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 15, 2026
Filed: August 20, 2026

Before GRUENDER, SHEPHERD, and KELLY, Circuit Judges.

GRUENDER, Circuit Judge.

Holsey Ellingburg, Jr., robbed a bank in December 1995. A jury convicted him in August 1996. He was sentenced to imprisonment and ordered to pay $7,567.25 in restitution in November 1996. After his release in 2022, he sued to block the continued enforcement of his restitution order. He argues that the Mandatory Victim Restitution Act ("MVRA") violates the Ex Post Facto Clause as applied to him because the statute took effect after he committed his crimes but before he was convicted of them. We previously affirmed the district court's rejection of his argument that MVRA restitution is a criminal punishment. *See United States v. Ellingburg*, 113 F.4th 839, 842 (8th Cir. 2024). On remand from the Supreme Court, we conclude that the application of the MVRA to Ellingburg violates the Ex Post Facto Clause and reverse.

I. Background

When Ellingburg robbed a bank in December 1995, the Victim and Witness Protection Act of 1982 ("VWPA") was in effect. As relevant here, the VWPA provided that "[a]n order of restitution may be enforced" "in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title." 18 U.S.C. § 3663(h) (1994). Subchapter B of chapter 229 provided that a defendant's "liability to pay a fine expires" either "(1) twenty years after the entry of the judgment; or (2) upon the death of the individual fined." 18 U.S.C. § 3613(b) (1994). While the VWPA did not explicitly mention interest, the circuits generally held that district courts had the authority to impose interest on a restitution order. *See, e.g.*, *Gov't of V.I. v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994) (affirming district court's inclusion of prejudgment interest in restitution order under VWPA); *United States v. Rochester*, 898 F.2d 971, 983 (5th Cir. 1990) (holding that although the VWPA was silent on the issue, "both pre- and postjudgment interest may be awarded under the VWPA"); *United States v. Smith*, 944 F.2d 618, 626 (9th Cir. 1991) (adopting the Fifth Circuit's position).

Congress amended this statutory scheme with the MVRA, which took effect four months before Ellingburg's conviction. Two MVRA amendments are relevant here. First, the MVRA extends the time period over which the Government may collect restitution to be the "later of 20 years from the entry of judgment *or 20 years after the release from imprisonment of the person fined*." 18 U.S.C. § 3613 (1996) (emphasis added). Second, the MVRA makes interest awards mandatory, unless the district court determines that the defendant is unable to pay. 18 U.S.C. § 3612 (1996). Importantly, the MVRA provides that its amendments "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." Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 211, 110 Stat. 1214, 1241.

Ellingburg remained imprisoned until June 2022, and much of his restitution is still unpaid. If the VWPA governs his restitution order, he would owe nothing because his restitution liability expired in 2016—twenty years after the entry of judgment. But the Government maintains that because Ellingburg was sentenced after the passage of the MVRA, he remains liable for his restitution (plus interest) until 2042.

Ellingburg disagrees. Acting *pro se*, he petitioned the district court for an order that the MVRA violates the Ex Post Facto Clause as applied to him. The district court rejected his petition, finding that the MVRA's extension of liability did not increase his punishment. On appeal, we affirmed on the threshold ground that MVRA restitution was not criminal punishment and thus did not implicate the Ex Post Facto Clause. *See Ellingburg*, 113 F.4th at 842. Ellingburg then petitioned the Supreme Court for certiorari, which it granted on the question of whether MVRA restitution is a criminal punishment.

Unlike when it argued the case before us, the Government conceded to the Supreme Court that restitution under the MVRA likely constitutes criminal punishment. But in its brief opposing the grant of certiorari, the Government argued that the district court's decision should nonetheless be affirmed because the MVRA's extended period for paying restitution does not "increase the punishment," *see Collins v. Youngblood*, 497 U.S. 37, 46 (1990), and thus does not violate the Ex Post Facto Clause. Considering the Government's altered position, the Court appointed an *amicus curiae* to defend our judgment that MVRA restitution is not penal. The *amicus* argued that (1) the Court had improvidently granted Ellingburg's petition because he was sentenced under the VWPA, meaning that any ruling on the MVRA would be advisory, and (2) that MVRA restitution is not a criminal punishment.

