No._____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WARREN SCULLY, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a restitution order imposed as part of a federal criminal sentence and based on fact-findings made by the district court, rather than the jury, violates the fifth amendment indictment and notice guarantees and the sixth amendment jury trial guarantee.

2. Whether law enforcement agents who failed to conduct any reasonable investigation to determine whether two houses were separate properties before applying for a search warrant for one house at a particular address can have rely in objective good faith on the warrant to search both properties.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert Scully asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 4, 2020.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the court below

OPINION BELOW

The opinion of the court of appeals, *United States v. Scully,* 951 F.3d 656 (5th Cir. 2020), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on March 4, 2020. This petition is filed within 150 days after entry of judgment. Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The fourth amendment to the U.S. Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fifth amendment to the U.S. Constitution provides in pertinent part that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury[.]"

The sixth amendment to the U.S. Constitution provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"

FEDERAL STAUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3663(a)(1) provides in pertinent part that a district court, "when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense[.]"

Title 18 U.S.C. § 3663A(a)(1) provides in pertinent part that a district court, "when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense[.]"

STATEMENT

This case presents the Court with an opportunity to resolve important questions about the nature of federal criminal restitution and what, if any restrictions the fifth and sixth amendments place on court-ordered restitution. Two justices of the Court have recently urged review of these questions. *Hester v. United States,* 139 S. Ct. 509, 510 (2019) (Gorsuch, J. and Sotomayor, J., dissenting from denial of certiorari on restitution issue).

The case also presents the Court with an opportunity to clarify whether the good-faith exception to the exclusionary rule applies when an agent applying for the warrant has not made any reasonable investigation into the address to be searched and uses the warrant obtained to search two houses when the warrant was issued for a single house and the warrant application described a single house. The court of

appeals found the agents' actions sufficient but such lax investigative requirements seem at odds with the Court's precedent in *United States v. Leon,* 468 U.S. 897 (1984) and *Maryland v. Garrison,* 480 U.S. 79 (1987) and appear to allow manipulation and diminution of the warrant process, which is contrary to consistent precedent of this Court. *See, e.g, Riley v. California,* 574 U.S. 373 (2014).

Petitioner Bob Scully was the chief executive officer of Gourmet Express, a company that made frozen, quick-preparation meals sold in supermarkets. The company was started in the late 1990s, by Bob Scully, Ken Sliz, and another man. That man sold his share fairly early on and, by the early 2000s, Scully and his nephew Kevin Scully held a controlling 60% interest in the company. Ken Sliz held the other 40%.

The company came close to foundering in its first couple of years. Its ingredient supply chains were too expensive, with purchases often made on U.S. spot markets in relatively small quantities. Scully decided that Gourmet needed a stable supply chain to provide predictable costs and quality ingredients. He contracted with a supplier in Thailand to provide the ingredients. Working through a Thai company, allowed Gourmet to avoid the letter of credit and pre-payment generally required of foreign buyers in that country. EROA.5172-73; EROA.7408-10; EROA.9155-58. The Thai company, known as Groupwell for most of its existence, supplied, at a set price, shrimp from Thailand, as well as vegetables from China. The new supply chain allowed Gourmet to know its costs, to better set its product prices, and to outsell its competitors. Gourmet ran off several years of consistent profitability.

Despite the company's success, a rift developed between the Scullys and Sliz in 2006 and 2007. Sliz claimed that, during this time, he learned that Gourmet was buying ingredients from Groupwell and that Nataporn Phaengbutdee, Bob Scully's sister-in-law, and Nuchanat Scully, Bob's wife, had involvement in the Groupwell. EROA.4951-53. Sliz went to the Internal Revue Service to complain of Bob Scully.

IRS agents obtained a warrant to search Scully's home. That warrant authorized a search of the house at 1015 East Cliff Drive in Santa Cruz, California. EROA.2862-64; EROA.12470-73. The warrant attachment described the house to be searched in specific terms and it described only a single house. EROA.2864; EROA.12488-89.

The agents searched the house at 1015 East Cliff Drive. They also searched the house at 1015½ East Cliff Drive, across the alley from 1015 East Cliff Drive. From that second house, which Scully used as an office, the agents seized evidence, including a computer belonging to Scully. Scully moved to suppress evidence seized from the second house.

