

NO. 21-338

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

GARY STEVEN CHRISTENSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

Where no determination of federal tax liability has been made by the IRS and the court of appeals has ruled patently contrary to this court's decision in *Return Mail, Inc. v. United States Postal Serv.*, 139 S.Ct. 1853 (2019) and contrary to its own precedent in *United States v. Green*, 735 F.2d 1203 (9th Cir. 1984) and *United States v. Batson*, 608 F.3d 630 (9th Cir. 2010), does such a radical departure from binding precedent warrant Supreme Court's supervisory intervention to confine trial courts' jurisdiction in criminal tax cases to those functions delegated to Congress by the Sixteenth Amendment, which does not include the authority to ascertain, compute, and collect federal income taxes through restitution, as that activity is statutorily relegated to the Dept. of Treasury, but which nation wide practice routinely deprives criminal defendants of equal protection and due process of law?

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LIST OF RELATED PROCEEDINGS

There is currently pending in the Ninth Circuit Court of Appeals Case No. 21-15515, *Gary Steven Christensen v. United States of America*. Christensen filed his informal opening brief in that appeal (Dkt. Entry 3) on June 29, 2021. The Response of the United States is due on or before August 30, 2021. This is an appeal of the partial denial of Christensen's Petition for Writ of Error Coram Nobis and presents the identical issues for which the Petition for Certiorari is herein being sought.

CITATIONS TO THE REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

District Court Order denying Christensen's objections to the garnishments and granting the government's motions for disposition orders (CR Doc. 265), *United States v. Christensen*, Case No. CR-14-08164 filed 10/27/2020.

District Court Order granting in part, and denying in Part, Christensen Petition for Writ of Error Coram Nobis (CR Doc. 274, CV Doc. 30), *United States v. Christensen*, Case No. CR-14-08164, CV-20-08152, filed 3/16/2021, 2021 U.S. Dist. LEXIS 9306; 2021 WL 185050 (D. Ariz. Jan. 19, 2021).¹

District Court Order denying Motion for Reconsideration (CR Doc. 276), *United States v. Christensen*, Case No. CR-14-08164, CV-20-08152, filed 3/16/2021, 2021 U.S. Dist. LEXIS 49427 at *1; 2021 WL 977167 (D. Ariz. Mar. 16, 2021).

1 Although Christensen filed his Petition for Writ of Error Coram Nobis in his criminal case, the Clerk of Court nonetheless opened a separate civil action when the petition was filed, Case No. CV-20-08152. Documents filed in the criminal case are cited as "CR Docs." Documents filed in the civil action are denoted "CV Docs."

DECISION BELOW

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit (Dkt.Entry 19-1) denying the appeal is unpublished, and is reproduced at Pet. App. pp 1-3

The Order of the United States Court of Appeals for the Ninth Circuit (Dkt.Entry 22) denying Christensen's Petitions for Panel Rehearing and Rehearing En Banc is unpublished, and is reproduced at Pet. App. p 4.

JURISDICTION

The Ninth Circuit entered its Memorandum decision on April 22, 2021. *See* Pet. App. pp. 1-3. Christensen filed a Petition for Panel Rehearing and Petition for Rehearing En Banc (Dkt.Entry 20) on May 3, 2021, that is reproduced at Pet. App. pp 5-23. The Order denying rehearing (Dkt.Entry 22) was filed August 2, 2021, and is reproduced at Pet. App. p 4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

U.S. CONST. amend XVI:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

18 U.S.C. § 3556:

The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A [18 USCS § 3663A],

and may order restitution in accordance with section 3663 [18 USCS § 3663]. The procedures under section 3664 [18 USCS § 3664] shall apply to all orders of restitution under this section.

18 U.S.C. § 3563(b)(2):

Discretionary conditions. The court may provide, as further conditions of a sentence of probation . . . that the defendant . . . make restitution to a victim of the offense under section 3556.

