

2 Rulings Poke Holes In Mandatory Restitution Framework

By **Jillian Berman and Cindy Kuang** (April 7, 2026)

Two recent federal court decisions provide defense practitioners with new tools to challenge Mandatory Victims Restitution Act restitution orders.

First, on Jan. 20, the U.S. Supreme Court unanimously held in *Ellingburg v. U.S.* that MVRA restitution is criminal punishment for purposes of the U.S. Constitution's ex post facto clause.[1]

Before the *Ellingburg* case was decided, we identified the latent Apprendi problem in imposing restitution based on judicial factfinding.[2] We suggested that if the Supreme Court in *Ellingburg* held that MVRA restitution is indeed punishment, the decision would open the door to Sixth Amendment challenges to the restitution framework under the Supreme Court's *Apprendi v. New Jersey* ruling from 2000.

Then, just 10 days after the *Ellingburg* ruling, the U.S. Court of Appeals for the Third Circuit held in *U.S. v. Abrams* that the MVRA does not authorize restitution for victims' attorney fees,[3] taking a contrary position to the U.S. Court of Appeals for the Second Circuit's 2022 decision in *U.S. v. Afriyie*. [4]

Currently, attorney fees borne by victims may comprise a substantial portion of an eventual restitution order, particularly in white collar cases. The circuit split on whether such fees are losses under the MVRA may prompt further action by the Supreme Court in cabining the way courts determine restitution.

The issues surfaced in the *Ellingburg* and *Abrams* cases are not necessarily distinct — indeed, they converged recently in the prosecution of Charlie Javice and her co-defendant Olivier Amar in the U.S. District Court for the Southern District of New York. Following Javice's and Amar's convictions by a jury in March 2025, each defendant was not only sentenced to prison for multiple years, but also ordered to pay more than hundreds of millions of dollars in restitution for victim losses — over \$115 million of which comprised attorney fees — determined by the court under a preponderance of the evidence standard.

This outcome raises serious questions about how restitution is currently determined and imposed, particularly after the *Ellingburg* ruling. The *Abrams* ruling, while not binding precedent outside the Third Circuit, also raises more doubt about the propriety of including attorney fees in MRVA restitution orders.

Both Javice and Amar have already noticed their appeals,[5] — providing the Second Circuit with occasion to reconsider its position on the nature and limits of restitution sooner rather than later.

Restitution's Apprendi Problem

Under the *Apprendi* ruling, any fact that increases punishment beyond the statutory maximum must be found by a jury beyond a reasonable doubt.[6]



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The MVRA currently permits judges to find facts contributing to restitution under the lesser proof standard of preponderance, and courts have declined to apply *Apprendi* to restitution on two grounds: (1) restitution has been characterized as remedial, not punitive, and (2) judicial fact-finding can never exceed the statutory maximum of restitution when that figure — defined by the MVRA as the victim's losses — is determined by the court at sentencing.

The Supreme Court removed the first hurdle to bringing an *Apprendi* challenge by holding in *Ellingburg* that restitution is punitive. Perhaps it is now worth examining the logic of the second reason for rejecting *Apprendi*'s applicability to restitution.

Restitution obligations may far exceed the duration and impact of any prison sentence.[7] Yet, under current precedent, a defendant ordered to pay restitution would have no constitutional right to have a jury determine the facts allowing such punishment.

To date, the Second Circuit has uniformly rejected *Apprendi* challenges to MVRA restitution. As it held in *U.S. v. Reifler* in 2006, because "the MVRA fixes no range of permissible restitutionary amounts and sets no maximum amount of restitution that the court may order," there is no statutory maximum that judicial fact-finding could exceed.[8]

In other words, the MVRA permits restitution up to the amount of the victim's loss — and that loss is determined by judicial fact-finding. Therefore, the statutory maximum for restitution is what the court says it is.

