment—retribution and deterrence[.]” *Id.* As defendant argues, it is possible that imposing restitution on defendants may deter future crimes as an additional negative consequence of conviction. However, “in light of the other potential consequences of criminal punishment, such as . . . fines . . . and incarceration,” *Earl*, 495 Mich at 46, restitution is

¹⁰ Indeed, neither of the parties identified these factors as relevant to the present analysis.

unlikely to have a substantial deterrent effect. Further, while restitution may appear retributive because it is an additional negative consequence for a convicted defendant, its focus—as already discussed—is alleviating the harm suffered by the victim rather than punishing the actions of the defendant. See *People v Grant*, 455 Mich 221, 230 n 10; 565 NW2d 389 (1997) (“[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.”). The restitution statutes allow recovery of specific and identifiable losses, and they do not consider the severity of the defendant’s crimes outside the limited perspective of what harm they caused.

Defendant identifies MCL 780.766(5) as a particularly retributive aspect of the restitution statutes. That provision allows the trial court to order “up to 3 times the amount of restitution” if the crime results in death or serious impairment of a bodily function. While this provision standing alone could fairly be viewed as punitive rather than compensatory, it is noteworthy that the award is still based on the initial calculation of harm suffered by the victim and may also be characterized as recognition that the continuing and future monetary cost of such a devastating injury is difficult to estimate. We find that, in light of the surrounding provisions explicitly tying restitution to the amount necessary to compensate the victim, this provision alone does not tip the scales toward finding restitution punitive as a general

matter. Moreover, the trial court in this case did not triple the amount of restitution owed and only ordered defendant to pay restitution equal to the actual costs of the decedent's funeral arrangements. Accordingly, as with the deterrent effect of the restitution statutes, we conclude that the retributive effect of the restitution statutes is also minimal.

Sixth, we consider whether the restitution statutes have “a rational connection to a nonpunitive purpose.” *Betts*, 507 Mich at 558. The United States Supreme Court has described this factor as “[m]ost significant.” *United States v Ursery*, 518 US 267, 290; 116 S Ct 2135; 135 L Ed 2d 549 (1996); *Smith*, 538 US at 102. As discussed, the restitution statutes’ purpose is to compensate victims for the losses suffered as a result of a defendant’s crimes, which is a nonpunitive purpose. See *Earl*, 495 Mich at 43 (noting that the “regulatory purpose” of the CVRA, which includes MCL 780.766, is “to protect the health and safety of Michigan crime victims”); *Peters*, 449 Mich at 524 (explaining that Const 1963, art 1, § 24 and the CVRA “underscore the rights of crime victims and the compensatory nature of restitution in Michigan”); *Grant*, 455 Mich at 230 n 10. By mandating compensation, the statutes obviously have a rational connection to that purpose.

Seventh, and finally, we consider “whether [application of the restitution statutes] appears excessive in relation to the alternative purpose assigned . . .” *Mendoza-Martinez*, 372 US at 169. We conclude that the restitution statutes are not excessive. Under these statutes, restitution orders are limited to defendants who have been convicted of a crime. MCL 780.766(2); MCL 769.1a(2). The amount

of restitution is linked to the amount of provable damages suffered or expected to be suffered by a limited class of victims. MCL 780.766(1) and (3) through (8); MCL 769.1a(1)(b) and (3) through (8). The statutes also limit the type of recoverable damages to specific losses, including medical and related professional services, physical and occupational therapy and rehabilitation, after-tax income loss, psychological and medical treatment for the victim's family, and homemaking and child care costs. MCL 780.766(3) through (8); MCL 769.1a(3) through (8). Because the amount recoverable is limited to certain types of harm suffered and certain categories of victims and because the amount is tailored to the specific injury caused by the specific defendant, the restitution statutes are not applied excessively.¹¹

Additional statutory provisions ensure that the restitution statutes are not unduly severe. Although the restitution statutes no longer require a trial court to consider the defendant's ability to pay when determining the restitution amount, the defendant's ability to pay *is* considered when deciding whether a defendant's probation or parole should be revoked

¹¹ Defendant argues that restitution is excessive because a court is sometimes required to order restitution to third parties who are not the victims of the crime, such as insurers. See MCL 780.766(8). However, a third party's right to restitution is limited to reimbursement for compensation to a victim "for a loss incurred by the victim," or for "the costs of services provided . . . to the victim as a result of the crime." *Id.* Ordering restitution for third parties in these circumstances reasonably serves the statute's compensatory purpose by encouraging more prompt and complete compensation for victims.

because of a failure to pay. MCL 780.766(11); MCL 769.1a(11). The restitution statutes also allow a defendant to repay restitution in the form of services, if the victim consents, providing the defendant greater flexibility in resolving the restitution order. MCL 780.766(6); MCL 769.1a(6). The statutes also allow the defendant to petition the trial court to modify the method of payment in cases of undue hardship. MCL 780.766(12); MCL 769.1a(12).

