

12-5106 (L)
United States v. Maynard and Ludwig

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2013

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8 (Argued: November 21, 2013 Decided: February 24, 2014)

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10 Docket Nos. 12-5106 (Lead), 12-5124 (Con)

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13
14 UNITED STATES OF AMERICA,

15
16 Appellee,

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18 - v.-

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20 JOHN W. MAYNARD and JILL M. LUDWIG,

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22 Defendants-Appellants.

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24 - - - - -x

25
26 Before: KEARSE, JACOBS, and PARKER, Circuit
27 Judges.

28
29 John Maynard and Jill Ludwig appeal from judgments of
30 the United States District Court for the District of Vermont
31 (Reiss, C.J.) requiring them to pay restitution after a
32 series of bank robberies. Maynard and Ludwig contest paying
33 a bank's expenses other than the money taken in the robbery.
34 We vacate the restitution component of the judgments and
35 remand to redetermine restitution.

1 STEVEN L. BARTH, on behalf of
2 Michael L. Desautels, Federal
3 Public Defender for the District
4 of Vermont, Burlington, Vermont,
5 for Appellant John W. Maynard.
6

7 NANCY J. WAPLES, Hoff Curtis,
8 Burlington, Vermont, for
9 Appellant Jill M. Ludwig.

10 WILLIAM B. DARROW (Paul J. Van
11 de Graaf, on the brief), on
12 behalf of Tristram J. Coffin,
13 United States Attorney for the
14 District of Vermont, Burlington,
15 Vermont, for Appellee.
16

17
18 DENNIS JACOBS, Circuit Judge:
19

20 John Maynard and Jill Ludwig appeal the restitution
21 component of judgments entered following their guilty pleas
22 on a series of bank robberies. Pursuant to the Mandatory
23 Victims Restitution Act of 1996 ("MVRA"), Pub. L. No. 104-
24 132, 110 Stat. 1214 (codified at 18 U.S.C. §§ 3663-64), the
25 United States District Court for the District of Vermont
26 (Reiss, C.J.) imposed restitution in an amount consisting of
27 the money taken in the robberies and additional expenses
28 incurred by one of the victim banks. Maynard and Ludwig
29 object only to restitution for these additional expenses as
30 falling outside the provisions of the MVRA. For the
31 following reasons, we vacate the restitution component of
32 the judgments and remand to the district court.

1 **BACKGROUND**

2 Maynard and Ludwig robbed five banks between September
3 and November 2011.¹ Each time, one of the two entered the
4 bank alone, passed a note to the teller claiming possession
5 of a gun, and demanded money. Each robbery lasted only a
6 few minutes. Nobody was harmed.

7 The couple was arrested hours after the last robbery on
8 November 2, 2011. They were indicted on three bank-robbery
9 counts and one count of conspiracy. Ludwig pled guilty on
10 August 16, 2012 to one charge of bank robbery in violation
11 of 18 U.S.C. § 2113(a). The next month, Maynard pled guilty
12 to conspiracy in violation of 18 U.S.C. § 371. The two were
13 sentenced in December 2012.

14 In the sentencing phase, the Government sought
15 restitution under the MVRA, pursuant to 18 U.S.C. § 3663A.
16 More than half of the proposed restitution (\$12,966) was to
17 repay the money taken during the robberies, and is
18 uncontested on appeal. The rest included certain expenses
19 paid by Merchants Bank, of which the following are the

¹ The date and place of the robberies are: 1) Merchants Bank, Rutland, Vt. on Sept. 7, 2011; 2) Lake Sunapee Bank, West Rutland, Vt. on Oct. 7, 2011; 3) TD Bank, Granville, N.Y. on Oct. 25, 2011; 4) TD Bank, Granville, N.Y. on Oct. 29, 2011; and 5) Citizens Bank, Poultney, Vt. on Nov. 2, 2011.

1 subject of this appeal: 1) paid time-off for the bank's
2 regular staff, and the pay of replacement staff (\$7,991.68);
3 2) mileage expenses for the replacement staff (\$213.34); 3)
4 the cost of wanted posters (\$106.66); and 4) the cost of a
5 temporary security guard at the bank after the robbery
6 (\$574.52).

