

APPENDIX

APPENDIX A:	Order Denying Petition for Rehearing En Banc, 8th Cir. No. 23-3129 (Sept. 30, 2024)	1a
APPENDIX B:	Opinion, 8th Cir. No. 23-3129 (Aug. 23, 2024).....	2a
APPENDIX C:	Judgment, 8th Cir. No. 23-3129 (Aug. 23, 2024).....	10a
APPENDIX D:	Order Denying Motion to Show Cause, W.D. Mo. No. 4:22-cr-00173-RK (May 4, 2023).....	12a
APPENDIX E:	Judgment as to Ellingburg, S.D. Ga. No. CR496-00063-001 (Nov. 20, 1996).....	17a
APPENDIX F:	U.S. Constitution art. I, § 9, cl. 3 (Ex Post Facto Clause)	31a
APPENDIX G:	18 U.S.C. § 3663 (1994)	32a
APPENDIX H:	18 U.S.C. § 3663A	38a

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3129

United States of America

Appellee

v.

Holsey Ellingburg, Jr.

Appellant

Appeal from U.S. District Court for the Western District
of Missouri - Kansas City (4:22-cr-00173-RK-1)

ORDER

The petition for rehearing en banc is denied. The
petition for rehearing by the panel is also denied.

September 30, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX B

**United States Court of Appeals
For the Eighth Circuit**

No. 23-3129

United States of America

Plaintiff - Appellee

v.

Holsey Ellingburg, Jr.

Defendant - Appellant

Appeal from United States District Court for the
Western District of Missouri - Kansas City

Submitted: April 9, 2024

Filed: August 23, 2024

[Published]

Before GRUENDER, MELLOY, and KELLY, Circuit
Judges.

PER CURIAM.

In December 1995, Holsey Ellingburg, Jr. robbed a
bank. Mr. Ellingburg was indicted in April 1996, and in

August of that same year, he was convicted. Mr. Ellingburg was sentenced to time in prison and ordered to pay more than \$7,500 in restitution.

Mr. Ellingburg was released from prison in June 2022. At that time, Mr. Ellingburg had paid a little more than one quarter of his original restitution order. In 2023, Mr. Ellingburg filed a motion to show cause in district court,¹ challenging the continued enforcement of his restitution order, which, with interest, had grown to five figures. Mr. Ellingburg argued that the statutory period of time for paying his restitution (“restitution liability term”) under the Victim and Witness Protection Act (“VWPA”) had expired in 2016. 18 U.S.C. § 3613(b)(1) (1995). Furthermore, he argued that retroactively applying an expanded restitution liability term under the Mandatory Victim Restitution Act (“MVRA”), 18 U.S.C. § 3613(b), violated the U.S. Constitution’s Ex Post Facto Clause, U.S. Const. art. I, § 9, cl.3. The district court held that retroactively applying the MVRA to his restitution order did not violate the Ex Post Facto Clause, and Mr. Ellingburg now appeals. We affirm.

In April 1996, Congress passed the MVRA, superseding the VWPA in relevant part. Pub. L. No. 104-132, tit. II, §§ 201–11, 110 Stat. 1214, 1227–41 (1996). One significant difference between the two statutes, relevant to this appeal, is that the MVRA changed the restitution liability term. Under the VWPA, the term was 20 years from entry of judgment. Under the MVRA, the term became “the later of 20 years from entry of judgment or 20 years after the release from imprisonment of the

¹ The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

person fined.” 18 U.S.C. § 3613(b). Additionally, the MVRA made interest on restitution orders mandatory. *Id.* § 3612(f)(1). Mr. Ellingburg’s offense conduct occurred while the VWPA was still in force, and he was convicted and sentenced after the MVRA became law.

The parties do not dispute that the MVRA has been applied to Mr. Ellingburg’s sentence retroactively. Rather, the parties dispute whether application of the MVRA to Mr. Ellingburg’s sentence violates the Ex Post Facto Clause. “We review questions involving the constitutionality of a federal statute *de novo*.” *United States v. Crawford*, 115 F.3d 1397, 1400 (8th Cir. 1997).

