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BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY OF THE JUDICIARY COMMITTEE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

June 13, 2006, Hearing
The "Restitution Improvement Act of 2006"

Mr. Chairman and Distinguished Members of the Committee:

I am honored to have this opportunity to appear before you today to express my views regarding the "Restitution Improvement Act of 2006." I am a practicing criminal defense attorney in Tampa, Florida. Throughout my career I have taken a keen interest in federal sentencing law. Since 1994 I have helped to organize and moderate the Annual National Seminar on the Federal Sentencing Guidelines, which is a joint project of the Federal Bar Association and the United States Sentencing Commission. From 1998 to 2002 I served as Co-Chair of the Practitioners' Advisory Group to the Sentencing Commission. I am the immediate past Co-Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section and a current member of the ABA's *ad hoc* task force on *Blakely* and *Booker*. I am also a member of the Sentencing Initiative of The Constitution Project, a bi-partisan panel of federal and state judges, scholars, and practitioners chaired by

former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann. Our group also includes Judge Cassell as well as, until very recently, then circuit judge Samuel Alito. My testimony today is strictly in my personal capacity, and the views I express are not necessarily those of any of the above groups or organizations.

I. Introduction

I have serious reservations about the Bill under consideration and believe that it will not result in an overall improvement of federal restitution law. My concerns stem from the fact that the bill would (1) expand mandatory restitution without regard for the defendant's actual ability to pay; (2) needlessly inhibit rehabilitation by offenders attempting to re-enter society after lengthy periods of incarceration; (3) greatly complicate sentencing proceedings with insufficient beneficial results; (4) result in inefficient allocation of scarce criminal justice resources; and (5) violate the Constitution. I urge the Subcommittee to reject this Bill, or at least to study whether there is any need for it and its likely consequences before legislating in this area.

II. The Bill represents unwise policy because it is likely to result in less restitution, to hamper rehabilitation, and to waste scarce criminal justice resources.

A. Expansion of mandatory restitution

Mandatory restitution sounds better in theory than it works in practice. This is primarily because, as the saying goes, "you cannot get blood out of a stone." Based on statistical reports from federal defenders and discussions with them and court officials (judges, circuit executives, and clerks of court), Defender Services estimates that approximately 85% of individuals prosecuted in the federal district and circuit courts of appeals are represented by federal defender organizations and private counsel appointed under authority of the Criminal Justice Act. By definition, these defendants are indigent and lack the financial means to make restitution even before they have gone to prison.[1] Their financial circumstances are not likely to improve during incarceration and employment opportunities are typically fewer after incarceration than before prosecution.

Given that at most 15% of defendants are able to pay any meaningful restitution, a fair question is whether it should be ordered in every case anyway. If

[1]Persons unfamiliar with the criminal justice system often make the simplistic assumption that if a victim lost money it must be because the defendant took it, and restitution is simply a matter of ordering them to "give it back." In actuality, in many if not most cases there is virtually no connection between the losses suffered by victims and the personal gain reaped by individual defendants.

there were no costs associated with ordering indigent people to do what we all know they actually cannot, the "one size fits all" approach of mandatory restitution could perhaps be justified. Having experience in the field, however, I believe the better approach is to allow the federal judges of our nation to tailor appropriate payment obligations based on the actual ability of defendants to satisfy them.

Among the costs of ordering a defendant to pay what everyone recognizes he or she cannot is that there is little incentive for the defendant to try. A defendant ordered to pay an amount he or she can never hope to satisfy regardless of how many years he or she tries to do so has no incentive to earn anything more than the bare minimum necessary for survival. Indeed, individuals under this circumstance face unfortunate temptation to return to unlawful behavior because little hope for improvement is offered by a law-abiding lifestyle.

In contrast, by tailoring restitution orders based on what defendants can realistically hope to pay, they are given an incentive to do so. They have hope that if they do more than the minimum – if they rehabilitate themselves as fully as possible – they can one day satisfy their obligations and try to improve their overall lot in life. Thus, mandatory restitution orders imposed without regard to ability to pay may lead to victims ultimately receiving less restitution and not more. Morever, by giving

defendants every incentive to abide by the law, we prevent additional people from becoming victims in the first place.

The issue seems important enough to warrant actual research rather than legislation by anecdote or hunch. Congress should ask the Sentencing Commission to examine the extent to which mandatory restitution results in more rather than less restitution actually being received by victims.

Another cost of ordering defendants to pay what we know they cannot is that scarce criminal justice resources are squandered. Precious court time is spent determining victim losses that bear no resemblance to the resources available for payment. Limited probation office resources are expended on supervising indigent individuals' financial affairs with little return on the time invested. Assistant United States Attorneys, rather than investigating and prosecuting the next case, are instead diverted to efforts to establish loss amounts even though such amounts can be repaid in any amount in only 15% of cases.

In sum, mandatory restitution without regard to consideration of the defendant's ability to pay results in no greater, and possibly less, ultimate compensation for victims, inhibits rehabilitation efforts, and causes unnecessary waste of limited criminal justice resources. Thus, I view the Bill's expansion of mandatory restitution to be unwise.