The Supreme Court reversed, holding that MVRA restitution constitutes criminal punishment under the Ex Post Facto Clause. *See Ellingburg v. United States*, 607 U.S. 163, 166 (2026). The Court also dispatched *amicus's* argument that it had improvidently granted Ellingburg's petition, noting that "the Eighth Circuit decided this case on the understanding that the MVRA was applied to Ellingburg." *Id.* n.2. The Court then remanded the case with instructions that we "may consider the Government's separate arguments for affirmance," *id.* at 169, namely, that even if MVRA restitution is a criminal punishment, applying the law to Ellingburg did not increase his punishment.

On remand, we requested supplemental briefing on (1) whether the MVRA's extended liability period increases Ellingburg's punishment, and (2) whether Ellingburg was sentenced under the VWPA or the MVRA. Echoing the Supreme Court-appointed *amicus*, Ellingburg first claims that the sentencing court imposed his restitution order under the VWPA, which means that the MVRA's extended liability period does not apply to him. Alternatively, Ellingburg contends that the MVRA, if it applies, increases his punishment in violation of the Ex Post Facto Clause. The Government argues that even if the sentencing court applied the VWPA to Ellingburg, the MVRA nonetheless retroactively applies to him. The Government further reasons that the MVRA's retroactive application does not violate the Ex Post Facto Clause because it does not increase Ellingburg's punishment. The parties also dispute whether the MVRA's mandatory interest provisions separately violate the Clause.

II. Discussion

A.

We first address whether the MVRA applies and hold that it does. Even if Ellingburg was *sentenced* under the VWPA, the MVRA's provisions on enforcing restitution orders still *apply* to him. The MVRA's amendments "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." § 211, 110 Stat. at 1241.

This is consistent with both the district court's initial order and with our prior panel opinion. The district court agreed that Ellingburg had been sentenced under the VWPA but nonetheless reached the issue of whether "applying the MVRA's expanded liability period to the order of restitution in this case violates the Ex Post Facto Clause." Presumably this is because, as we previously noted, "[t]he parties d[id] not dispute that the MVRA has been applied to Mr. Ellingburg's sentence retroactively." *Ellingburg*, 113 F.4th at 841.

Ellingburg retreats from that position on remand, arguing that "if this Court rules that the sentencing court applied the pre-MVRA version of the VWPA at Mr. Ellingburg's sentencing, then the VWPA's twenty-year liability period provision applies." But he cites no authority for this proposition aside from a passing comment by Justice Jackson at oral argument. We likewise have found no apposite authority to support his position and thus apply the MVRA "to the extent constitutionally permissible." *See* § 211, 110 Stat. at 1241.

B.

We next address whether the application of the MVRA to Ellingburg's restitution order violates the Ex Post Facto Clause. We review such challenges *de novo*. *United States v. Winston*, 850 F.3d 377, 380 (8th Cir. 2017).

The Ex Post Facto Clause, *see* U.S. Const. art. I, § 9, cl. 3, prohibits penal statutes that disadvantage the offender "after the fact," *i.e.*, after the offender has acted, *Collins*, 497 U.S. at 41. In *Calder v. Bull*, Justice Chase explained that a law may violate the Ex Post Facto Clause when it falls within one of four categories. 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.). Relevant here is *Calder*'s third category, where a law "*changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *See id.* A law inflicts a greater punishment for a crime when it "presents a sufficient risk of increasing the measure of punishment attached to the covered crime." *See Peugh v. United States*, 569 U.S. 530, 539 (2013) (citation modified). Whether a law "creates such a risk is a matter of degree; the test cannot be reduced to a single formula." *Id.* (citation modified).