This doctrinal move has had significant practical consequences, as evidenced in the recent case against Javice and Amar. Both were convicted of defrauding JPMorgan Chase in connection with JPMorgan's acquisition of Frank, a now-closed student financial aid startup Javice founded.[9]

At sentencing, the government sought almost \$300 million in restitution from both defendants, jointly and severally. While more than \$168 million related to acquisition costs of Frank by JPMorgan, approximately \$115 million sought as loss to the victim, JPMorgan, was attorney fees incurred by Javice and Amar in their legal defense, but contractually obligated to be paid by JPMorgan.[10]

Given the well-established and accepted Second Circuit law that *Apprendi* is inapplicable to MVRA restitution, the amounts put forward as victim loss compensable under the MVRA were not put to a jury and proven beyond a reasonable doubt. Instead, what ultimately became an outsize portion of Javice's and Amar's overall punishment was determined somewhat summarily during the sentencing phase, by U.S. District Judge Alvin K. Hellerstein of the Southern District of New York, under a mere preponderance standard of proof.

In November 2025, Javice and Amar were sentenced to 85 months and 68 months in prison, respectively, based on facts found by the jury beyond a reasonable doubt.[11] But the restitution ordered based on the court's finding under a preponderance standard is striking: Javice and Amar were ordered to pay \$287 million[12] and \$223 million[13] in restitution, respectively, collectible for up to 20 years after the end of their prison sentences.

Sentencing for Javice and Amar was contested and included a substantial dispute over what constituted compensable victim loss recoverable as restitution. In their sentencing submissions and during court proceedings regarding restitution, the government and counsel for each defendant addressed whether certain categorized expenditures — including

JPMorgan's attorney fees, its payment of the defendants' attorney fees, prejudgment interest, and retention payments to Frank employees — qualified as victim loss under the MVRA.[14]

Yet ultimately, the court somewhat quickly made its determination as to what constituted MVRA loss — under a preponderance standard, without any jury involvement. Notably, single determinations made by the court meant the difference of tens of millions of dollars owed by each defendant in restitution.

After the Ellingburg ruling, restitution is undeniably a criminal penalty, comparable to time served in prison. Yet the factual findings that can add hundreds of millions of dollars to a defendant's punishment are determined under a preponderance standard — one that would be constitutionally inadequate, in many circumstances, for adding a single day to a prison sentence.

In addition, federal district court decisions on restitution are reviewed on appeal under the deferential "abuse of discretion" standard, making reversal exceedingly rare.[15] In the wake of the Supreme Court's latest posture on restitution, the Second Circuit's Apprendi framework — which continues to produce such incongruous outcomes — warrants fresh scrutiny.

In his pre-Ellingburg sentencing brief, Amar raised the argument that ordering nonzero restitution based on facts not found by a jury violated his Fifth and Sixth Amendment rights.[16] Since the Ellingburg ruling was handed down, other litigants have also started to raise similar Apprendi arguments in an effort to challenge restitution orders.[17]

Restitution for Legal Fees

The Javice case also highlights another issue that warrants a fresh look, particularly in light of the recent Abrams ruling in the Third Circuit: whether the MVRA authorizes the recovery of legal fees incurred by offense victims.

The Second Circuit previously addressed this issue in its Afriyie ruling, but given recent developments, reconsideration is appropriate. In Afriyie, the Second Circuit analyzed whether victims' attorneys' fees survived the Supreme Court's narrowing of the MVRA in *Lagos v. U.S.* in 2018.[18]

The Lagos ruling held that the statute's reference to "investigation" and "proceedings" in describing expenses borne by offense victims that are reimbursable is limited to government investigations and criminal proceedings.[19] But the Afriyie panel concluded that Lagos did not disturb an earlier Second Circuit decision — 2008's *U.S. v. Amato* — holding that attorney fees could qualify as "other expenses" under Section 3663A(b)(4) of the MVRA.[20]

The court reasoned that its holding "follows from the plain language of the statute," emphasizing that attorney fees are sometimes "necessary ... expenses" to participate in government investigations.[21] While Afriyie did narrow the scope of recoverable fees — holding that legal fees associated with civil matters, including parallel U.S. Securities and Exchange Commission investigations, do not qualify for restitution — the panel reaffirmed that attorney fees incurred in connection with a government criminal investigation remain compensable in the Second Circuit.[22]

However, the Third Circuit recently rejected this reasoning. In its Abrams ruling, the Third

Circuit held that victims' attorney fees do not constitute compensable victim loss under the MVRA.[23] Applying traditional tools of statutory interpretation, the panel concluded that the items enumerated in Section 3663A(b)(4) — lost income, child care and transportation — reflect modest, attendance-related out-of-pocket costs.

