

**STATE OF MICHIGAN
IN THE 37th CIRCUIT COURT FOR THE COUNTY OF CALHOUN**

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs.

**Case No. 2013-0000002745-FH
Hon. Conrad J. Sindt**

CHRISTOPHER WAHMHOF,
Defendant.

/

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/

**DEFENDANT'S REQUEST TO DISMISS RESTITUTION CLAIMS; AND, IF SUCH
CLAIMS ARE TO BE PURSUED, TO REQUIRE THE PARTIES TO EXCHANGE IN
ADVANCE OF ANY HEARING ANY DOCUMENTS WHICH WILL BE USED TO
SUPPORT OR OPPOSE ANY RESTITUTION CLAIMS; AND TO OBJECT TO THE
RECEPTION OF HEARSAY EVIDENCE AT ANY RESTITUTION HEARING.**

Introduction

Several weeks ago, counsel for the Defendant initiated efforts to ask the assistant prosecuting attorney assigned to this case for the names of witnesses he plans to call during the Restitution Hearing in this case, and for copies of any documents which will be used during the Restitution Hearing to support any claims for restitution. In spite of the fact that numerous

messages were left to this effect, none of them were returned. However, on Wednesday, April 22, 2015, John Royal, undersigned co-counsel for the Defendant, was able to speak by telephone with assistant prosecuting attorney Brandon Hultink, and make these same requests. Mr. Hultink responded that he does not have to provide a witness list for the Restitution Hearing; he does not have to provide discovery of any documents he intends to rely on or use during the Restitution Hearing; and he also stated his position that hearsay evidence is admissible at the Restitution Hearing. In addition, however, Mr. Hultink did state that he intends to call the Officer-in-Charge, Detective Steve Hinkley, to testify at the Restitution Hearing, and he intends to call representatives of the law enforcement agencies that have made claims for restitution. Undersigned counsel assumes that Mr. Hultink was referring to the following claims, as set forth in the Presentence Investigation Report:

Fredonia Fire Department		\$3,500.00
Calhoun County Sheriff's Department	\$4,665.50	
City of Marshall	<u>\$4,481.00</u>	
Total Restitution Recommended by PSIR;		\$12,646.50

Having obtained this information, Defendant Chris Wahmhoff requests that these requests for restitution be denied. However, if a Restitution Hearing is to be held, Mr. Wahmhoff requests that the Court order the exchange between the parties prior to any such hearing of any documents which either party intends to use during the hearing as exhibits; or to refresh the memory of a party; or which were used or referred to by any claimant in the process of calculating the amount of damages. Finally, Mr. Wahmhoff contends that People v Matzke, 303 Mich App 281 (2013)_was wrongly decided, and that the Michigan Rules of

Evidence are indeed applicable during statutory restitution hearings.

**I. THE CLAIMS FOR RESTITUTION BY THE
LAW ENFORCEMENT AND PUBLIC SAFETY
DEPARTMENTS ARE NOT RECOVERABLE PURSUANT
TO THE RESTITUTION STATUTE.**

The law enforcement and public safety departments are here requesting restitution for the ordinary general costs of investigating and prosecuting crime, for normal personnel expenses and for the normal costs of the usage of their equipment. The restitution statute does not permit the recovery of these normal operating costs and expenses as restitution. People v Newton, 257 Mich App 61, 68-69; 668 N.W.2d 504 (2003) followed People v Crigler, 244 Mich App 423, 625 NW2d 424 (2001), and held:

Here, the cost of the investigation would have been incurred without regard to whether defendant was found to have engaged in criminal activity. We therefore agree with the reasoning in Crigler, and conclude that, under the plain language of the statute, the general cost of investigating and prosecuting criminal activity is not direct "financial harm as a result of a crime." Thus, we hold that the trial court erred in ordering defendant to pay \$2,500 restitution to the Barry County Sheriff's Department.