Although there is no "single formula," the Supreme Court's cases applying *Calder*'s third category are instructive. In *Lynce v. Mathis*, for example, the Court held that a state law cancelling the award of early release credits violated the Ex Post Facto Clause. 519 U.S. 443, 446-47 (1997). The Court rejected the state's argument that the credits "were not an integral part of petitioner's punishment" because the Ex Post Facto Clause's "essential inquiry" hinges on whether the law "had the effect of lengthening petitioner's period of incarceration." *Id.* at 439, 442-43. Likewise, the Court in *Weaver v. Graham* held that a statute that "reduce[d] the number of monthly gain-time credits available to an inmate . . . [b]y definition . . . lengthen[ed] the period that someone in petitioner's position must spend in prison." 450 U.S. 24, 33 (1981). In doing so, the law increased the defendant's punishment by "effectively postpon[ing] the date when he would become eligible for early release." *Lynce*, 519 U.S. at 442 (construing *Weaver*). And even when the Court has held that a law does not violate the Clause, it has reaffirmed that the *Calder* inquiry turns on a law's *effect*. *See, e.g.*, *Garner v. Jones*, 529 U.S. 244, 255-56 (2000) (looking to "evidence drawn from [a] rule's practical implementation" to determine if the rule "will result in a longer period of incarceration"); *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 512 (1995) (scrutinizing a rule's "effect on [a] prisoner's actual term of confinement").

Ellingburg argues that the MVRA's extension of his liability period increases his punishment and violates the Ex Post Facto Clause. The Government echoes the view of five of our sister circuits which have held that applying the MVRA's extended liability period to defendants who committed their crimes before 1996 does not increase their punishment in violation of the Ex Post Facto Clause. *See Solis v. Merendino*, No. 24-2962, 2026 WL 412106, at *3 (7th Cir. Feb. 13, 2026); *United States v. Weinlein*, 109 F.4th 91, 104 (2d Cir. 2024); *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) (per curiam); *United States v. McGuire*, 636 F. App'x 445, 447 (10th Cir. 2016). Only the Third Circuit has held otherwise. *See United States v. Norwood*, 49 F.4th 189, 200-01 (3d Cir. 2022).

We hold that the MVRA's retroactive application to Ellingburg violates the Ex Post Facto Clause because it increases his punishment in two ways: (1) it extends the liability period, which is itself a punishment, and (2) its practical effect is to increase the amount that Ellingburg will actually pay.

Begin with the MVRA's extended liability period. Restitution is debt. *See Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 564 (1990) ("Restitution obligations constitute debts within the meaning of . . . the Bankruptcy Code . . . ."), *superseded by statute*, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865. Given that restitution is debt—and punitive debt at that, *see Ellingburg*, 607 U.S. at 169—its dollar amount is hardly the end of the story. As any borrower knows, a debt's terms and conditions are vital. Under the VWPA, Ellingburg would only have been responsible for $7,567.25 for a maximum of 20 years after the entry of judgment—from November 1996 to November 2016. Under the MVRA, Ellingburg will be responsible for repaying $7,567.25 for a maximum of 20 years after his *release*, making him liable until 2042. In other words, the statutory scheme in effect when Ellingburg committed his crimes would have freed him from his restitution debt within 20-odd years; applying the MVRA amendments extends that date by almost 28 years. This constitutes an impermissible increase in Ellingburg's punishment that violates the Ex Post Facto Clause. *See Norwood*, 49 F.4th at 218 ("[P]ermitting the Government to seek collection over a greater period of time . . . . constitutes a retroactive increase in [plaintiff's] punishment . . . .").

Even setting aside the "terms and conditions" of restitution—*i.e.*, whether the liability period is a component of punishment—and assuming, *arguendo*, that the dollar amount of the restitution is the only relevant punishment to be considered, we cannot agree with the Government's view that the MVRA's extended liability period does not increase the punishment. As the Third Circuit noted, the Constitution "do[es] not require that a law alter the sentence as written; it is enough if a change in the law poses a significant risk of increasing the *portion* of a sentence that a defendant will actually be made to satisfy." *Id.* at 216.

Before the MVRA, Ellingburg's liability period would have lapsed in 2016. In effect, the VWPA's limited liability period moderated the restitution order's impact on Ellingburg because he paid only a little more than one quarter of his restitution while in prison. But applying the MVRA to Ellingburg "effectively postpone[s] the date" when Ellingburg will be free of his debt. *See Lynce*, 519 U.S. at 442. Therefore, the MVRA's effect poses a "significant risk of increasing the *portion*" of restitution that Ellingburg "will actually be made to satisfy." *See Norwood*, 49 F.4th at 216.