As the United States Supreme Court has remarked, the *Mendoza-Martinez* factors “may often point in differing directions”—as they do to some extent here. *Mendoza-Martinez*, 372 US at 169. However, the Legislature’s intent that the restitution statutes create a civil remedy rather than a criminal punishment can only be overcome by “the clearest proof” of the punitive effect of the statutes, as shown through the *Mendoza-Martinez* factors. *Hendricks*, 521 US at 361 (quotation marks and citation omitted). Here, although the restitution statutes impose some affirmative disability and are connected to criminal activity, a majority of the *Mendoza-Martinez* factors support a conclusion that the punitive effect of the restitution statutes is minimal. Accordingly, the aggregate punitive effects of the restitution statutes do not negate the state’s intention to deem it a civil remedy. Restitution imposed under MCL 780.766 and MCL 769.1a is not a criminal punishment, and so its imposition on defendant does not violate

constitutional ex post facto protections. See *Earl*, 495 Mich at 37.¹²

IV. CONCLUSION

In enacting the restitution statutes, the Legislature intended to create a civil remedy. Although the imposition of these statutes has some punitive effect, that effect is not sufficient to overcome the demonstrated legislative intent. Accordingly, the imposition of restitution is not punishment. Given this conclusion, the trial court's application of the current restitution statutes on defendant during resentencing does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions because it does not constitute a retroactive increase in punishment. See *id.* We affirm.

Elizabeth T. Clement
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden

¹² We note that, even if defendant had successfully proved that the imposition of restitution under the current statutes constituted criminal punishment and that the statutory changes here increased the punishment for his offense, the proper remedy would be a remand for resentencing under the statutes in effect at the time defendant committed his crimes—not a vacation of the restitution order, as defendant argues.

APPENDIX B

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED November 10, 2022
Plaintiff-Appellee,	
v	No. 358043
WILLIAM EDWARD NEILLY,	Kalamazoo Circuit Court LC No. 1993- 000756-FC
Defendant-Appellant.	

Before: SAWYER, P.J., and MARKEY and SWARTZLE, JJ.
PER CURIAM.

Defendant appeals as of right the trial court’s imposition of restitution at resentencing. We affirm.

In 1993, defendant, along with three other individuals, was involved in the robbery and shooting death of a 17-year-old individual. Defendant was convicted of first-degree felony murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a felony. Defendant, who

was 17 years old at the time of the offense, was sentenced to life imprisonment without the possibility of parole for the first-degree felony-murder conviction. Defendant was not ordered to pay restitution.

Following the United States' Supreme Court's decision in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) and the enactment of MCL 769.25a, defendant was set to be resentenced for the first-degree felony-murder conviction. Defendant and the prosecution agreed to a sentence of 35 to 60 years' imprisonment for the felony-murder and conspiracy convictions. Before the resentencing hearing was held, the victim's mother requested that defendant pay restitution of \$14,895.78 for funeral expenses. At the conclusion of the hearing, the trial court ordered that defendant pay restitution in the amount requested.

On appeal, defendant argues that the imposition of restitution at resentencing was a violation of the Ex Post Facto Clause of the Michigan¹ and United States² Constitutions because defendant was sentenced under the current version of the restitution statutes, and not the version of those statutes that was in effect at the time of defendant's original sentencing in 1993. We disagree.

Generally, we review an order of restitution for an abuse of discretion. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). "[W]hen the determination of restitution involves statutory

¹ Const 1963, art 1, § 10.

² US Const, art I, § 9.

interpretation, the review is de novo.” *People v Byard*, 265 Mich App 510, 511; 696 NW2d 783 (2005). We review constitutional questions de novo. *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015).

An order of restitution is governed in part by MCL 780.766(2). The current version of MCL 780.766(2) states as follows:

Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction or to the victim’s estate.^[3]

In 1993, this statute was largely the same, except that it provided that the trial court *may* order restitution, instead of requiring the trial court to order restitution. MCL 780.766(2), as amended by 1988 PA 21.