Attorney fees, the panel noted, are fundamentally different in both nature and scale.[24] Where the enumerated items in Section 3663A(b)(4) are "incidental" expenses expected to total in the hundreds of dollars, "[l]egal fees, by contrast, are often orders of magnitude higher," because they involve professional advocacy and specialized expertise.[25] As such, the court observed that it "would be unusual, to say the least, for Congress to smuggle so substantial a category of liability into a residual phrase." [26]

The court further noted that Congress expressly authorized restitution for certain other professional services elsewhere in the MVRA — such as medical and rehabilitative services — making the absence of legal fees in the statute seem all the more deliberate.

The Third Circuit's concerns about stretching the text of the MVRA beyond its meaning are borne out to the extreme in the Javice case. A substantial component of restitution in Javice was the defendants' attorney fees — totaling approximately \$115 million.[27] That figure dwarves the legal fees contemplated in Abrams — around \$100,000[28] — and the basis for its inclusion is more tenuous.

To withstand legal scrutiny, Javice would require an even broader definition of compensable victim loss than Abrams rejected: The legal fees at issue were incurred not by JPMorgan in its capacity as a crime victim participating in the government's investigation, but by the defendants — and were borne by JPMorgan only because the Delaware Court of Chancery ruled that the Frank merger agreement obligated the bank to advance Javice and Amar's defense costs.

Including millions in fees that a victim was contractually compelled to pay for the defendants' own legal representation as "other expenses incurred during participation in the investigation or prosecution" — as the Abrams ruling put it — represents precisely the kind of smuggling the Third Circuit warned against, and then some. Whether these fees are ultimately recoverable by JPMorgan as restitution will likely be an issue on appeal.

More broadly, the dispute in Javice as to whether attorney fees borne by a crime victim may be recovered through restitution is a significant example of how restitution, under the current framework, turns on factual determinations that receive minimal procedural protection.

Conclusion

Restitution is an incredibly powerful sentencing measure. A framework that imposes criminal punishment without commensurate constitutional safeguards cannot survive indefinitely.

After the Ellingburg ruling, defense attorneys should consider challenging the existing framework by which restitution is determined, and the Abrams ruling presents grounds to revisit whether victims' attorney fees are covered losses under the MVRA beyond the Third Circuit.

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[1] *Ellingburg v. United States*, 146 S. Ct. 564 (2026).

[2] Jillian Berman, Cindy X. Kuang & Nkiru Anyaegbunam, *Restitution on Trial: How Ellingburg Could Reshape the Sixth Amendment*, Lankler Siffert & Wohl (Oct. 8, 2025), <https://www.lswlaw.com/2025/10/08/restitution-on-trial-how-ellingburg-could-reshape-the-sixth-amendment/>.

[3] *United States v. Abrams*, 165 F.4th 784, 812 (3d Cir. 2026).

[4] *United States v. Afriyie*, 27 F.4th 161, 166 (2d Cir. 2022).

[5] Notice of Appeal by Charlie Javice, *United States v. Javice*, No. 23-cr-00251-01 (S.D.N.Y. Nov. 12, 2025), ECF No. 461; Notice of Appeal by Olivier Amar, *United States v. Javice*, No. 23-cr-00251-02 (S.D.N.Y. Apr. 1, 2026), ECF No. 494.