At the suppression hearing, Scully showed that the second house had a different address from his residence at 1015 East Cliff Drive. The second house was 1015½ East Cliff Drive. ROA.12409-10. He also showed that on East Cliff, there were three homes served by one driveway. ROA.12412.[1] And he showed that Pacific Gas

[1] Agent Ploetz's team did not search the third house related to Scully on the property because Agent Hardeman told them not to. ROA.12490.

and Electric had 1015 and 1015½ listed as separate accounts at separate addresses. ROA.12414-15.

IRS agent Demetrius Hardeman admitted knowing before he applied for a warrant that Scully owned more than one property in Santa Cruz. Nonetheless, he stopped looking at property records as soon as he found the 1015 address. ROA.12434-36. Hardeman acknowledged he did not investigate whether the separate buildings had separate addresses or utilities. ROA.12433-37. He simply decided to treat the two houses as one location. ROA.12429; ROA.12437. Hardeman also acknowledged that, in the warrant application, he had not listed 1015½ as an address of a house to be searched. ROA.12433.

At Agent Hardeman's direction, Agent Gary Ploetz, who was in California, acted as the "affiant" for the warrant application and affidavit, the Texas-based Hardeman had prepared. ROA.12480-81. Hardemen told the agents in California to take photographs of 1015 East Cliff. That was not done. Instead, Ploetz drove by the house and he looked at satellite photographs of it on the internet. ROA.12482-83; ROA.12487. Ploetz did not check with PG&E or the post office to see if the house in back had a separate address. ROA.12492.

The warrant listed only 1015 East Cliff Drive. Neither the warrant nor Attachment A to the warrant described the house containing the office as being included in the authorized search. ROA.12470-73; ROA.2862-64. Nothing in warrant named a building other than the house at 1015 East Cliff Drive and nothing in the

attachment described a building other than 1015 East Cliff Drive. ROA.12488-89; ROA.2864. The district court excused the entry into the apartment containing the office, finding the officers had acted in objective good faith when they searched the house at 1015½ East Cliff Drive. ROA.12521.

After the motion to suppression was denied and numerous other matters handled, a jury trial was held. Scully had initially been indicted on a tax charge. When he declined to plead guilty, the prosecutor added more tax charges and also brought wire-fraud charges related to Groupwell's relationship to Scully and Gourmet. A jury found Scully guilty of a tax conspiracy count, a wire-fraud conspiracy count, and three substantive wire-fraud counts. The district court sentenced him to 15 years imprisonment and ordered him to pay $1.2 million in restitution. EROA.3486; EROA.3490; EROA.3611.

Scully appealed, challenging, among other issues, the denial of his motion to suppress evidence and the restitution order entered by the district court. The Fifth Circuit rejected both arguments. It ruled that suppression was not warranted because the agents had done enough to fall within the good-faith exception to the exclusionary rule, 951 F.3d at 964-968, and that its precedent foreclosed Scully's argument that restitution could be ordered only if a jury had determined the need for restitution and its amount, 951 F.3d at 672 n.7 (citing *United States v. Rosbottom,* 763 F.3d 408, 420 (5th Cir. 2014)).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER FEDERAL RESTITUTION IMPOSED UNDER 18 U.S.C. § 3663 AND 18 U.S.C. § 3663 CONSTITUTES A CRIMINAL PENALTY THAT CAN BE INCREASED ONLY UPON NOTICE IN THE INDICTMENT AND PROOF TO THE JURY.

The sixth amendment requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The fifth amendment requires that "a fact that describe[es] punishment must be charged in the indictment" because doing so allows a defendant to "predict with certainty the judgment from the face of the felony indictment[.]" *Alleyne v. United States*, 570 U.S. 99, 109-10 (2013) (quoting *Apprendi*, 530 U.S. at 478).

Since *Apprendi*, the Court has explained the application of the constitutional requirements in a number of contexts. It taught the proper way to determine the relevant maximum punishment. *Blakely v. Washington,* 542 U.S. 296 (2004). It explained how the rules apply to enhanced statutory sentences, *Alleyne,* 570 U.S. at 107-16, to state and federal guideline sentencing schemes that permit judges a fact-finding role, *Blakely,* 542 U.S. at 303-05, *United States v. Booker,* 543 U.S. 220 233-44 (2005), *California v. Cunningham,* 549 U.S. 270, 288-94, and to criminal fines, *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012).