Additionally, in the 1993 version of MCL 780.767(1), the trial court was required to consider the financial resources and earning ability of the defendant when determining whether to order restitution and the amount of that restitution. MCL 780.767(1), as amended by 1985 PA 87. That consideration is not

³ The current version of MCL 769.1a(2) is nearly identical with the current version of MCL 780.766(2). Like MCL 780.766(2), the version of MCL 769.1a(2) in effect in 1993 allowed, but did not require, that the trial court order restitution. MCL 769.1a(2), as amended by 1985 PA 89.

included in the current version of MCL 780.767(1). In the current version, the trial court is only instructed to consider the amount of loss sustained by the victim when determining the amount of restitution. MCL 780.767(1).

For the application of a criminal or penal law to violate the Ex Post Facto Clause of the Michigan or United States Constitutions, two elements must be present: “it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.” *Weaver v Graham*, 450 US 24, 29; 101 S Ct 960; 67 L Ed 2d 17 (1981). However, a statute does not violate the Ex Post Facto Clause of either the United States or Michigan Constitutions unless, among other things, the law increases the punishment for a crime.⁴ *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014); see also *Weaver*, 450 US at 29 n 12. The Supreme Court enumerated a two-step analysis for determining whether a law is a “punishment” and, therefore, is capable of violating the Ex Post Facto Clause:

The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. If the Legislature’s intention was to impose a criminal punishment,

⁴ Other instances in which a law can be found to violate the Ex Post Facto Clause are when it “(1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; . . .or (4) allows the prosecution to convict on less evidence.” *Earl*, 495 Mich at 37. Those instances are not applicable to this case.

retroactive application of the law violates the Ex Post Facto Clause and the analysis is over. However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Stated another way, even if the text of the statute indicates the Legislature's intent to impose a civil remedy, we must determine whether the statute nevertheless functions as a criminal punishment in application. [*Earl*, 495 Mich at 38 (quotation marks and citations omitted).]

However, if this Court determines that the legislative intent was to impose a civil penalty, then the statute will be deemed to be a punishment only if the defendant shows by "the clearest proof" that the statute is so punitive either in purpose or effect so as the statute functions as a criminal penalty. *People v Betts*, 507 Mich 527, 543-544; 968 NW2d 497 (2021).

There is conflicting authority regarding whether the purpose of restitution was to serve as a punishment. This Court has held that the purpose of restitution is to compensate the injured party. *People v Schluter*, 204 Mich App 60, 63; 514 NW2d 489 (1994). But this Court also concluded on the basis of the language of MCL 780.766(2) that restitution is part of the penalty imposed by the trial court. *Id.* at 65. In the context of determining whether restitution violated a defendant's protection against double jeopardy, this Court held that "the trial court's order of restitution was not in excess of the punishment intended by the Legislature." *People v Dewald*, 267 Mich App 365, 385;

705 NW2d 167 (2005). The Michigan Supreme Court has held that, although the defendant argued that a restitution order was a penalty because it forced him to pay a large sum of money, the fact that the restitution order would cause the defendant financial pain did not “automatically render the order primarily penal.” *People v Peters*, 449 Mich 515, 523, 526; 537 NW2d 160 (1995).

In a recent opinion, this Court noted that it “has consistently held that the focus of restitution is on the victims’ losses not on punishing criminal defendants” and that restitution was remedial in its character. *People v Foster*, 319 Mich App 365, 389; 901 NW2d 127 (2017); see also *People v Allen*, 295 Mich App 277, 282; 813 NW2d 806 (2011) (holding that the legislative intent of the Victim’s Rights Act was to shift the burden of losses arising from criminal conduct to the defendants, and that the law was “remedial in character . . .”). This Court has also stated that “the purpose of restitution is to allow crime victims to recoup losses suffered as a result of criminal conduct.” *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003).

This Court has also explicitly stated that “a restitution order is not a penalty.” *Foster*, 319 Mich App at 389. This Court made these statements in the context of analyzing whether a restitution order violated the Sixth Amendment requirement that any fact that increases the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 388, 389.