7 At separate sentencing hearings, the Merchants Bank
8 teller testified about the anxiety and emotional harm she
9 suffered as a result of being held up. At Maynard's hearing
10 only, the bank's security officer, Robert O'Neill, testified
11 that the regular staff was sent home the day of the robbery
12 because the bank was a crime scene, and that the bank did
13 not reopen until it was released by law enforcement at the
14 end of the day. On the two days following, the bank
15 operated with temporary replacements while the regular staff
16 was given paid leave to handle any trauma associated with
17 the robbery. He explained that this was the bank's usual
18 practice, and that taking care of employees in that way
19 served a business purpose.

20 Maynard and Ludwig contested the inclusion of the
21 bank's expenses in the restitution order. The court found,
22 however, that the expenses claimed could be compensated

1 because they were directly and proximately caused by the
2 robbery. The couple was sentenced, *inter alia*, to pay
3 restitution in the amount of \$21,852.20 jointly and
4 severally. This amount included the expenses incurred by
5 Merchants Bank listed above.

6
7 **DISCUSSION**

8 While the MVRA serves the broad policy purpose of
9 assisting the victims of crime, it also enumerates the
10 specific losses compensable in a mandatory restitution
11 order. Maynard and Ludwig argue that Merchants Bank's
12 expenses are not subject to restitution because they are not
13 among these enumerated harms.

14
15 **I**

16 Prior to 1982, federal courts were not permitted to
17 order restitution outside the probation context. See United
18 States v. Amato, 540 F.3d 153, 159 (2d Cir. 2008). The
19 Victim and Witness Protection Act of 1982 ("VWPA"), Pub. L.
20 No. 97-291, 96 Stat. 1248 (currently codified, as amended by
21 the MVRA, at 18 U.S.C. § 3663), afforded courts discretion
22 to impose restitution for specified kinds of harm. See
23 Amato, 540 F.3d at 159.

1 The victims' rights movement later inspired a review of
2 the judiciary's use of restitution. In 1996, Congress
3 passed the MVRA to help victims and to hold offenders
4 accountable for the losses they inflict.² See S. Rep. No.
5 104-179, at 17-18 (1995).

6 The MVRA made restitution mandatory for a broad swath
7 of offenses.³ See 18 U.S.C. §§ 3663A(a)(1), (c). The
8 purpose of the MVRA "is to make victims of crime whole, to
9 fully compensate these victims for their losses and to
10 restore these victims to their original state of well-
11 being." United States v. Boccaagna, 450 F.3d 107, 115 (2d
12 Cir. 2006) (quoting United States v. Simmonds, 235 F.3d 826,
13 831 (3d Cir. 2000)) (internal quotation marks omitted).

14 When the MVRA controls, a court "shall require" the
15 defendant to pay restitution for the harms listed in the
16 statute. 18 U.S.C. § 3663A(b).⁴ No other expense

² While the MVRA started out as a separate bill, it was later placed within the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

³ The parties agree that the MVRA applies here because a bank robbery is a "crime of violence" under 18 U.S.C. § 3663A(c).

⁴ The full text of 18 U.S.C. § 3663A(b) states:
The order of restitution shall require that such defendant--

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(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

1 reimbursement is made mandatory. There is no provision in §
2 3663A giving the district court discretion to order any
3 other restitution.

4 The broad scope of the MVRA is subject to some
5 limitations. Only a 'victim' (or the victim's estate) is
6 entitled to restitution. See 18 U.S.C. § 3663A(a)(1). The
7 term 'victim' is defined as "a person directly and
8 proximately harmed as a result of the commission of an
9 offense for which restitution may be ordered." 18 U.S.C. §
10 3663A(a)(2). This causation principle also governs the
11 calculation of reimbursable loss. See United States v.
12 Gushlak, 728 F.3d 184, 194-95 (2d Cir. 2013). And only a
13 victim's "actual loss" is compensable, not losses that are
14 hypothetical or speculative. Id. at 195.