Mr. Ellingburg argues that application of the MVRA violates the Ex Post Facto Clause because it enlarges his restitution liability term, increasing his punishment. “To fall within the *ex post facto* prohibition, a law must be retrospective—that is ‘it must apply to events occurring before its enactment’—and it ‘must disadvantage the offender affected by it’ by altering the definition of criminal conduct or increasing the punishment for the crime.” *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)). The Ex Post Facto Clause applies only to criminal penalties, and thus the dispute before us is whether MVRA restitution is a criminal or civil penalty. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

The Eighth Circuit’s view on this issue appears to have changed over time. In *Williams*, we stated that “an order of restitution under the MVRA is punishment for Ex Post Facto Clause purposes.” 128 F.3d at 1241. We explained that “because the MVRA provides that the district court shall order restitution ‘in addition to . . . any other penalty authorized by law. . . .’ 18 U.S.C.A.

§ 3663A(a)(1)[,] [t]he plain meaning is that restitution under the MVRA is a penalty.” *Id.* A year after *Williams*, we further noted “that an order of restitution under the [MVRA]” constitutes a criminal penalty. *United States v. Dugan*, 150 F.3d 865, 868 (8th Cir. 1998).

Although *Williams* and *Dugan* were both persuasive, neither case definitively held whether restitution under the MVRA amounted to a criminal or civil penalty. *United States v. Carruth*, 418 F.3d 900, 903 (8th Cir. 2005) (“Our discussion about whether restitution is a penalty or punishment for ex post facto purposes was thus dicta and not necessary to reach the court’s holding.”). In *Carruth*, we had the opportunity to decide the issue. *Id.* at 903–04. There, we held that, because restitution under the MVRA “is designed to make victims whole, not to punish perpetrators, . . . it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” *Id.* at 904.

After *Carruth*, the Supreme Court called our holding into question. First, the same year we decided *Carruth*, the Court explained that the reason for MVRA restitution was “to mete out appropriate criminal punishment for [certain] conduct.” *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). Then, in 2014, the Court went further. *Paroline v. United States*, 572 U.S. 434 (2014). Although the Court examined whether restitution was criminal or civil under a different statute, 18 U.S.C. § 2259, it concluded that restitution ordered as part of a criminal sentence serves “penological purposes.” *Paroline*, 544 U.S. at 457.

In light of *Paroline*, at least one circuit, the Tenth, overruled prior precedent that had found MVRA restitution was a civil penalty. *See United States v.*

Anthony, 25 F.4th 792, 798 n.5 (10th Cir. 2022) (“We have previously held that restitution statutes such as the MVRA do not inflict criminal punishment and thus are not punitive. *See United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) But we reexamined this conclusion after the Supreme Court explained in *Paroline* that restitution ‘serves punitive purposes.’” (citations omitted)).

When the Tenth Circuit changed course, it joined the majority of circuits in finding that MVRA restitution is a criminal penalty. *See United States v. Tull-Abreu*, 921 F.3d 294, 305 (1st Cir. 2019); *Gonzalez v. United States*, 792 F.3d 232, 236, 236 n.18 (2d Cir. 2015); *United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006); *United States v. Grant*, 715 F.3d 552, 554 (4th Cir. 2013); *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004); *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005); *United States v. Lillard*, 935 F.3d 827, 835 (9th Cir. 2019); *United States v. Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998); *but see United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 593 (7th Cir. 2006).

The year after *Paroline*, our court was asked to overrule *Carruth*. *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015). The court addressed *Carruth* and declined to overrule it, finding *Carruth* to remain binding precedent. *Id.* (rejecting defendant’s argument that “restitution is a criminal punishment”); *see also United States v. Rodriguez*, 915 F.3d 532, 536 (8th Cir. 2019) (“While some aspects of mandatory restitution statutes are punitive, the primary purpose of such statutes is ‘remedial or compensatory.’” (quoting *Paroline*, 572 U.S. at 456)).

Carruth and *Thunderhawk* remain the binding

precedent in the Eighth Circuit, and only the en banc court may overturn such precedent. *United States v. Flynn*, 969 F.3d 873, 882 (8th Cir. 2020). Accordingly, retroactive application of the MVRA to Mr. Ellingburg’s restitution order does not violate the Ex Post Facto Clause. We affirm.²

MELLOY, Circuit Judge, with whom KELLY, Circuit Judge, joins, concurring.