18 U.S.C. § 3583(d):

Conditions of supervised release. The court shall order, as an explicit condition of supervised release, . . . that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution,

18 U.S.C. § 3663(a)(1)(A):

The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c) [18 USCS § 3663A(c)], 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, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

18 U.S.C. § 3663(a)(2):

For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered

18 U.S.C. § 3663A(a)(1):

Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.

18 U.S.C. § 3663A(a)(2):

For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3664(a):

For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete

accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant.

18 U.S.C. § 3664(i):

In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

26 U.S.C. § 6201(a)(4):

(A) In general. The Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.

(B) Time of assessment. An assessment of an amount of restitution under an order described in subparagraph (A) shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.

(C) Restriction on challenge of assessment. The amount of such restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under this title (including in any suit or proceeding in court permitted under section 7422 [26 USCS § 7422]).

STATEMENT OF THE CASE

Christensen was found guilty of evading the assessment of income taxes for tax years 2004-2010 and of failing to file income tax returns for the years 2009-2010. At trial, for purposes of proving its case, the Government only presented evidence of

estimated tax loss for all years charged in the indictment. (Reporter's Transcript, Doc. 110-6, p. 8, lines 3-6, lines 23-25; CR Doc. 244, p. 11; CV Doc. 1, p. 11). At sentencing, the court ordered restitution not only for the years of conviction, but for years not charged, 1997-2003 and 2011-2015. Payment of the amount of restitution was ordered to be paid commencing immediately at the time of sentencing, to continue while incarcerated, with any remainder to be paid as a condition of supervised release. (CR Doc. 140.)²

On November 4, 2016, the government sent Christensen a Demand for Payment pursuant to 28 U.S.C. § 3205(b)(1)B) stating that restitution in the amount of \$1,604,283 is due immediately. This was over three years before Christensen was admitted to supervised release. (CV Doc. 23, p. 3.)

Between February 18, 2020 and May 18, 2020, the government requested, and the court issued, fourteen (14) continuing writs of garnishment to collect the ordered restitution. (CR Docs. 181-92, 237.)

On February 28, 2020, the Government requested an extension of time for Christensen to respond to the pending garnishments (CR Doc. 210). The District Court granted the motion; Christensen's response was then due on or before May 22, 2020. (CR Doc. 214).

On May 15, 2020, Christensen's attorney filed a Motion to Withdraw because his retainer had been garnished (CR Doc. 234, amended at CR Doc. 236). The same day the

2 The Judgment and Commitment was amended by CR. Doc 146 and CR Doc. 231, without substantial change.

parties filed a Consent Motion for extension of time for Christensen to file a response to the pending garnishments (CR Doc. 235). On May 22, 2020, the District Court granted the motion to withdraw and the consent motion for extension of time, giving Christensen until July 6, 2020 to respond to the pending garnishments (CR Doc. 238).

On June 22, 2020, Christensen now appearing pro se, having lost his criminal representation, filed a Petition for Writ of Error Coram Nobis in the criminal case (CR Doc. 244), a copy of which is reproduced at Pet. App. pp. 24-41, that resulted in a new civil case being opened, CV-20-8152. (CV Doc. 1.) Christensen asserted: (1) the government's collection of a civil tax that has not been assessed violates the separation of powers under the United States Constitution; (2) tax collection in the guise of restitution must comply with the Internal Revenue Code; (3) the government did not prove at trial the actual amount of tax owed for the charged years; (4) the restitution order must be assessed as a civil tax under 26 U.S.C. § 6201(a)(4) and then collected by the IRS, not the Department of Justice; (5) more than \$1 million of the restitution amount consists of back taxes for years not covered by the convictions; and (6) Christensen was ordered to pay restitution while incarcerated. CV Doc. 1 at 1-2.