Although there is some conflicting authority on this issue, the weight of the authority establishes that this

Court treats the primary intention of the Legislature in enacting the restitution statute to be compensating crime victims. *Foster*, 319 Mich App at 389; *Allen*, 295 Mich App at 282; *Newton*, 257 Mich App at 68; *Schluter*, 204 Mich App at 63. Therefore, we conclude that the Legislature did not intend for the restitution statutes to be a criminal punishment. See *Earl*, 495 Mich at 38.

We must next determine if, nevertheless, the statute functions as a criminal punishment in application. *Earl*, 495 Mich at 38. The United States Supreme Court enumerated the following factors when making this determination (the *Mendoza-Martinez* factors):

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. [*Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963); see also *Betts*, 507 Mich at 545.]

Some of the *Mendoza-Martinez* factors suggest that restitution is a penalty. It could be said that the operation of the restitution statute will promote the

traditional aims of punishment— retribution and deterrence. See *Earl*, 495 Mich at 38. But several other *Mendoza-Martinez* factors suggest that restitution is not a punishment. Restitution does not involve an affirmative disability or restraint, defendant has not provided any evidence that restitution had historically been regarded as a punishment, restitution does not come into play only on a finding of scienter, there is an alternative purpose to which restitution may rationally be connected, and restitution is not excessive in relation to that alternative purpose. See *Mendoza-Martinez*, 372 US at 168-169. Therefore, there is not “the clearest proof” that, despite the Legislature’s intent, restitution functions as a penalty. See *Betts*, 507 Mich at 543-544.

Because restitution is not a penalty under the legislative intent or in its application, it cannot violate the Ex Post Facto Clause as the application of the current version of the statute does not increase the punishment for a crime. See *Earl*, 495 Mich at 37.

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Brock A. Swartzle

APPENDIX C

Original – Court
 1st copy – Corrections

2nd copy – Corrections (for return)
 3rd copy – Michigan State Police CJIC

4th copy – Defendant
 5th copy – Prosecutor

<p>STATE OF MICHIGAN 9TH JUDICIAL CIRCUIT KALAMAZOO COUNTY</p>	<p>AMENDED JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS Resentencing on Counts 1 and 5/Juvenile Lifer</p>	<p>CASE NO. 1993-0756-FC</p>						
<p>ORI MI-390015J Police Report No. KDPS-93-19265</p>	<p>Court Address Trial Division - 227 West Michigan Avenue, Kalamazoo, Michigan 49007</p>	<p>Court telephone no. (269) 383-8837</p>						
<p>THE PEOPLE OF THE STATE OF MICHIGAN</p>	<p>v</p>	<p>Defendant's name, address, and telephone no. William Edward Neilly 925 HAZARD KALAMAZOO MI</p> <table border="1"> <tr> <td data-bbox="1104 987 1470 1024">TCN:</td> <td data-bbox="1470 987 1566 1024">SID</td> <td data-bbox="1566 987 1740 1024">DOB</td> </tr> <tr> <td data-bbox="1104 1024 1470 1057">CTN: 39-93061115-01</td> <td data-bbox="1470 1024 1566 1057"></td> <td data-bbox="1566 1024 1740 1057">05/31/1976</td> </tr> </table>	TCN:	SID	DOB	CTN: 39-93061115-01		05/31/1976
TCN:	SID	DOB						
CTN: 39-93061115-01		05/31/1976						
<p>Prosecuting attorney name Jeffrey S. Getting Bar. no. P43227</p>	<p>Defendant's attorney name Claire Alexis Ward Bar no. P83174</p>							

THE COURT FINDS:

1. The defendant has the following dispositions of the crime(s) stated below:

Ct	CONVICTED BY	CONVICTION DATE	CRIME	CHARGE CODE(S)
1	Guilty Verdict	11/08/1993	Homicide - Felony Murder	750.316-B
2	Guilty Verdict	11/08/1993	Weapons Felony Firearm	750.227B-A
3	Dismissed by Court	11/29/1993	Assault W/intent To Rob While Armed	750.89
4	Dismissed by Court	11/29/1993	Weapons Felony Firearm	750.227B-A
5	Guilty Verdict	11/08/1993	Conspiracy - Conversion	750.157(A)
6	Guilty Verdict	11/08/1993	Weapons Felony Firearm	750.227B-A

2. The conviction is reportable to the Secretary of State pursuant to MCL 257.625(21)(b).
 Defendant's driver's license number is: **Defendant's driver's license number**
3. HIV testing and sex offender registration are completed.
4. The defendant has been fingerprinted according to MCL 28.243.
5. A DNA Sample is already on file with the Michigan State Police from a previous case. No assessment is required.