15 "The procedures by which the sentencing court imposes a
16 restitution order are set forth in 18 U.S.C. § 3664."
17 United States v. Marino, 654 F.3d 310, 317 (2d Cir. 2011);
18 see also 18 U.S.C. § 3663A(d). Among other things, this
19 section prevents restitution from being conditioned or

(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.

1 limited by a defendant's ability to pay: "In each order of
2 restitution, the court shall order restitution to each
3 victim in the *full amount* of each victim's losses as
4 determined by the court and without consideration of the
5 economic circumstances of the defendant." 18 U.S.C. §
6 3664(f)(1)(A) (emphasis added).

7
8 **II**

9 The decisive issue on this appeal is whether expenses
10 other than those enumerated in § 3663A(b) are compensable
11 under the MVRA. We conclude they are not.

12 "We begin our interpretation of a federal statute with
13 the statutory text." City of New York v. Permanent Mission
14 of India to the United Nations, 618 F.3d 172, 182 (2d Cir.
15 2010). It is apparent from the text of § 3663A that
16 unlisted harms are not compensable in restitution. Because
17 courts have no inherent authority to order restitution,
18 Congress must provide the authority. See United States v.
19 Casamento, 887 F.2d 1141, 1177 (2d Cir. 1989). Congress did
20 so through the MVRA, but chose to include only the four
21 categories of harms listed in § 3663A(b). If Congress
22 intended to include all harms directly and proximately

1 caused by a defendant's offense, it could have done so with
2 wording more simple and categorical. "Applying the rule of
3 statutory construction '*inclusio unius est exclusio*
4 *alterius*'--that to express or include one thing implies the
5 exclusion of the other"--it follows that Congress intended
6 to limit the restitutable harms covered by the MVRA. United
7 States v. Tappin, 205 F.3d 536, 540 (2d Cir. 2000).

8 The Government's reliance on the statutory mandate to
9 impose restitution "in the full amount of each victim's
10 losses," 18 U.S.C. § 3664(f)(1)(A), is misplaced. The MVRA
11 provides that § 3664 is procedural rather than substantive.
12 See 18 U.S.C. § 3663A(d); see also United States v. Cliatt,
13 338 F.3d 1089, 1093 (9th Cir. 2003) (stating § 3664 cannot
14 trump substantive restitution provisions because it is only
15 a procedural mechanism). Furthermore, the context of this
16 clause is that the "full amount" of loss be determined
17 "without consideration of the economic circumstances of the
18 defendant." 18 U.S.C. § 3664(f)(1)(A). The provision
19 emphasizes only that courts may not decrease restitution to
20 account for the defendant's ability to pay. Taken thus in
21 context, this clause cannot serve as the Government's
22 springboard for restitution more broad than the text
23 specifies.

1 The Government seems to suggest that any and all losses
2 are compensable to the extent that they were 'directly and
3 proximately' caused by a defendant's offense. However, the
4 requirements of direct and proximate causation, see, e.g.,
5 Marino, 654 F.3d at 317, are necessary conditions for
6 restitution under the MVRA--not sufficient ones. As the
7 statute makes clear, the harm must also come within one of
8 the categories enumerated in § 3663A(b).

9 The Government's cases do not support a broader
10 application of the MVRA. Many are mere applications of §
11 3663A(b)(1), which allows reimbursement for property loss.
12 See, e.g., United States v. Ourashi, 634 F.3d 699, 702-05
13 (2d Cir. 2011) (allowing prejudgment interest for funds paid
14 out of life insurance funds to ensure the victim received
15 the "full amount" of their losses); United States v. Donaby,
16 349 F.3d 1046, 1051-55 (7th Cir. 2003) (damage to police car
17 in chase after bank robbery).