Here as well, the law enforcement and public safety agencies are requesting restitution for their normal payroll and operating expenses. They are not entitled to recover these costs pursuant to the restitution statute.

Restitution is being requested pursuant to the Crime Victim's Rights Act, MCL 780.751 *et seq.*, specifically MCL 780.766. The language in question is

when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

And as stated in People v Logan Gaines, 306 Mich App 289, 312, 856 N.W.2d 222 (2014): “Under MCL 780.766(1), victims entitled to restitution include a ‘governmental entity . . . that suffers *direct* physical or financial harm as a result of a crime.’ ” (Emphasis added). The Court went on to explain in Logan Gaines, *supra*:

[D]efendant argues that the trial court erred
by ordering
him to pay
restitution for
the general
cost of
investigating
and
prosecuting
criminal
activity. We
agree....

Restitution is afforded both by statute and by the Michigan Constitution. Const 1963, art 1, § 24; People v Grant, 455 Mich 221, 229; 565 NW2d 389 (1997). The purpose of restitution is to "allow crime victims to recoup losses suffered as a result of criminal conduct." *Id.* at 230. The Crime Victim's Rights Act, MCL 780.751 et seq., determines whether a sentencing court's restitution order is appropriate. People v Crigler, 244 Mich App 420, 423; 625 NW2d 424 (2001). [People v Newton, 257 Mich App 61, 68-69; 668 NW2d 504 (2003).]....

In Crigler, 244 Mich App at 423, this Court determined that the loss of buy money paid by a narcotics enforcement team for controlled substances constituted direct financial harm resulting from the defendant's crime. *Id.* at 426-427. This Court noted:

The loss of buy money is qualitatively unlike the expenditure of other money related to a criminal investigation, because it results directly from the crime itself; that is, the money is lost when it is exchanged for the controlled substance. The payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and

other similar expenditures are "costs of investigation" unrelated to a particular defendant's criminal transaction. These expenditures would occur whether or not a particular defendant was found to be engaged in the sale of controlled substances. [Id. at 427.]

In Newton, this Court relied on the dicta in Crigler that the payment of costs of the investigation a crime, such as salaries and equipment, would occur regardless whether a particular defendant committed the crime and therefore could not be recouped through restitution. 257 Mich App at 69-70. Therefore, the Newton panel determined that the \$2,500 the defendant was ordered to pay the sheriff's department as reimbursement for its cost in the investigation of the defendant was plain error affecting the defendant's substantial rights. Id. at 70.

Here, the trial court ordered defendant to pay restitution for officer investigation (24 hours for \$864), a forensic analyst (102 hours for \$3,672), and disks (\$6.64). These costs are comparable to costs of the investigation in Newton and distinguishable from the direct cost of the buy money paid in Crigler. [footnote omitted] Therefore, the trial court erred by ordering restitution and we vacate that portion of the judgment of sentence ordering \$4,542.64 in restitution.

Logan Gaines, supra, 306 Mich App 289, 310, 856 NW2d 222 (2014)

The Court of Appeals has consistently found that “[s]alary payments and similar expenditures were implicitly recognized in Crigler as qualitatively different than the harm contemplated for restitution purposes.” See Newton, supra, 257 Mich App 61, 68–70; 665 NW2d 504, 509 (2003).

And the Court of Appeals in Crigler, supra, found: “[t]he payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and other similar expenditures are “costs of investigation” unrelated to a particular defendant's criminal transaction.” *Id* at 427.

The Michigan courts have consistently found that victims of crime cannot recover for the

salaries they paid their employees as part of restitution. In People v Newton, supra, the court evaluated the trial court's award of \$2,500 to the Barry County Sheriff's Department as reimbursement for investigating the defendant. 257 Mich App 61, 66, 665 NW2d 504, 507 (2003). There, the court looked at whether expenses the law-enforcement agency expends in investigating the crime was direct "financial harm as a result of the crime." Id at 69. The Court concluded that "under the plain language of the statute, the general cost of investigating and prosecuting criminal activity is not direct 'financial harm as a result of a crime.'" Id at 69-70.