IT IS ORDERED:

6. Probation is revoked.
-

7. Participating in a special alternative incarceration unit is: prohibited. permitted.

8. The defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM			MAXIMUM			DATE SENTENCE BEGINS	JAIL CREDIT		OTHER INFORMATION
		Years	Mos.	Days	Years	Mos.	Days		Years	Days	
1	04/21/2021	35			60			04/21/2021	25	321	
2	11/29/1993	2			2			11/29/1993		172	
5	04/21/2021	35			60			04/21/2021	25	321	
6	11/29/1993	2			2			11/29/1993		172	

9. Sentence(s) to be served: (if line below is bank, sentence is concurrent) each other.
 case numbers __

Counts 1 and 5 are concurrent with one another. Counts 2 is preceding and consecutive to Count 1. Count 6 is preceding and consecutive to Count 5.

10. The defendant shall pay:

45a

State Minimum	Crime Victim	DNA Fee	Restitution	Court Costs	Attorney Fees	Fine	Other Costs	Total
0.00	30.00	0.00	14,895.78	0.00	0.00	0.00		\$14,925.78

The due date for payment is the date of your sentence. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

MCL 765.15(2), MCL 769.1k, MCL 769.16a, MCL 775.22, MCL 780.766
CC 219b-MT (3/16) JUDGMENT OF SENTENCE, COMMITMENT TO MCR 6.427
DEPARTMENT OF CORRECTIONS
9CC Modified 11/20/17 Page 1 of 2

Original – Court
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4th copy – Defendant
5th copy - Prosecutor

STATE OF MICHIGAN 9TH CIRCUIT COURT KALAMAZOO COUNTY	AMENDED JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 1993-0756-FC Page 2 of 2
ORI MI-390015J	Court Address Trial Division - 227 West Michigan Avenue, Kalamazoo, Michigan 49007	Court telephone no. (269) 383-8837

THE PEOPLE OF THE STATE OF MICHIGAN

v **William Edward Neilly**
925 HAZARD KALAMAZOO MI

Defendant's name, address, and telephone no.

11. The defendant is subject to lifetime monitoring pursuant to MCL 750.520n.
- X 12. Court recommendation: Any financial obligations previously ordered remain in effect. Restitution is joint and several with co-defendants. Counts 1 and 5 and concurrent with one another. Count 2 is preceding and consecutive to the prison term imposed in Count 1. Count 6 is preceding and consecutive to the prison term imposed in Count 5. (At the time of resentencing the sentence on Counts 2 and 6 had been completed)

Signed: 4/21/2021 4:54:06PM

FILED
9TH JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

/s/ Pamela L. Lightvoet

Honorable Pamela L. Lightvoet

P47477

Bar No.

47a

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver the defendant to the Michigan Department of Corrections at a place designated by the department.

Signed:

4/22/2021 10:05:39 AM

/s/Lisa A. Owsiany
Deputy court clerk

MCL 765.15(2), MCL 769.1k, MCL 769.16a, MCL 775.22, MCL 780.766
CC 219b-MT (3/16) JUDGMENT OF SENTENCE, COMMITMENT TO DEPARTMENT OF CORRECTIONS MCR 6.427
9CC Modified 11/20/17 Page 2 of 2

APPENDIX D

State of Michigan Ninth Judicial Circuit Kalamazoo County	Judgment of Sentence Commitment to Corrections Department	CASE NO. 1993-0756-FC
ORI MI-390015-J 227 West Michigan Ave.	Court Address Kalamazoo, Michigan 49007	Telephone no. (616) 383-8837
The People of the State of Michigan	V	Defn: WILLIAM EDWARD NEILLY 925 HAZARD KALAMAZOO MI CTN: 39-93061115-01 SID DOB 05/31/76
Prosecuting Attorney Bar JAMES J. GREGART No. P14352		Defendant Attorney Bar no. GERALD L CHARLAND P22813

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/08/93 of the crime(s) as stated below:

Count	CONVICTED BY			CRIME	CHARGE CODE(S)					
	Plea	Court	Jury							
1			X	MURDER 1 ST DEGREE F	750.316-B					
2			X	POSS FIREARM AT FEL	750.227B-A					
5			X	CONSPIRACY	750.157(A)					
<p>__ 2. The conviction is reportable to the Secretary of State under MCL 257.732. Defendant's driver's license number is:</p> <p>IT IS ORDERED</p> <p>__ 3. Defendant is sentenced to the custody of the Michigan Department of Corrections as stated below. This sentence shall be immediately executed.</p>										
Count	SENTENCE DATE	MINIMUM			MAXIMUM		DATE SENTENCE BEGINS	CREDIT		OTHER INFORMATION
		Years	Mos.	Days	Years	Mos.		Months	Days	
1	11/29/1993		Life		999 LIFE ^{RRL}		11/29/1993			
2	11/29/1993	2			2		11/29/1993		172	

5	11/29/1993		Life		999 LIFE ^{RRLL}		11/29/1993			
___ Defendant shall pay restitution of _____ <input checked="" type="checkbox"/> Defendant is also ordered to pay a <u>\$30.00</u> Victim Rights Fund Assessment pursuant to 1989 PA 196.										

4. Court Recommendations:
 CT. 1 – LIFE W/O PAROLE. CT.2 CONSECUTIVE TO CT. 1
 CT. 6 CONSECUTIVE TO CT. 5.

_____ /s/ Richard Ryan Lamb
 Date Judge Bar No.

Under MCL 769.16a, the clerk of the court shall send a copy of this order to the Michigan State Police Central records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(Seal)

 Deputy Court Clerk

**cc219b (Local) JUDGMENT OF SENTENCE/COMMITMENT TO CORRECTIONS
 DEPARTMENT MCR6,427(A)**

APPENDIX E

Michigan Compiled Laws § 780.766

780.766 Restitution; order; condition of probation, parole, or sentence; revocation of probation or parole; petition to modify payment method; lien; enforcement; failure to pay restitution; payment by parent of juvenile; review; report or petition; compliance; copy of order to department of corrections; disposition of unclaimed restitution; amendment of order; effect of bankruptcy; minor as victim

Sec. 16. (1) As used in this section only, “victim” means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. As used in subsections (2), (3), (6), (8), (9), and (13) only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime.

(2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction or to the victim’s estate. For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or

unconditional dismissal, the court shall order the restitution required under this section.

(3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

(a) Return the property to the owner of the property or to a person designated by the owner.

(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:

(i) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(ii) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(c) Pay the costs of the seizure or impoundment, or both.

(4) If a crime results in physical or psychological injury to a victim, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

- (a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.
- (b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and rehabilitation actually incurred and reasonably expected to be incurred.
- (c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime.
- (d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members of the victim's family actually incurred and reasonably expected to be incurred as a result of the crime.
- (e) Pay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the crime or, if homemaking or child care is provided without compensation by a relative, friend, or any other person, an amount equal to the costs that would reasonably be incurred as a result of the crime for that homemaking and child care, based on the rates in the area for comparable services.
- (f) Pay an amount equal to the cost of actual funeral and related services.
- (g) If the deceased victim could be claimed as a dependent by his or her parent or guardian on the parent's or guardian's federal, state, or local income tax returns, pay an amount equal to the loss of the tax deduction or tax credit. The amount of reimbursement

shall be estimated for each year the victim could reasonably be claimed as a dependent.

(h) Pay an amount equal to income actually lost by the spouse, parent, sibling, child, or grandparent of the victim because the family member left his or her employment, temporarily or permanently, to care for the victim because of the injury.

(5) If a crime resulting in bodily injury also results in the death of a victim or serious impairment of a body function of a victim, the court may order up to 3 times the amount of restitution otherwise allowed under this section. As used in this subsection, “serious impairment of a body function of a victim” includes, but is not limited to, 1 or more of the following:

- (a) Loss of a limb or use of a limb.
- (b) Loss of a hand or foot or use of a hand or foot.
- (c) Loss of an eye or use of an eye or ear.
- (d) Loss or substantial impairment of a bodily function.
- (e) Serious visible disfigurement.
- (f) A comatose state that lasts for more than 3 days.
- (g) Measurable brain damage or mental impairment.
- (h) A skull fracture or other serious bone fracture.
- (i) Subdural hemorrhage or subdural hematoma.
- (j) Loss of a body organ.

(6) If the victim or victim’s estate consents, the order of restitution may require that the defendant make restitution in services in lieu of money.

(7) If the victim is deceased or dies, the court shall order that the restitution or remaining restitution be

made to those entitled to inherit from the victim's estate.