The Government and courts taking the majority approach insist that the MVRA does not increase Ellingburg's punishment because the relevant "punishment" at issue is the dollar amount of the restitution owed—here, $7,567.25. *See, e.g.*, *Weinlein*, 109 F.4th at 99-104. Because the MVRA simply prolongs the time period during which the Government may collect the restitution debt, the Government and a majority of circuits reason that the MVRA is analogous to an extension of an unexpired statute of limitations. *See id.* (reciting majority view). The circuit consensus, including our own, has found that extending an unexpired statute of limitations does not violate the Ex Post Facto Clause. *Stogner v. California*, 539 U.S. 607, 618 (2003) (holding that re-opening an *expired* statute of limitations violates the Ex Post Facto Clause but stating that the holding "does not affect" "extensions of *unexpired* statutes of limitations"); *United States v. Jeffries*, 405 F.3d 682, 685 (8th Cir. 2005) ("[E]xtending a limitations period before prosecution is barred does not violate the ex post facto clause.").

Although the majority view has a surface-level appeal, we respectfully disagree. The Supreme Court has analyzed statutes of limitations under *Calder*'s second category, which it understood to prohibit laws that "inflict[] punishments, where the party was not, by law, liable to any punishment." *Stogner*, 539 U.S. at 612 (quoting *Calder*, 3 U.S. (3 Dall.) at 389 (opinion of Chase, J.)). Laws reviving an expired statute of limitations cause someone who had ceased to be "liable to any punishment" to once more be liable and thus are, according to the Court in *Stogner*, unconstitutional. *Id.* at 610, 612 (stating that the law "falls literally" within *Calder*'s second category). But extensions of unexpired statutes of limitations do not fall within this category. Nor do they trigger *Calder*'s third category—which *Stogner* did not even mention—by increasing the punishment for the crime. Indeed, they do not affect the punishment at all: they only affect whether a person may be prosecuted in the first place. So extending an unexpired statute of limitations is constitutional because it has nothing to do with any of the *Calder* categories. Here, by contrast, we are in the territory of *Calder*'s third category, so we must look to Supreme Court cases that relate to increasing punishments. And those teach that when a law's "purpose and effect" is "to increase the rates and length" of the punishment—as the MVRA does to Ellingburg here—the law violates the Ex Post Facto Clause. *See Peugh*, 569 U.S. at 545 (citation modified).

Our sister circuits who reached the opposite conclusion failed to treat an increase in either the liability period or the expected total payment as an "increase[e] [in] the measure of punishment." *See id.* at 539. Instead, they either treated it as irrelevant, applied the now-defunct substantive/procedural distinction,[1] or failed to discuss the possibility at all. *See Weinlein*, 109 F.4th at 91, 103 (acknowledging that "extending the enforcement period may—or may not—increase the amount that the defendant will actually pay" but holding that the punishment imposed was nonetheless unchanged); *Solis*, 2026 WL 412106, at *3 ("The possibility that the government will collect more of the fine does not affect the amount Solis owes"); *Blackwell*, 852 F.3d at 1166 (upholding retroactive application because MVRA was a "[p]rocedural change . . . which d[id] not . . . increase the penalty by which a crime

[1]Earlier Supreme Court decisions asked whether a statutory change was substantive or procedural when analyzing ex post facto claims. *See, e.g.*, *Weaver*, 450 U.S. at 30 n.12. The Court has since rejected that test. *See Collins*, 497 U.S. at 46, 50.

is punishable"); *McGuire*, 636 F. App'x 445 (no discussion); *Rossello,* 737 F. App'x at 908 ("The extension of the collection period has no effect on the amount of restitution that Rosello owes."). We decline to follow their approach. We find that the MVRA's application to Ellingburg increases his punishment and violates the Ex Post Facto Clause.[2]

III. Conclusion

For the foregoing reasons, we vacate the district court's judgment and remand to the district court for further proceedings consistent with this opinion.

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[2]Because we hold that the retroactive application of the MVRA's extended liability period to Ellingburg violates the Ex Post Facto Clause, we need not address whether the MVRA's imposition of mandatory interest separately violates the Clause.