The Court has not yet considered whether and how the notice and jury-findings requirements of the fifth and sixth amendments apply to restitution imposed as part of the sentence in federal criminal cases. *See Hester v. United States,* 139 S. Ct. 509, 510 (2019) (Gorsuch, J. and Sotomayor, J., dissenting from denial of certiorari on restitution issue). Federal criminal restitution appears on the face of the relevant statutes to be a criminal penalty. *See* 18 U.S.C. § 3663(a)(1); 18 U.S.C. § 3663A(a)(1). The courts of appeals, however, have divided over the nature of a federal criminal restitution order, with some holding that restitution is a criminal penalty and others holding that it is more like a civil remedy. *Compare United States v. Ziskind,* 471 F.3d 266, 270 (1st Cir. 2006), *United States v. Edwards,* 162 F.3d 87, 91 (3d Cir. 1998) and *United States v. Adams,* 363 F.3d 363, 365 (5th Cir. 2004) *with United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015) and *United States v. Serawop,* 505 F.3d 1112, 1123 (10th Cir. 2007). Not surprisingly, those circuits that hold restitution is civil in nature have decided that the fifth and sixth amendments and the *Apprendi* rule do not apply to the restitution portion of a criminal sentence. *See, e.g., Thunderhawk,* 799 F.3d at 1209. Surprisingly, that same result has been reached by the circuits that do recognize restitution as a criminal penalty. These circuits believe either that *Apprendi* does not apply because the federal statutes do not set a maximum restitution amount, *see, e.g., United States v. Rosbottom,* 763 F.3d 408, 420 (5th Cir. 2014), or that they must wait for the Court to decide whether *Apprendi* extends to restitution, *see, e.g., United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013).

The Court should now decide whether federal criminal restitution orders are criminal penalties and should clarify what the constitution requires of the prosecutors that seek the orders and the sentencing courts that impose them. Resolving the nature of restitution orders and bringing constitutional clarity to restitution proceedings would have significant practical effects. The federal district courts impose restitution in thousands of federal criminal cases each year. S*ee* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf last visited June 1, 2020. The total amount defendants are ordered to pay each year runs to billions of dollars. *Id.*; *see also Hester v. United States,* 139 S. Ct. 509, 510 (2019) (Gorsuch, J. and Sotomayor, J., dissenting from denial of certiorari). These restitution orders hamstring lives, create the risk of impoverishment or even imprisonment, and affect other constitutional rights, such as the right to counsel of choice, of those who are subject to them. *See, e.g., United States v. Scully,* 882 F.3d 549 (5th Cir. 2018). Review is therefore merited.

A. Though the circuits are divided, the better view is that federal restitution is a criminal penalty.

Federal restitution for a federal criminal offense is a sanction created by statute. Title 18 U.S.C. § 3556 provides that a district court "in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section." Both § 3663 and § 3663A state that restitution is imposed "in addition"

to "any other penalty authorized by law[.]" 18 U.S.C. § 3663(a)(1); 18 U.S.C. § 3663(a)(1).

Statutory language must be given its plain meaning. *See, e.g., United States v. Gonzales,* 520 U.S. 1, 4-5 (1997). That restitution is directed to be imposed "in addition to" any "other penalty" tells us that restitution is a criminal penalty, just as other sanctions, such as imprisonment or fines, are penalties. If restitution were not a criminal penalty, the phrases "in addition to" and "any other penalty" would have no meaning in the statute. Congress would have needed only to state that restitution should or could be imposed by a district court if there were any persons who were victims of an offense. *Cf. Corley v. United States,* 556 U.S. 303, 314-15 (language of statute as written must be given effect). The plain language of the statutes strongly suggests that restitution is a punishment.

This reading of the plain language of the statutes comports with what the Court has identified as the purposes of criminal prosecution and of sentencing restitution orders. The Court has stated that a purpose of restitution in a criminal case is "to mete out appropriate criminal punishment for [the defendant's criminal] conduct." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). Restitution, while it does also serve remedial and compensatory goals, arises from the "'prosecutorial powers of government'" and "also serves punitive purposes[.] *United States v. Paroline*, 572 U.S. 434, 456 (2014) (quoting *Browning-Ferris Industries of Vt., Inc v. Kelco Disposal, Inc,* 492 U.S. 257, 275 (1989)). Restitution when imposed as part of a criminal sentence furthers the "rehabilitative and deterrent goals" sentencing. *Kelly*

v. Robinson, 479 U.S. 36, 52 & n.10 (1986). These teaching reinforce the bedrock point that criminal prosecutions are brought to hold persons to societal criminal account and to impose criminal punishment, not to ensure monetary compensation for individual, are what cause a prosecution to be brought. *Id.* at 52-53; *cf. United States v. Leahy*, 438 F.3d 328, 341-42 (3d Cir. 2006) (en banc) (goal of deterrence and punishment of criminal conduct means restitution is a criminal penalty) (McKee, J., concurring in part and dissenting in part).