B. Restitution without conviction

Sec. 2 of the bill, in proposed § 3663(a)(2), would authorize, for the first time in our nation's history, restitution for crimes with which a defendant has been neither charged nor convicted. Given the reduced procedural protections afforded during sentencing proceedings, a restitution order for uncharged and unconvicted conduct, indeed even conduct for which a defendant has been acquitted, will raise significant Constitutional issues. This is a Constitutional line familiar to the Congress and one which it has explicitly recognized and declined to cross. *See* H.R.Rep. No. 99-334, p.7 (1985) (citing H.R.Rep. No. 98-1017, p.83, n. 43 (1984))("To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law"). Restitution beyond the offense of conviction is also inconsistent with traditional notions of fairness. If the defendant has not been convicted of a crime, he should not be punished for it.[2]

[2]Restitution for losses beyond the offense of conviction is also inconsistent with the 2004 Victims' Rights Act, which defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e).

C. Lifetime supervision in nearly every case

The Bill also provides that no term of supervised release or probation can ever be terminated while a defendant's restitution obligation remains unpaid. *See* Sec. 2, proposed § 3664(m); Sec. 4, proposed § 3564(f). In combination with mandatory restitution regardless of ability to pay, this will mean that in virtually every case defendants will effectively be under court supervision for the rest of their lives. Under existing law, a defendant's unpaid restitution obligation is automatically converted to a judgment upon expiration of the defendant's supervision, which is enforceable by the Financial Litigation Unit of the U.S. Attorneys Office. Thus, requiring defendants to remain under court supervision will not necessarily translate into additional compensation for victims beyond that already available under existing law. At the same time, however, the expenditure of resources necessary to keep every federal defendant ordered to pay restitution under supervision for the rest of his or her life will be enormous. These resources will generate few concrete benefits. Routine lifetime supervision will also needlessly hamper defendants' rehabilitative efforts because regardless of their efforts and behavior, they will still be under court supervision for the rest of their lives anyway. Automatic life terms of supervision based on restitution obligations ordered without regard to ability to pay is simply poor policy.

This aspect of the Bill is also likely unconstitutional. The proposed legislation would allow for increased punishment – a period of supervised release or probation beyond the otherwise applicable statutory maximum – based upon judicial factual finding regarding restitution. As the Supreme Court has explained, the Sixth Amendment prohibits a court from imposing punishment that relies upon a judicial finding of fact where the punishment was not available absent that finding. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Requiring supervised release or probation to continue until complete restitution is paid will routinely result in defendants remaining on supervised release or probation indefinitely solely because of a judge's restitution finding. The statutory maximum for supervised release in the absence of a restitution order, however, is limited to a period of five years, three years, or one year depending upon the classification of the offense. *See* 18 U.S.C. § 3583. The statutory maximum for probation is five years. *See* 18 U.S.C. § 3561. The increased punishment required by the proposed legislation – punishment based upon a judge's restitution finding and exceeding the statutory maximum – thus presents a significant Sixth Amendment issue.

Although courts have held the current restitution law does not violate the Sixth Amendment, the proposed legislation differs significantly from existing law. In

holding the current law does not violate the Sixth Amendment, courts have consistently relied upon the notion that the current statutes do not provide for any "statutory maximum," and, implicitly, that the amount of restitution due is the only consequence of the court's finding. *See*, *e.g.*, *United States v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 338 (3rd Cir. 2006) (en banc); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005). Where the current law allows only a restitution order based on a court's restitution finding, the statute proposed by the Bill allows for longer periods of supervised release or probation based on a court's restitution finding. This change would fatally undermine the reasoning of the courts that have upheld the current restitution statutes against Sixth Amendment challenge.

D. Restitution for consequential damages

The Bill also expands mandatory restitution to include so-called consequential damages. The identification, litigation, and quantification of consequential damages would greatly complicate restitution determinations. As those familiar with traditional civil litigation involving consequential damages are aware, the factual complexities presented by consequential damages issues are limited only by the imagination. And given that only 15% of defendants will have any hope of paying

these additional damages, the complexity added by determining such consequential damages would be for naught in the vast majority of cases.[3]

Another cost of including consequential damages in restitution will be the complication and potential frustration of the plea bargaining process. Prosecutors and law enforcement agencies properly devote their resources to gathering the proof necessary to establish the guilt of the defendant. They are typically unaware of the details of victim losses at the time they plea bargain with defendants. Defendants are similarly unaware of the details of victim losses. Thus, even without the addition of consequential damages, it is sometimes difficult for the parties to resolve cases because neither party knows what restitution penalty will flow from any particular plea disposition. The addition of consequential damages will only exacerbate this difficulty by adding to the mix of information to be considered at sentencing yet more information that is unknown and unknowable at the time of plea negotiations.

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[3]Where a defendant has the ability to pay restitution, of course, all "consequential damages" will be recoverable in a parallel civil action wherein the victim will almost certainly be able to obtain a summary judgment against the defendant. *See* 18 U.S.C. § 3664(l) ("A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim").