In *Thunderhawk*, we reaffirmed our holding in *Carruth* that MVRA restitution “is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” *Thunderhawk*, 799 F.3d at 1209 (quoting *Carruth*, 418 F.3d at 904). Though *Paroline* was issued just months before, our opinion in *Thunderhawk* did not address or analyze that case. *See generally id.* Because results dictate stare decisis, we are bound by our holding in *Thunderhawk*, and I therefore concur. However, if not for *Thunderhawk*, I would conclude *Paroline* overruled *Carruth*. *Paroline*, 572 U.S. at 456–57 (explaining that restitution “is imposed by the Government ‘at the culmination of a criminal proceeding and requires conviction of an underlying’ crime”; “restitution still implicates ‘the prosecutorial powers of government,’”; “[t]he primary goal of restitution is remedial or compensatory . . . but it also serves punitive purposes”; interpreting restitution as a civil penalty “would

² Mr. Ellingburg also argues that application of the MVRA’s mandatory interest provision to his sentence violates the Ex Post Facto Clause. Because *Thunderhawk* precludes relief from interest on the same grounds as the restitution payments, we affirm.

undermine the remedial and penological purposes” of criminal restitution; “there can be no doubt Congress wanted victims to receive restitution for harms”; mandatory restitution has penological purposes, “includ[ing] the need to impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims” (citations omitted throughout); see also *Hester v. United States*, cert. denied, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., dissenting) (explaining that “restitution is imposed as part of a defendant’s criminal conviction” and that federal statutes and Supreme Court cases “describe restitution as a ‘penalty’ imposed on the defendant as part of his criminal sentence 18 U.S.C. §§ 3663(a)(1)(A), 3663A(a)(1), 3572(d)(1); see *Paroline v. United States*, 572 U.S. 434, 456 (2014); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)”).

GRUENDER, Circuit Judge, concurring in the judgment.

I agree that *United States v. Carruth*, 418 F.3d 900 (8th Cir. 2005), and *United States v. Thunderhawk*, 799 F.3d 1203 (8th Cir. 2015), control the outcome of this case. However, the court also suggests that our precedent conflicts with the Supreme Court’s decisions in *Pasquantino v. United States*, 544 U.S. 349 (2005), and *Paroline v. United States*, 572 U.S. 434 (2014). I concur in the judgment but write separately because, in my view, nothing in *Pasquantino* or *Paroline* calls our prior holdings into question.

In *Carruth* and *Thunderhawk*, we held that restitution under the Mandatory Victims Restitution Act (“MVRA”) is “essentially a civil remedy.” *Carruth*, 418

F.3d at 904; *Thunderhawk*, 799 F.3d at 1209. In *Pasquantino* and *Paroline*, the Supreme Court noted that restitution serves penological purposes. *Pasquantino*, 544 U.S. at 365; *Paroline*, 572 U.S. at 457. Because restitution serves penological purposes, the court today suggests that MVRA restitution is a criminal penalty, and not a civil remedy. But restitution can serve penological purposes and still be, as *Carruth* and *Thunderhawk* held, “essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” *Carruth*, 418 F.3d at 904; *Thunderhawk*, 799 F.3d at 1209.

Whether restitution is primarily civil or criminal is a matter of statutory construction and not based solely on “the character of the actual sanctions imposed.” *Hudson v. United States*, 522 U.S. 93, 101 (1997). “[T]he mere presence of [a penological] purpose [such as deterrence] is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals.” *Id.* at 105 (internal quotation marks omitted); *see also Paroline*, 572 U.S. at 456 (“The primary goal of restitution is remedial or compensatory. . .”). Because the court takes it a step too far by suggesting that *Carruth* and *Thunderhawk* are inconsistent with Supreme Court precedent, I do not join the court as to that part of the opinion.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3129

United States of America

Plaintiff - Appellee

v.

Holsey Ellingburg, Jr.

Defendant - Appellant

Appeal from U.S. District Court for the Western District
of Missouri - Kansas City (4:22-cr-00173-RK-1)

JUDGMENT

Before GRUENDER, MELLOY, and KELLY, Circuit
Judges.

This appeal from the United States District Court
was submitted on the record of the district court, briefs of
the parties and was argued by counsel.

After consideration, it is hereby ordered and
adjudged that the judgment of the district court in this
cause is affirmed in accordance with the opinion of this
Court.

August 23, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF
AMERICA,

Plaintiff,

v.

HOLSEY
ELLINGBURG, JR,

Defendant.