The history of restitution also suggests that restitution is a criminal penalty that must be alleged in the indictment and proved to the jury. The *Apprendi* "rule is rooted in longstanding common-law practice," *Cunningham,* 549 U.S. at 281, and thus the Court has looked to historical practice to determine what facts are necessary to punishments. *Southern Union,* for example, looked to the historical practices around criminal fines. 567 U.S. at 354-56. Its examination revealed that, historically, facts concerning a possible fine were alleged in the charging instrument and submitted to juries. *Id.* Because the common-law rule was that facts "essential to the punishment" were the ones so submitted, the Court concluded fines were a penalty and subject to the *Apprendi* rule. 567 U.S. at 356.

As Justices Gorsuch and Sotomayor recently recounted, restitution at common law had to be alleged and submitted to the jury. *Hester,* 139 S. Ct. at 509-10. "[A]s long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury. 1 J. Chitty, Criminal Law

817–820 (2d ed. 1816); 1 M. Hale, Pleas of the Crown 545 (1736). In America, too, courts held that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered." 139 S. Ct. at 509 (citing, *inter alia, Schoonover v. State*, 17 Ohio St. 294 (1867) and *Commonwealth v. Smith,* 1 Mass. 245 (1804)). That restitution was available only when the indictment listed it and the jury considered the justifications for it is strong evidence that restitution is punishment. If restitution were not "essential to punishment" there would have been no reason to submit restitution facts to the jury. *Cf. Southern Union,* 567 U.S. at 356; *Blakely,* 542 U.S. at 301-02.

The federal restitution statutes at § 3663 and § 3663A deviate substantially from historical practice. When imposing either discretionary restitution under § 3663 or mandatory restitution under § 3663A, the sentencing judge determines who has been injured and how much the defendant must pay. *See* 18 U.S.C. § 3663(a)(1)(B)(i)(I); (a)(2); 18 U.S.C. § § 3663A(a)(2), (b)(1). The district court makes these determinations after having the probation officer collect and obtain information and after hearing from the government and the defendant. 18 U.S.C. § 3664(a), (f).

If restitution is a criminal penalty these deviations raise significant constitutional questions. Clarifying the nature of restitution would aid the circuit courts and would have significant practical impact, both for the law and for individuals. *Cf. United States v. Carruth,* 418 F.3d 900, 905 (8th Cir. 2005) (observing that some circuits have held that restitution is a punishment for purposes of the ex

post facto clause, but not for the fifth and sixth amendments and this distinction has "no principled basis).

B. If Restitution Is a Punishment, It Must be Alleged and Submitted to the Jury.

The *Apprendi* rule "reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of a jury trial." *Blakely,* 542 U.S. at 305. "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives *wholly* from the jury's verdict." *Id.* (emphasis added). That means, *Blakely* explained, that for, for sixth amendment purposes, the statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. The practical effects of this rule are significant: in many cases the maximum sentence is not the highest term set forth by statute, but rather "the maximum [the judge] may impose *without* any additional findings." *Id.* at 303-04; *see also Booker,* 543 U.S. at 232 (same).

Thus, a judge may not impose punishment beyond what the jury's verdict, or a defendant's admissions, allow. Greater punishment than that implicates the core concern of the sixth amendment by "remov[ing] from the [province of the] jury" the determination of facts that warrant punishment for a specific statutory offense. *Oregon v. Ice*, 555 U.S. 160, 170 (2009) (quoting *Apprendi,* 530 U.S. at 490) (internal quotation marks omitted). In finding that the facts supporting a criminal fine had to be found by the jury, the Court reemphasized that, "while judges may exercise discretion in sentencing, they may not "inflic[t] punishment that the jury's verdict

alone does not allow." *Southern Union Co,* 567 U.S. at 348 (quoting *Blakely,* 542 U.S. at 304).