(8) The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action.

(9) Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the crime victim services commission made after an order of restitution under this section.

(10) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

However, the court may require that the defendant make restitution under this section within a specified period or in specified installments.

(11) If the defendant is placed on probation or paroled or the court imposes a conditional sentence as provided in section 3 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.3, any restitution ordered under this section shall be a condition of that probation, parole, or sentence. The court may revoke probation or impose imprisonment under the conditional sentence and the parole board may revoke parole if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole or impose imprisonment, the court or parole board shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(12) Subject to subsection (18), a defendant who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the sentencing judge or his or her successor to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the defendant or his or her immediate family, and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim, the court may modify the method of payment.

(13) An order of restitution entered under this section remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien.

(14) Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so.

(15) If the court determines that a juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile's parent or parents and an opportunity for the parent or parents to be heard the court may order the parent or parents having supervisory responsibility for the juvenile at the time of the acts upon which an order of restitution is based to pay any portion of the restitution ordered that is outstanding. An order under this subsection does not relieve the juvenile of his or her obligation to pay restitution as ordered, but the amount owed by the juvenile shall be offset by any amount paid by his or her parent. As used in this subsection:

(a) "Juvenile" means a person within the court's jurisdiction under section 2d or 4 of chapter XIA of

the probate code of 1939, 1939 PA 288, MCL 712A.2d and 712A.4.

(b) "Parent" does not include a foster parent.

(16) If the court orders a parent to pay restitution under subsection (15), the court shall take into account the parent's financial resources and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations the parent may have. If a parent is required to pay restitution under subsection (15), the court shall provide for payment to be made in specified installments and within a specified period of time.

(17) A parent who has been ordered to pay restitution under subsection (15) may petition the court for a modification of the amount of restitution owed by the parent or for a cancellation of any unpaid portion of the parent's obligation. The court shall cancel all or part of the parent's obligation due if the court determines that payment of the amount due will impose a manifest hardship on the parent and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim.

(18) In each case in which payment of restitution is ordered as a condition of probation, the court shall order any employed defendant to make regularly scheduled restitution payments. If the defendant misses 2 or more regularly scheduled payments, the court shall order the defendant to execute a wage assignment to pay the restitution. The probation officer assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered

to be made within a specific period of time, the probation officer assigned to the case shall review the case at the end of the specific period of time to determine if the restitution has been paid in full. The final review shall be conducted not less than 60 days before the probationary period expires. If the probation officer determines at any review that restitution is not being paid as ordered, the probation officer shall file a written report of the violation with the court on a form prescribed by the state court administrative office or shall petition the court for a probation violation. The report or petition shall include a statement of the amount of the arrearage and any reasons for the arrearage known by the probation officer. The probation officer shall immediately provide a copy of the report or petition to the prosecuting attorney. If a petition or motion is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance.

(19) If a defendant who is ordered to pay restitution under this section is remanded to the jurisdiction of the department of corrections, the court shall provide a copy of the order of restitution to the department of corrections when the defendant is remanded to the department's jurisdiction.

(20) The court shall not impose a fee on a victim, victim's estate, or prosecuting attorney for enforcing an order of restitution.

(21) If a person or entity entitled to restitution under this section cannot be located, refuses to claim the

restitution within 2 years after the date on which he or she could have claimed the restitution, or refuses to accept the restitution, the restitution to which that person or entity is entitled shall be deposited in the crime victim's rights fund created under section 4 of 1989 PA 196, MCL 780.904, or its successor fund. However, a person or entity entitled to that restitution may claim that restitution any time by applying to the court that originally ordered and collected it. The court shall notify the crime victim services commission of the application and the commission shall approve a reduction in the court's revenue transmittal to the crime victim's rights fund equal to the restitution owed to the person or entity. The court shall use the reduction to reimburse that restitution to the person or entity.

(22) The court may amend an order of restitution entered under this section on a motion by the prosecuting attorney, the victim, or the defendant based upon new information related to the injury, damages, or loss for which the restitution was ordered.

(23) A court that receives notice that a defendant who has an obligation to pay restitution under this section has declared bankruptcy shall forward a copy of that notice to the prosecuting attorney. The prosecuting attorney shall forward the notice to the victim at the victim's last known address.