A particularly poor candidate for inclusion in restitution calculations is the victims' "costs of seeking and collecting restitution." This may well be interpreted to include items such as the victims' attorneys fees in either interfacing with the criminal process or even possibly in parallel civil litigation. Altering the criminal restitution process to encompass fee shifting in parallel civil litigation will introduce yet another level of needless complexity, as those familiar with attorney fee litigation may attest. In 85% of cases all of this additional time and effort expended will not result in the victim receiving one more penny in actual compensation.

The Bill also proposes permitting restitution for all "personal injury." *See* Sec. 2, proposed § 3663(a). I do not construe this to include non-economic damages such as emotional distress, but this point should be clarified to avoid potential litigation. If I have misread the Bill and it is intended to authorize restitution for non-economic damages, then I would urge the Subcommittee to reject this approach. The introduction of non-economic damages into criminal restitution proceedings will convert them into civil tort damages hearings, complete with competing experts, that will add significantly to the complexity of the proceedings. Given that these hearings and findings would be mandatory regardless of ability to pay, this approach would be further unwise policy for the reasons I have set forth above.

E. Mandatory joint and several liability

Existing law permits joint and several liability where more than one defendant contributes to the loss of a victim, but also allows the court to "apportion liability among the defendants to reflect the level of contribution to the victim's loss and the economic circumstances of each defendant." 18 U.S.C. § 3664(h). The Bill would eliminate this discretion to order fair apportionment and replace it with mandatory joint and several liability in every case. I do not know what justification is offered for this change, but it does not appear to be a beneficial change. While there are many cases in which joint and several liability among co-defendants is appropriate, there are, as recognized by existing law, many cases in which apportionment is necessary to achieve fairness for all concerned. I am aware of no reason why the existing law regarding joint and several liability should no be retained.

F. Disclosure of Presentence Investigation Reports

The Bill would authorize, for the first time, disclosure of a portion of the Presentence Investigation Report ("PSR") to non-parties. This is an area in which the Congress should tread carefully and should receive input from the field. PSR's are treated in a highly confidential fashion for varied and compelling reasons. Indeed, in many jurisdictions defendants themselves are not permitted to have a copy of their own PSR and instead may only review it in the presence of their attorney or

classification officer. In many jurisdictions attorneys are prohibited from sharing PSR's with other counsel. PSR's are routinely sealed and are generally transmitted to appellate courts separate from the rest of the record on appeal to ensure their continued confidentiality. In short, PSR's are consistently handled in a highly confidential fashion and any decision to disclose portions of them to non-parties must be considered carefully if their purposes are to be fulfilled.

III. Restitution settlements should be permitted

One area in which current restitution law could be improved would be to permit restitution obligations to be the subject of settlement agreements. Given the routine entry of restitution orders in amounts defendants cannot pay, some victims may wish to give defendants an incentive to borrow money from others to make a lump sum payment in settlement of a greater restitution obligation that will be satisfied, if ever, only over a long period of time. Unfortunately, the statute as currently drafted and as proposed in the Bill deprives the district courts of jurisdiction to modify restitution orders to recognize such settlements, thus making them impossible even among willing defendants and victims. *See United States v. Maestrelli*, 156 Fed. Appx.144, 2005 WL 3078597 (11th Cir. 11/18/05) (district court had no jurisdiction to effectuate restitution settlement). Given the statute as construed in *Maestrelli*, the government was obligated to continue efforts to collect from the defendant even though no one

is entitled to receive funds collected. Victims obviously cannot be forced to settle if they do not want to, but reason suggests they should have the option to do so if they wish. The Bill could be improved by adding jurisdiction for district courts to modify restitution obligations to give effect to a settlement agreement reached in good fath between a victim and a defendant.

Conclusion

The effect of this Bill will be to allocate scarce prosecutorial resources to the role of civil collection agent where there is no money to be had instead of investigating, prosecuting, and incarcerating other criminals. Defendants attempting to successfully re-enter society after lengthy periods of incarceration will have little incentive to do anything more than the bare minimum and will be without hope that they will ever be truly free again. The process of determining the precise restitution amounts will be greatly complicated through the litigation of numerous matters unrelated to the facts of the case involving facts outside the possession of any of the parties. The Bill suffers from serious Constitutional defects to the extent that it authorizes punishment without conviction and increased punishment based on judicial fact-finding. And I believe the result of this Bill, even if Constitutional, this will be little if any additional compensation to victims. There is certainly no data at this point indicating this Bill is either necessary or desirable.

Mandatory restitution for every loss conceivably caused by the defendant sounds good in theory. In practice it will do nothing more for victims than would the pre-1996 law allowing Courts to order full restitution for all direct losses caused by the offense of conviction taking into account the defendant's actual ability to pay. Indeed, the fact that the Bill's approach will improve nothing in practice may explain why not one of the constituents within the criminal justice community (the Department of Justice, the Judiciary, U.S. Probation) appears to favor it. I appreciate this opportunity to assist the Subcommittee on these important issues. I will be pleased to answer any questions the Subcommittee might have at this time or, if necessary, in a subsequent written submission.