A number of the courts of appeal appear to have disregard this core precedent when they reasoned that restitution does not implicate the fifth and sixth amendments and the *Apprendi* line because neither § 3663 nor § 3663A set a maximum amount of restitution that a defendant can be ordered to pay. These rulings began after *Apprendi* and have continued after *Southern Union.* The Eight Circuit long ago declined to apply the Apprendi rules because "there isn't really a 'prescribed' maximum" for restitution. *United States v. Ross,* 279 F.3d 600, 609 (8th Cir. 2002). *Blakely* and *Southern Union* would seem to have called such reasoning into doubt, but several circuits after *Southern Union* have held that, because no statutory maximum is set in the restitution statutes, a sentencing court's imposition of restitution cannot exceed a statutory maximum. *See United States v. Bengis*, 783 F.3d 407, 412-13 (2d Cir. 2015) ("there is no range prescribed by statute and thus there can be no *Apprendi* violation."); *United States v. Day*, 700 F.3d 713, 731 (4th Cir. 2012) ("Critically, however, there is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense"); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (relying on prior Fifth Circuit precedent to reject challenge to restitution based on *Southern Union*, "because no statutory maximum applies to restitution"). *United States v. Churn*, 800 F.3d 768, 782-83 (6th Cir. 2015) (rejecting argument). The First Circuit

recently put it bluntly, stating that because there is no maximum set out in the restitution statute, "a judge cannot find facts that would cause the amount to exceed a prescribed statutory maximum." *United States v. Vega-Martinez,* 949 F.3d 43 (1st Cir. 2020) (quoting *Bengis,* 783 F.3d at 412).

But, as Justice Gorsuch recently wrote, in the ordinary case, "the statutory maximum for restitution is usually *zero,* because a court can't award *any* restitution without finding additional facts about the victim's loss. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order." *Hester v. United States,* 139 S. Ct. 509 (2019) (Gorsuch, J. and Sotomayor, J., dissenting from denial of certiorari) (emphases in original). This is because, under *Apprendi* and *Blakely,* the maximum restitution authorized by the jury verdict is nothing. No accusation of loss has been considered by the jury and thus the jury has made no findings whatsoever that a loss occurred or that a victim existed.

Southern Union helps make this clear. In that case, the Court cited *Commonwealth v. Smith*, 1 Mass. 245, 247 (1804), a larceny case in which the trial court was authorized to order a fine of three times the amount of money stolen. The court refused allow a fine for stolen property that was not listed or valued in the indictment. *Southern Union* explained that "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'" 567 U.S. at 356 (citing *Blakely,* 542 U.S. at 301-02). It would seem that restitution, if it is

a criminal penalty, must work the same way. If there is no allegation of loss made or no victim named in the indictment, no restitution is authorized. The Court should grant certiorari to resolve this issue.

C. Scully's Case Provides a Good Vehicle for Resolving These Issues, Which Affect Thousands of Defendants Each Year and Can Also Affect the Right to Counsel.

The nature of federal criminal restitution orders and the constitutional strictures that may apply to them are questions that affect thousands of cases each year. In government fiscal year 2019, restitution was imposed in 12.5 percent of criminal cases and those orders totaled 7.7 billion dollars. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf last visited June 1, 2020. If restitution facts need to be pleaded and proved by the government (or admitted by the defendant), then many judgments are ordered and many lives impacted each year in violation of the fifth and sixth amendments.

Restitution judgments against individuals have significant effects. An order to pay hundreds, thousands, or, as in Scully's case, a million or more dollars creates a long-term obligation that may destroy a credit history, drive a family into poverty, or return a defendant to prison if restitution has been made a condition of his supervised release. All of these punitive consequences arise without notice of them to the defendant in the indictment and without a jury ever authorizing an amount of restitution.

The loss of these notice and jury rights matters. Given notice of damages he is claimed to have caused, a defendant can contest claims of purported victims and amounts, can confront witnesses, and can hold the government to our system's most demanding standard of proof. Restitution determined by a judge at sentencing removes those protections, greatly increasing the chance that a defendant will be financially punished. This is because, compared to notice and trial, the procedures in the restitution statute and at sentencing offer reduced opportunities to effectively challenge assertions.