(24) If the victim is a minor, the order of restitution shall require the defendant to pay to a parent of the victim an amount that is determined to be reasonable for any of the following that are actually incurred or reasonably expected to be incurred by the parent as a result of the crime:

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- (a) Homemaking and child care expenses.
- (b) Income loss not ordered to be paid under subsection (4)(h).
- (c) Mileage.
- (d) Lodging or housing.
- (e) Meals.
- (f) Any other cost incurred in exercising the rights of the victim or a parent under this act.

APPENDIX F

Michigan Compiled Laws § 769.1a

769.1a Order of restitution; authority of court; form;
amount; payment; modification; duration; lien;
enforcement

Sec. 1a. (1) As used in this section:

(a) “Crime victim services commission” means that term as described in section 2 of 1976 PA 223, MCL 18.352.

(b) “Victim” means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a felony, misdemeanor, or ordinance violation. For purposes of subsections (2), (3), (6), (8), (9), and (13), victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a felony, misdemeanor, or ordinance violation.

(2) Except as provided in subsection (8), when 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.

(3) If a felony, misdemeanor, or ordinance violation results in damage to or loss or destruction of property

of a victim of the felony, misdemeanor, or ordinance violation or results in the seizure or impoundment of property of a victim of the felony, misdemeanor, or ordinance violation, the order of restitution may require that the defendant do 1 or more of the following, as applicable:

(a) Return the property to the owner of the property or to a person designated by the owner.

(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:

(i) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(ii) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(c) Pay the cost of the seizure or impoundment, or both.

(4) If a felony, misdemeanor, or ordinance violation results in physical or psychological injury to a victim, the order of restitution may require that the defendant do 1 or more of the following, as applicable:

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- (a) Pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care.
- (b) Pay an amount equal to the cost of actual physical and occupational therapy and rehabilitation.
- (c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the felony, misdemeanor, or ordinance violation.
- (d) Pay an amount equal to the cost of psychological and medical treatment for members of the victim's family that has been incurred as a result of the felony, misdemeanor, or ordinance violation.
- (e) Pay an amount equal to the cost of actual homemaking and child care expenses incurred as a result of the felony, misdemeanor, or ordinance violation.
- (5) If a felony, misdemeanor, or ordinance violation resulting in bodily injury also results in the death of a victim, the order of restitution may require that the defendant pay an amount equal to the cost of actual funeral and related services.
- (6) If the victim or the victim's estate consents, the order of restitution may require that the defendant make restitution in services in lieu of money.
- (7) If the victim is deceased, the court shall order that the restitution be made to the victim's estate.
- (8) The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the

compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the felony, misdemeanor, or ordinance violation. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or a victim's estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action. If an entity entitled to restitution under this subsection for compensating the victim or the victim's estate cannot or refuses to be reimbursed for that compensation, the restitution paid for that entity shall be deposited by the state treasurer in the crime victim's rights fund created under section 4 of 1989 PA 196, MCL 780.904, or its successor fund.

(9) Any amount paid to a victim or a victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the crime victim services commission made after an order of restitution under this section.

(10) If not otherwise provided by the court under this subsection, restitution shall be made immediately. However, the court may require that the defendant

make restitution under this section within a specified period or in specified installments.

(11) If the defendant is placed on probation or paroled or the court imposes a conditional sentence under section 3 of this chapter,ⁱ any restitution ordered under this section shall be a condition of that probation, parole, or sentence. The court may revoke probation or impose imprisonment under the conditional sentence and the parole board may revoke parole if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole or impose imprisonment, the court or parole board shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(12) A defendant who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the sentencing judge or his or her successor to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the defendant or his or her immediate family, the court may modify the method of payment.

(13) An order of restitution entered under this section remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be

enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien.

(14) Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so.

(15) In each case in which payment of restitution is ordered as a condition of probation, the probation officer assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. The final review shall be conducted not less than 60 days before the probationary period expires. If the probation officer determines that restitution is not being paid as ordered, the probation officer shall file a written report of the violation with the court on a form prescribed by the state court administrative office. The report shall include a statement of the amount of the arrearage and any reasons for the arrearage known by the probation officer. The probation officer shall immediately provide a copy of the report to the prosecuting attorney. If a motion is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance.

(16) If a defendant who is ordered to pay restitution under this section is remanded to the jurisdiction of the department of corrections, the court shall provide a copy of the order of restitution to the department of corrections when the defendant is ordered remanded to the department's jurisdiction.

ⁱ M.C.L.A. § 769.3.