18 19 III

20 We now consider whether the specific costs incurred by
21 Merchants Bank fall within the enumerated harms of §
22 3663A(b).
23

1

A

2 In the wake of the robbery, the bank was closed as a
3 crime scene for the afternoon, and the bank's regular staff
4 stayed home the following two days to get over any stress
5 caused by the incident. The district court ordered Maynard
6 and Ludwig to pay restitution for the full amount of the
7 wages paid to the regular staff over this period of time.
8 However, given the goal of restoring victims "to their
9 original state of well-being," Boccagna, 450 F.3d at 115
10 (internal quotation marks omitted), we need to take into
11 account that the bank would have paid the regular staff in
12 any event. Thus, the bank would enjoy a windfall if it
13 recovered compensation for the full amount of the regular
14 staff and replacement staff wages.

15 A portion of the regular staff wages is nevertheless
16 compensable because the bank derived no benefit from the
17 wages paid during the bank's closure on the day of the
18 robbery. When a victim's facility is required to close
19 temporarily for crime scene investigation, the associated
20 costs may well fall under the MVRA. See, e.g., United
21 States v. Wilfong, 551 F.3d 1182, 1183-87 (10th Cir. 2008)
22 (lost work time due to evacuation after bomb threat); United

1 States v. Quillen, 335 F.3d 219, 222-23 (3d Cir. 2003)
2 (closing mailroom due to contamination from anthrax); United
3 States v. De La Fuente, 353 F.3d 766, 768, 771-73 (9th Cir.
4 2003) (lost work hours for postal service employees during
5 decontamination resulting from receipt of a threatening
6 letter said to contain anthrax). To the extent the bank
7 paid its regular staff for the remainder of that day,
8 restitution is proper.

9
10 **B**

11 The wages for the temporary staff do not fall within
12 the enumerated harms of § 3663A(b). The temporary staff
13 wages did not compensate for losses such as destruction of
14 property or funeral expenses, and were not necessary to the
15 prosecution or investigation of the offense. See 18 U.S.C.
16 § 3663A(b)(1), (3)-(4). The expense is arguably
17 attributable to the psychological recovery of the regular
18 staff present during the robbery; however, the MVRA
19 unambiguously limits recovery for psychological harm to
20 instances of "bodily injury." 18 U.S.C. § 3663A(b)(2); see
21 also United States v. Reichow, 416 F.3d 802, 805-06 (8th
22 Cir. 2005). The Government characterizes the wages as a

1 business expense absorbed by the bank, but the MVRA does not
2 include a business expense category. Because the temporary
3 staff wages fall outside the enumerated harms of § 3663A(b),
4 they may not be included in a restitution order.⁵

5 The Government adduces cases in which loss of income
6 has been compensated after a robbery. The summary order
7 issued in United States v. Blagojevic, 331 F. Appx. 791, 794
8 (2d Cir. 2009), allowed restitution for lost income when the
9 owner of a jewelry store closed the store during peak season
10 due to trauma suffered from a robbery. But Blagojevic was
11 decided on the plain error standard of review; the only
12 appellate issue was proximate causation, id. at 793-94; and
13 the order did not consider the types of harms compensable
14 under § 3663A. (On the whole, the case is a good example of
15 why summary orders lack precedential force.) The Government
16 also cites United States v. Tran, in which a teller who was
17 unable to work after a bank robbery was awarded restitution
18 for lost income. 234 F.3d 798, 804 (2d Cir. 2000),
19 overruled on other grounds by United States v. Thomas, 274
20 F.3d 655 (2d Cir. 2001) (in banc). However, the defendant

⁵ Because we hold that the award for temporary staff wages was improper, it follows that the mileage expense for the temporary staff is likewise not allowable.

1 challenged only the payment plan and not "the imposition of
2 restitution." Id. at 812-13.

3
4 **C**

5 The only category of allowable expense in which the
6 wanted posters and the temporary security guard might be
7 located is § 3663A(b)(4), which requires defendants to
8 "reimburse the victim for . . . *necessary* . . . expenses
9 incurred during participation in the investigation or
10 prosecution of the offense or attendance at proceedings
11 related to the offense." 18 U.S.C. § 3663A(b)(4) (emphasis
12 added).