The restitution statutes contemplate that a probation officer will collect information about restitution amounts and victims to put in a presentence report, or in a separate restitution report. 18 U.S.C. § 3664(a). In a reality in which courts have been known to refer to "my probation officer," the loss of the protections of an independent jury are highlighted. A probation officer seen, correctly, as working for the court cannot be challenged in the same ways that an opposing advocate or witness may. Additionally, when the probation officer puts information in a presentence report, that information acquires in the Fifth Circuit a presumption of reliability, *see, e.g, United States v. Caldwell,* 448 F.3d 287, 291 (5th Cir. 2006) and, in essence, the defendant is required to prove that the victims or amounts named in the presentence report are not true.

Restitution can also affect other rights, as it did in Scully's case. The sixth amendment permits a defendant "a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932); *see also Luis v. United States,* 136

S. Ct. 1083, 1089 (2016); *United States v. Gonzalez-Lopez,* 548 U.S. 140, 148 (2006). The right to counsel of choice is fundamental because of "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust" in the attorney-client relationship. *Luis,* 136 S. Ct. at 1089. Though fundamental, counsel of choice is not an unlimited one right. A defendant may not use tainted funds to hire counsel of choice. *Cf. Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 631 (1989).

The mere finding of guilt of a charged offense does not, however, make any specific property of the defendant, let alone all the property of the defendant, tainted. But the effect of a restitution finding by creates a taint, and thus can destroy the right to counsel of choice. That happened to Scully in this case: he was denied his appellate counsel of choice because of the district court's restitution findings. When the district court entered its judgment including restitution against Scully a statutory lien against *all* of Scully's property arose pursuant to 18 U.S.C. § 3613(c). This lien kept Scully from hiring his counsel of choice on appeal. *United States v. Scully,* 882 F.3d 549, 551-52 (5th Cir. 2018). That Scully's case illustrates how restitution orders made without jury findings can thwart additional constitutional rights and affect the presentation of cases on appeal makes his case a particular good vehicle for resolving the question presented.

These practical and legal effects on individuals, like the division in the circuits on how the *Apprendi* rule applies, call for review by this Court. Scully's case presents the issue clearly and cleanly. The jury made no findings on the amount of restitution

or who it should be paid to. The issues raised are purely legal ones; that the issue was not raised in the district court does not affect its presentation here. Fifth Circuit precedent would have required the district court to summarily deny a request that the restitution be submitted to the jury, in the same way that precedent required the Fifth Circuit to summarily wave aside Scully's challenge on appeal. *See* 951 F.3d at 672. The sixth amendment principles are set, only their application to the imposition of restitution remains to be answered. The Court should grant certiorari in this case and provide that answer.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER AN INADEQUATE INVESTIGATION OF THE PLACE TO BE SEARCHED CAN BE EXCUSED UNDER THE GOOD-FAITH EXCEPTION.

"The Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California,* 573 U.S. 373, 403 (2014). As the Court explained in *Payton v. New York,* "The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." 445 U.S. 573, 590 (1980).

The protection offered by the warrant requirement can be realized fully, however, only if the intent of the requirement is vigorously enforced. The warrant requirement "is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow weighed against the claims of police

efficiency" *Riley,* 573 U.S. at 401 (quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 481 (1971)). But merely applying for a warrant is not enough to ensure the protection intended by the warrant clause if law enforcement agents lack incentives to be rigorous and thorough in applying for warrants. Like any rule, the warrant requirement can be rendered a matter of form, not substance.

This concern was recognized by the Court when it approved the objective good-faith exception to the exclusionary rule in *United States v. Leon,* 468 U.S. 897 (1984). While, the virtue of a warrant is that it invokes "the detached scrutiny of a neutral magistrate," and provides a "more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" 468 U.S. at 913-14 (quoting *United States v. Chadwick,* 433 U.S. 1, 9 (1977) and *Johnson v. United States,* 333 U.S. 10, 14 (1948)), a warrant does not solve all fourth amendment infirmities. So, in approving the good-faith exception, the Court listed four categories of warrant-related issues that the exception would not apply to. 468 U.S. at 914-15.