Case No. 4:22-cr-00173-
RK

ORDER

On July 27, 2022, the Court received transfer of Defendant Holsey Ellingburg’s supervised release from the U.S. District Court for the Southern District of Georgia. (Doc. 1.) On March 2, 2023, Mr. Ellingburg filed a pro se “motion to show cause” (Doc. 6) challenging enforcement of a restitution obligation as ordered by the district court in Georgia in imposing a criminal judgment and sentence against Mr. Ellingburg in November 1996.¹ The Court liberally construes the filing as a motion for order to show cause. Mr. Ellingburg argues that (1) imposing continued liability for the restitution obligation under the expanded liability term enacted by the

¹ Although Mr. Ellingburg filed the motion for order to show cause directed to a probation officer, because it is responsible under federal law and regulations to collect restitution, the U.S. Attorney’s Office filed a response to the pro se motion. (Doc. 12); *see* 18 U.S.C. § 3612(c); 28 C.F.R. § 0.171.

Mandatory Victims Restitution Act of 1996 (“MVRA”) violates the Ex Post Facto Clause of the U.S. Constitution, and (2) his restitution obligation was extinguished because the government failed to renew the lien as required by 28 U.S.C. § 3201. After careful consideration and for the reasons explained below, the pro se motion is **DENIED**.

I. Background

In December 1995, Mr. Ellingburg (along with a co-defendant) robbed a Georgia bank. (*See* Doc. 15 at 4, ¶ 1.) Mr. Ellingburg was indicted by a federal grand jury on April 4, 1996. (*See id.*) Mr. Ellingburg was subsequently convicted of two counts (bank robbery and using a firearm in a violent crime) on August 29, 1996, following a jury trial. *See United States v. Ellingburg*, No. 4:96-cr-00063-WTM-CLR-1 (S.D. Ga.) (doc. 136). On November 19, 1996, the district court in Georgia imposed a sentence of a total of 322 months’ imprisonment followed by a total of five years’ supervised release, in addition to an order of restitution in the amount of \$7,567.25. (Doc. 12-2.)

II. Discussion

In his pro se motion, Mr. Ellingburg challenges the enforceability of the initial restitution order to the extent (1) applying the expanded liability period contained within the MVRA violates the Ex Post Facto Clause of the U.S. Constitution, and (2) the Government failed to timely renew the lien pursuant to 28 U.S.C. § 3201.

In 1996, Congress enacted the MVRA to amend various provisions of the federal criminal code concerning restitution. Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Pursuant to § 211 of the MVRA, the amendments enacted thereby “shall, to the extent constitutionally permissible,

be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act.” *Id.* Particularly applicable here, the MVRA expanded the liability period for an order of restitution from 20 years after judgment to either 20 years after judgment or 20 years after release from imprisonment, whichever occurs later. *Id.* (codified at 18 U.S.C. § 3613(b)). Mr. Ellingburg argues that applying the MVRA’s expanded liability period to the order of restitution in this case violates the Ex Post Facto Clause.²

A criminal law is ex post facto in violation of Article 1, § 9 of the U.S. Constitution if it (1) applies retrospectively to “events occurring before its enactment” and (2) “disadvantages the offender affected by it.” *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citations omitted). “[N]o

² The Court notes that the offense conduct occurred in December 1995 (pre-MVRA) while Mr. Ellingburg was convicted and sentenced in August 1996 (post-MVRA). Mr. Ellingburg appears to argue that the sentencing court wrongfully applied the MVRA in ordering restitution in its criminal judgment and sentence, also in violation of the Ex Post Facto Clause. But Mr. Ellingburg was convicted and sentenced after the MVRA became effective by its terms. More significantly, though, the record indicates that rather than applying the MVRA in ordering restitution, the sentencing court instead applied the Victim and Witness Protection Act of 1982 (“VWPA”). (See Docs. 12-2 at 23 (judgment of sentence adopting factual findings and guideline application in the presentence report); 15 (presentence report) at 4-5, 12-14, 15 (factual findings regarding amount of loss sustained by the victim as well as Mr. Ellingburg’s financial resources, financial needs, ability to pay, and earning ability; and recommending that “Pursuant to 18 U.S.C. § 3663, restitution may be ordered in this case”).) To the extent Mr. Ellingburg seeks to collaterally attack the restitution order itself, including under the VWPA, or to raise an ineffective-assistance-of-counsel claim regarding the restitution order as he does in his reply (*see* Doc. 16 at 3-5), the instant pro se motion for order to show cause is not the proper vehicle to do so.

ex post facto violation occurs if the change effected is merely procedural, and does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.” *Id.* at 29 n.12 (citations and quotation marks omitted). Here, Mr. Ellingburg challenges the applicability of the expanded limitations or termination period of liability enacted by the MVRA.