Based upon the above authorities, the restitution which has been requested by the law enforcement and public safety departments is not authorized by statute, and should be rejected.

**II. IF A RESTITUTION HEARING IS TO BE
HELD, MR. WAHMHOFF REQUESTS THE COURT TO
ORDER AN EXCHANGE OF RELEVANT DOCUMENTS
PRIOR TO THE HEARING.**

If a Restitution Hearing is to be held, Mr. Wahmhoff requests that the Court order the exchange between the parties prior to any such hearing of any documents which either party intends to use during the hearing as exhibits; or to refresh the memory of a party; or which were used or referred to by any claimant in the process of calculating the amount of damages. It is an old but wise saying that discovery makes the truth easier to determine. In a hearing such as a Restitution Hearing, where all the witnesses have a motive to shade the truth, it is especially important for the parties to be able to fully prepare for the complicate factual arguments that sometimes take place. Such preparation will necessarily include an exchange of documents. Mr. Wahmhoff contends that either the criminal rules of discovery, MCR 6.201(A)(1), (3), or (6); or the civil rules of discovery, MCR 2.302(B)(1), and (3) and 2.310 (A), (B), and (C), are broad

enough to permit the exchange of documents sought here.

A procedure where parties can keep documents secret until presented to a witness for marking and identification as an exhibit is not conducive to adequate pre-hearing preparation, or to the presentation of all relevant facts and arguments to the Court. A pre-hearing exchange of documents ought to be required

III. PEOPLE v MATZKE, 303 MICH APP 281 (2013), WAS WRONGLY DECIDED; HEARSAY EVIDENCE IS NOT CONDUCTIVE TO ACCURATE FACT-FINDING , AND SHOULD NOT BE PERMITTED AT A RESTITUTION HEARING.

Statutory Restitution Hearings contain disputed factual issues, often concerning the interpretation of business records or financial records. These types of issues are more analogous to the types of issues considered at an evidentiary hearing, then at a sentencing hearing. Restitution is a statutory right which belongs to a complaining witness; it is not part of the punishment which is fashioned by the judge at a Sentencing Hearing. The evidentiary rules against hearsay and the other Michigan Rules of Evidence are designed to assist in the process of accurate fact-finding thru the application of time-tested rules which prohibit the use of unreliable evidence. And hearsay evidence is often unreliable.

Thus, the statement in People v Matzke, 303 Mich App 281 (2013), that the restitution hearing: “was exclusively conducted for purposes of sentencing,” is erroneous. A restitution hearing is a creation of the legislature, which was concerned about making crime victims whole.

This is vastly different from the important purposes of sentencing: to reform the offender, to punish the offender; and to protect the community. The application of the Rules of Evidence at a Restitution Hearing, as contemplated by MRE 1101(a), is necessary and appropriate to ensure that accurate fact-finding takes place, and that a defendant is not ordered to pay an excessive amount, in the guise of restitution.

WHEREFORE, for all the above reasons, the recommendations for restitution set forth in the Presentence Report should be rejected; however, if a Restitution Hearing is to be held, this Court should order an exchange of documents prior to any such hearing; and the Rules of Evidence should be followed at such a hearing.

Respectfully submitted,

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DATED: April 23, 2015

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Hon. James C. Kingsley

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CERTIFICATE OF SERVICE

John F. Royal states that on the 23rd day of April, 2015, he served a copy of the Defendant's Request to Dismiss Restitution Claims; and, if such Claims are to be Pursued, to Require the Parties to Exchange in Advance of any Hearing any Documents Which Will be Used to Support or Oppose any Restitution Claims; and to Object to the Reception of Hearsay Evidence at any Restitution Hearing, and this Certificate of Service in the above-entitled matter via email to: Brandon Scott Hultink, Assistant Prosecuting Attorney at: bhultink@calhouncountymi.gov.

/s/ John F. Royal

John F. Royal