Those categories were (1) when an affidavit supporting the warrant application was made with knowing or reckless falsity, *see Franks v. Delaware,* 438 U.S. 154, (1978), (2) when the issuing magistrate had failed to "perform his 'neutral and detached' function, *see Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979), (3) when a warrant application is so "bare bones" that it renders belief in the existence of probable cause "entirely unreasonable", and (4) when a warrant is facially deficient in that it fails to describe the place to be searched. *Leon,* 468 U.S. at 923. The Court

expressed a belief that establishing a good-faith exception with these four reservations would not affect the strict enforcement of the "the requirements of the Fourth Amendment[.]" *Id.* at 924. Justice Blackmun, concurring, added that "[i]f it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment," the Court would have to reevaluate the exception and its contours. *Id.* at 928

Petitioner's case shows that, while in large measure the good-faith exception has been proven correct, workable, and consistent with the goals of the fourth amendment, some fine-tuning may be needed. The Court should consider adding a fifth category in which the good-faith exception does not apply. That category is: when officers fail to adequately investigate the place description information they put in a warrant application or affidavit.

The addition of an adequate-investigation category would greatly reduce the chance that the warrant process could be manipulated or diminished for officer convenience creating the danger that warrants could become a formality, not a guarantee of freedom. *See, e.g, Riley,* 573 U.S. at 401. The "manifest purpose" of the fourth amendment's particularity requirement "was to prevent general searches." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987). A warrant application that on its face appears particularized is actually not particularized if the officers applying for the warrant, have not actually investigated the address and property to be searched.

For that reason, the Court in considering the application of the good-faith exception in a case in which officers executed a warrant on a premises not meant to be covered by the warrant, focused on the officers' conduct prior to obtaining the warrant. *Garrison,* 480 U.S. at 88-89. The Court held the officers had investigated sufficiently to believe, when applying for the warrant and when they began to execute the warrant, that the third-floor of the building they searched comprised a single apartment. The officers had investigated to try to determine if the third floor had multiple apartments, including inquiring with the local police, asking if there were separate rooms, and checking records at the local utility company. *Id.* at 85 n.10. Despite these efforts, the agents had made a mistake. The third floor did contain two apartments. *Id.* at 80-81, 88-89. The officers stopped searching when they realized that. *Id.*[2]

Garrison did not add an adequate-investigation category to those reserved by *Leon*. It had no need to–the officers had performed an adequate investigation of the address, and thus there was no reason to hold that they could not rely, under the then-new *Leon* rule, on the warrant the obtained. In fact, the search in *Garrison* occurred before *Leon* was decided. *See Garrison v. State,* 494 A.2d 193 (Md. 1985).

[2] In the alternative, if the Court does not grant certiorari to consider the possibility of adding an adequate-investigation category to the *Leon* categories, the Court should grant certiorari, vacate the judgment of the Fifth Circuit, and remand for reconsideration of the execution of the warrant on Scully's office in light of *Garrison*. The agents in this case did exactly the opposite of the officers in *Garrison.* Rather than stopping the search when they discovered two house when they had a warrant for one house, they chose to search both. That is not objectively reasonable conduct that fell within the scope of the warrant.

Petitioner's case shows that at least some officers may be using the existence of the good-faith rule as a reason not to adequately investigate a physical location before applying for a search warrant. The incentive that the officers in *Garrison* had at the time of their 1982 search is gone. Now, obtaining a warrant is likely to excuse the lack of investigation into a particular location that preceded the warrant. The *Franks* category under *Leon* does not extend sufficiently to reach lazy or disincentivized investigations, such as the one in this case, that fail to inquire into and describe the place to be searched. *Franks* requires knowing or reckless falsity. What happened in Petitioner's case was simply a failure to take necessary action.

The agents in Petitioner's case knew that Petitioner owned more than one property in Santa Cruz. Yet they did not bother to do any sort of actual investigation to determine whether the houses they ended up searching were separate properties with separate address. Through this inaction the agents were able to evade the essence and intent of the fourth amendment. Because they didn't feel like looking at property records, or tax records, or utility records, and did not even bother to do anything but drive past the houses and look at them on google maps, the officers had not investigated sufficiently to make a particularized warrant application. They filed the application using what information they had. The implicit assurance to the magistrate who considered the warrant application was that the agents had adequately investigated. The suppression hearing revealed that implicit assurance to have been misleading, but not knowingly or recklessly false. The agents therefore escaped accountability for the inadequate investigation. The Court should consider

whether the good-faith exception should be modified to prevent law enforcement agents from sheltering behind the exception when they have not done adequate investigation.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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