[6] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

[7] Lula A. Hagos, *Debunking Criminal Restitution*, 123 Mich. L. Rev. 469, 476 (2025) ("Restitution orders are often steep and long-lived, effectively keeping people entangled in criminal debt long after they have completed their sentence and severely limiting their economic mobility after release.").

[8] *U.S. v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006); see also *United States v. Bengis*, 783 F.3d 407, 412 (2d Cir. 2015) ("[U]nlike the terms of imprisonment at issue in *Apprendi*, the MVRA and VWPA specify no maximum restitution amount. Therefore, a judge cannot find facts that would cause the amount to exceed a prescribed statutory maximum.").

[9] Luisa Beltran, *Jury Rules Startup Founder Charlie Javice Guilty of Defrauding JPMorgan Chase*, *Fortune* (Mar. 28, 2025), <https://fortune.com/2025/03/28/charlie-javice-guilty-jp-morgan-fraud/>.

[10] The Delaware Chancery Court had previously held that JPMorgan was contractually obligated to indemnify the defendants (former bank employees) for their defense costs. *Javice v. JPMorgan Chase Bank NA*, No. 2022-1179-KSJM, 2023 WL 4561017, at *1 n.1 (Del. Ch. July 13, 2023).

[11] Judgment in a Crim. Case as to Charlie Javice, *United States v. Javice*, No. 23-cr-00251-01 (S.D.N.Y. Oct. 30, 2025), ECF No. 449; Judgment in a Crim. Case as to Olivier Amar, *United States v. Javice*, No. 23-cr-00251-02 (S.D.N.Y. Nov. 25, 2025), ECF No. 466.

[12] Javice was initially ordered to pay restitution in the amount of \$287,501.078. Order of Restitution as to Charlie Javice, *United States v. Javice*, No. 23-cr-00251-01 (S.D.N.Y. Sep. 30, 2025), ECF No. 434. However, it appears that the district court intends to amend this order as to the amount of attorneys' fees owed back to JPMorgan, so as to obligate each

defendant to only bear the cost of her or his own attorneys' fees, and not the other. See Order Denying Defendant's Motion for Reconsideration at 3, *United States v. Javice*, No. 23-cr-00251 (S.D.N.Y. Nov. 10, 2025), ECF No. 460. At the time of publication, the district court has yet to docket a modified restitution order reflecting its revised determination.

[13] Transcript of Proceedings as to Olivier Amar at 78, *United States v. Javice*, No. 23-cr-00251-02 (S.D.N.Y. Dec. 1, 2025), ECF No. 468.

[14] See *id.* at 63-78; Transcript of Proceedings as to Charlie Javice at 63-72, *United States v. Javice*, No. 23-cr-00251-02 (S.D.N.Y. Oct. 31, 2025), ECF No. 457.

[15] *United States v. Bengis*, 783 F.3d 407, 410 (2d Cir. 2015).

[16] Olivier Amar's Sent'g Memorandum at 67, *United States v. Javice*, No. 23-cr-00251-02 (S.D.N.Y. 2025).

[17] Defs.' Mem. in Supp. of Second Renewed Mot. to Terminate Restitution Proceedings, *United States v. Shah*, No. 19 Cr. 864 (N.D. Ill. Feb. 18, 2026), ECF No. 1010.

[18] *United States v. Afriyie*, 27 F.4th 161, 170 (2d Cir. 2022).

[19] *Lagos v. United States*, 584 U.S. 577, 584 (2018).

[20] *United States v. Amato*, 540 F.3d 153, 159-60 (2d Cir. 2008).

[21] *Afriyie*, 27 F.4th at 170.

[22] *Id.* at 171.

[23] *United States v. Abrams*, 165 F.4th 784, 816 (3d Cir. 2026).

[24] *Id.* at 813-14.

[25] *Id.* at 814.

[26] *Id.*

[27] Transcript of Proceedings as to Charlie Javice at 64, *United States v. Javice*, No. 23-cr-00251-02 (S.D.N.Y. Oct. 31, 2025), ECF No. 457.

[28] *Abrams*, 165 F.4th at 814.