As indicated above, however, to be ex post facto a retroactively applicable criminal law must “increase the punishment for criminal acts.” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (citations and quotation marks omitted). Although the Eighth Circuit has not squarely addressed this issue, the great majority of the federal circuit courts that have confronted this question have concluded that application of § 3613(b)’s expanded liability period for an order of restitution does not violate the Ex Post Facto Clause. *United States v. Rosello*, 737 F. App’x 907, 908-09 (11th Cir. 2018); *United States v. Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017); *United States v. McGuire*, 636 F. App’x 445, 447 (10th Cir. 2016); *but see United States v. Norwood*, 49 F.4th 189, 220 (3d Cir. 2022). The Court agrees with the majority of federal circuit courts that application of § 3613(b)’s expanded collections period, enacted through the MVRA, does not violate the Ex Post Facto Clause of the U.S. Constitution.

Second, as to Mr. Ellingburg’s argument that the lien was not properly renewed under 28 U.S.C. § 3201, the Court notes that § 3201 creates a lien only on real property and does not otherwise impact Mr. Ellingburg’s obligation to pay restitution as part of his criminal conviction under the relevant and applicable criminal law(s). Mr. Ellingburg provides no legal authority or argument otherwise.

III. Conclusion

For these reasons, the pro se motion for order to show cause (Doc. 6) is **DENIED**.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: May 4, 2023

APPENDIX E

United States District Court
SOUTHERN DISTRICT OF GEORGIA

**UNITED STATES OF
AMERICA**

v.

Holsey Ellingburg, Jr.

**JUDGMENT IN A
CRIMINAL CASE**

*(For Offenses Committed On
or After November 1, 1987)*

Case Number: CR496-00063-
001

Gary Wisenbaker
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) _____.
- pleaded nolo contendere to count(s) _____
which was accepted by the court.
- was found guilty on counts one and two after
a plea of not guilty.

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Numbers</u>
18 U.S.C. § 2113(a),(d)	Bank Robbery	December 4, 1995	One
18 U.S.C. § 924(c)	Use of a firearm in a violent crime	December 4, 1995	Two

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) _____

□ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [REDACTED] 1066

Defendant's Date of Birth: [REDACTED], 1960

Defendant's U.S.M. Number: 09172-021

Defendant's Residence Address:

[REDACTED]

Kansas City, MO 64106

Defendant's Mailing Address:

[REDACTED]

Kansas City, MO 64106

November 19, 1996

Date of Imposition of Judgment

William Moore

Signature of Judicial Officer

William T. Moore, Jr.

Judge, U.S. District Court

Name & Title of Judicial Officer

Nov. 20, 1996

Date

Defendant: Holsey Ellingburg, Jr.
Case Number: CR496-00063-001

Judgment-Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

262 months on count one and 60 months on count two. The sentence imposed on count two shall run consecutively to the sentence imposed on count one, for a total sentence of 322 months.

The Court makes the following recommendations to the Bureau of Prisons:

Designation to Leavenworth, Kansas, is recommended.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district,

at __ a.m./p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2:00 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed the judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

Defendant: Holsey Ellingburg, Jr. Judgment-Page 3 of 7
Case Number: CR496-00063-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years on count one and three years on count two to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- The above drug testing condition is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm as defined in 18 U.S.C. § 921 (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district

without permission of the court or probation officer;

- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in

plain view by the probation officer;

- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

Defendant: Holsey Ellingburg, Jr.
Case Number: CR496-00063-001

Judgment-Page 4 of 7

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the Court.

Defendant: Holsey Ellingburg, Jr.
Case Number: CR496-00063-001

Judgment-Page 5 of 7

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal

monetary penalties in accordance with the schedule of payments, set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
Totals	\$100.00		\$7,567.25

- If applicable, restitution amount ordered pursuant to plea agreement \$ _____
- Fines or restitution were ordered on multiple counts. See Additional Terms for Criminal Monetary Penalties page.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of \$ _____

The defendant shall pay interest on any fine of more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest. It is ordered that:

The interest requirement is waived.

The interest requirement is modified as follows:

RESTITUTION

- The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until ___. An Amended Judgment in a Criminal Case

will be entered after such determination.