13 We have not adopted a test for necessity in this
14 context. Our reading of a statutory text "'necessarily
15 begins with the plain meaning of a law's text and, absent
16 ambiguity, will generally end there.'" Dobrova v. Holder,
17 607 F.3d 297, 301 (2d Cir. 2010) (quoting Bustamante v.
18 Napolitano, 582 F.3d 403, 406 (2d Cir. 2009)) (internal
19 quotation mark omitted). "In conducting such an analysis,
20 we 'review the statutory text, considering the ordinary or
21 natural meaning of the words chosen by Congress, as well as
22 the placement and purpose of those words in the statutory

1 scheme.'" Id. (quoting United States v. Aguilar, 585 F.3d
2 652, 657 (2d Cir. 2009)). The dictionary definition of
3 "necessary" tends to be circular: essential or
4 indispensable. See 10 The Oxford English Dictionary 275-76
5 (2d ed. 1989) (defining "necessary" as "indispensable,
6 requisite, essential, needful; that cannot be done
7 without"). But the plain meaning is not obscure. The
8 victim expenses that are recoverable as restitution under 18
9 U.S.C. § 3663A(b)(4) are expenses the victim was required to
10 incur to advance the investigation or prosecution of the
11 offense.

12 Generally, this Circuit takes a broad view of what
13 expenses are "necessary." See United States v. Papagno, 639
14 F.3d 1093, 1101 (D.C. Cir. 2011) (citing Amato, 540 F.3d
15 153) ("In reaching our conclusion, we recognize that several
16 other courts of appeals have taken a broader view of the
17 restitution provision at issue here."). But respect for the
18 limits of the statute is not a narrowing of it.

19 Two of our cases reflect the standard of necessity.
20 Amato imposed restitution for attorney's fees and accounting
21 costs incurred by an internal investigation that uncovered
22 fraud--notwithstanding that not all of the effort and

1 expense was requested by the government. See 540 F.3d at
2 159-60, 162 (noting that the victim had "assisted in
3 gathering and producing evidence necessary to the
4 government's prosecution"). Likewise, in United States v.
5 Bahel, we affirmed restitution for legal fees incurred when
6 the United Nations hired outside counsel to conduct an
7 internal investigation rather than use on-staff lawyers.
8 See 662 F.3d 610, 647-48 (2d Cir. 2011).

9 In both cases, the internal investigations paid for by
10 the victims unmasked fraud and led to investigations
11 conducted by the authorities. The expense of the internal
12 investigations was necessary because the entity had
13 interests to protect (the integrity of its ongoing
14 operations and reputation, at the least) as well as a duty
15 to protect those interests when faced with evidence,
16 indicia, or a grounded suspicion of internal misconduct, and
17 the investigation was a means calculated to achieve the
18 protection of those interests.

19 A bank's production of wanted posters after a robbery
20 has occurred is by comparison, and in absolute terms,
21 gratuitous. The crime had been committed; there was no
22 especial likelihood that this bank would again be the victim

1 of the same robbers; the police had an ongoing investigation
2 and did not seek the bank's cooperation in posterizing the
3 neighborhood; and the bank had no interest to protect by an
4 independent investigatory effort--and certainly had no duty
5 to undertake it.

6 For many of the same reasons, the security guard served
7 no investigatory purpose. The guard provided additional
8 security for the bank after the robbery happened. If
9 additional security had been laid on permanently, it would
10 be necessitated by permanent security interests rather than
11 by the conduct of these defendants. As it happens, the
12 guard was hired on a short-term basis; but there is no
13 plausible showing that a second robbery of this branch by
14 these defendants was such an imminent peril or a risk that
15 the bank had a duty to take measures by posting a temporary
16 guard.

17 Because these expenses were not necessary to the
18 investigation or prosecution of the offense, and do not fall
19 within one of the other categories of harm enumerated in §
20 3663A(b), restitution for these expenses was improper.

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CONCLUSION

The restitution order properly included the amount of money stolen during the bank robberies. For the foregoing reasons, however, we conclude that the only portion of Merchants' expenses subject to restitution is the amount paid to the bank's regular staff while the bank was closed as a crime scene. To that end, we vacate the restitution component of the judgments and remand to determine the amount of restitution consistent with this opinion.