[x] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximate proportional payment unless specified otherwise in the priority order or percentage payment column below.

<u>Name of Payee</u>	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
First Union National Bank of GA P.O. Box 1211-9474 Augusta, GA 30913		\$7,567.25	
Totals \$ _____		\$ <u>7,567.25</u>	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994.

Defendant: Holsey Ellingburg, Jr. Judgment-Page 6 of 7
Case Number: CR496-00063-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [] in full immediately; or

B [x] \$ 100.00 immediately, balance due (in accordance

with C, D, or E); or

C not later than ____ ; or

D in installments to commence 30 days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E in ____ (e.g. equal weekly, monthly, quarterly) installments of \$ ____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay the cost of prosecution.

The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544 except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the Court, the probation officer, or the United States Attorney.

Defendant: Holsey Ellingburg, Jr.
Case Number: CR496-00063-001

Judgment-Page 7 of 7

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: VI

Imprisonment Range: 262 to 300 months

Supervised Release Range: 3 to 5 years

Fine Range: \$ 17,500.00 to \$ 175,000.00

Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution \$ 15,134.50

Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some

portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

- Partial restitution is ordered for the following reason(s):

A codefendant, Marvin Donnell Kelley, will be responsible for the remaining restitution

- The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

- The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

This defendant is a violent individual. During the instant offense, Ellingburg pointed a sawed-off shotgun at several individuals, including a woman who was eight months pregnant. Further, the defendant's prior criminal convictions consist of five violent offenses in which Ellingburg possessed weapons. As such, the Court has imposed a sentence within the applicable imprisonment range.

OR

The sentence departs from the guideline range:

- upon motion of the government, as a result of defendant's substantial assistance.

- for the following reason(s):

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF
AMERICA

CASE NO. CR496-63

vs.

Holsey Ellingburg

The undersigned, a regularly appointed and qualified deputy in the office of this Clerk of this District, while conducting the business of the Court for said Division does the following:

1. Pursuant to instructions from the court, and in the performance of my official duties, I personally placed in the U.S. Mail a sealed envelope bearing the lawful frank of the Court, and properly addressed to each of the persons, parties or attorneys listed below; and
2. That the aforementioned envelope(s) contained a copy of the documents known as JGMT dated 11-20, 1996, which is part of the official records of this case.

Date of Mailing: 11-21-96

Date of Certificate: ^^

HENRY R. CRUMLEY, JR., CLERK

By: M. Hagan
Marcia Hagan, Deputy Clerk

NAME:

1. Δ
2. Holsey Ellingburg

- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____

Cert/Copy

- ____ _ **DISTRICT JUDGE**
- ____ _ **MAGISTRATE JUDGE**
- ____ _ **MINUTES**
- ____ _ **U.S. PROBATION**
- ____ _ **U.S. MARSHAL**
- ____ _ **U.S. ATTORNEY**
- ____ _ **JAG OFFICE**
- ____ _ **DEPT OF JUSTICE**
- ____ _ **DEPT OF PUBLIC SAFETY**
- ____ _ **NICOLE**
- ____ _ **RAY**

APPENDIX F

United States Constitution, art. I, § 9, cl. 3 (Ex Post Facto Clause)

* * *

No Bill of Attainder or ex post facto Law shall be passed.

* * *

APPENDIX G

18 U.S.C. § 3663 (1994). Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or section 46312, 46502, or 46504 of title 49, may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of

sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by

the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

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

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, 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.

(h) An order of restitution may be enforced—

(1) by the United States—

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

(i)(1) A Federal agency shall immediately suspend all Federal benefits provided by the agency to the defendant, and shall terminate the defendant's eligibility for Federal benefits administered by that agency, upon receipt of a certified copy of a written judicial finding that the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section.

(2) Any written finding of delinquency described in paragraph (1) shall be made by a court, after a hearing, upon motion of the victim named in the order to receive the restitution or upon motion of the United States.

(3) A defendant found to be delinquent may subsequently seek a written finding from the court that the defendant has rectified the delinquency or that the defendant has made and will make good faith efforts to rectify the delinquency. The defendant's eligibility for Federal benefits shall be reinstated upon receipt by the agency of a certified copy of such a finding.

37a

(4) In this subsection, “Federal benefit” means a grant, contract, loan, professional license, or commercial license provided by an agency of the United States.

APPENDIX H**18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes**

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such

paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.