On the same day Christensen also filed a Motion to Stay all Restitution Payments and All Garnishment Proceedings pending the District Court's ruling on the Petition for Writ of Error Coram Nobis. (CV. Doc. 2). The filing of the Petition for Writ of Error Coram Nobis put the District Court and the government on notice that the Court's restitution order constituted plain error and was, therefore, void. The motion to stay was premised on the grounds set forth in Christensen's coram nobis petition.

Also on June 22, 2020, the District Court assigned Christensen's coram nobis petition to Magistrate Judge Deborah M. Fine and the Court's Legal Staff. (CV Doc. 3).

On July 6, 2020, the government filed its opposition (CV Doc. 5) to the motion to stay (CV Doc. 2) arguing there is no basis in law to stay a restitution order or garnishment proceedings on the basis of a post judgment petition for writ of error coram nobis.

On July 13, 2020, Christensen filed his reply (CV Doc. 6) to the government's opposition (CV Doc. 5) again pointing out that the District Court's restitution was illegal and void.

On July 16, 2020, the District Court issued its Order (CV Doc. 9) denying Christensen's Motion to Stay (Doc. 2) and again referring the matter to Magistrate Judge Fine.

On July 21, 2020, Christensen filed a Motion for Clarification (CV Doc. 12) of the Court's Order of July 16, 2020 (CV Doc. 9), seeking clarification of whether the garnishment proceedings will stay with the District Court Judge or is referred to the Magistrate, and seeking a 60 day extension of time to respond to the pending garnishments because the Court denied his motion to stay (CV Doc. 2).

On July 23, 2020, the IRS sent Christensen a letter establishing the IRS had assessed the District Court's restitution order in the amount of \$1,591,424.27. The notice of assessments is reproduced at Pet. App. pp. 42-43.

On July 30, 2020, the District Court granted Christensen's Motion for Clarification (Doc. 12) as follows: The District Court retained the garnishment

proceedings in the criminal case, and ordered the government to file a response to the 60 day extension request in the civil case. (CV Doc. 13).

On August 3, 2020, the government filed its response (CV Doc. 14) arguing Christensen failed to offer good cause or excusable neglect for not responding to the garnishments on or before July 6, 2020 although it acknowledged the filing of the Petition for Writ of Error Coram Nobis and the Motion to Stay, both of which were filed on June 22, well before the July 6, 2020 date.

On August 10, 2020, the District Court issued its Order (CV Doc. 16) directing Christensen to file a reply within the next ten days. Christensen filed his reply on August 20, 2020 (CV Doc. 18).

On August 27, 2020, the District Court issued its Order (CV Doc. 21) denying Christensen's motion for an extension of time to respond to the pending garnishment proceedings in the criminal case, and directing the Petition for Writ of Error Coram Nobis was to remain with the Magistrate Judge for further proceedings and a report and recommendation.

The next day, August 28, 2020, Christensen, noting that the Court after denying the motion for an extension did not set forth a date for a response to be filed, filed Objections to Garnishments (CV Doc. 22) on the grounds the order of restitution upon which the garnishments were premised was illegal and void for all of the reasons set forth in the Petition for Writ of Error Coram Nobis, among other reasons as pertained to each garnishee.

On September 1, 2020, despite having been made aware the restitution order constituted plain error and was void, the government filed a Motion for Entry of Garnishment Disposition Orders as to each garnishee. (CR Docs. 245-252; 254.)

On September 11, 2020, the government filed its Response (CV Doc. 23) to CV Doc. 22 again arguing Christensen failed to provide good cause or excusable neglect for not timely responding to the garnishments. On September 23, 2020, Christensen filed his Reply (CV Doc. 25).

On September 14, 2020, the government filed its Response to the Petition for Writ of Error Coram Nobis (CV Doc. 24), and on October 2, 2020, Christensen filed his Reply (CV Doc. 25).

On October 27, 2020, the District Court issued its Order (CR Doc. 265) granting the government's motions for garnishment dispositions.

On October 30, 2020, Christensen filed a Notice of Appeal to the Ninth Circuit (CR Doc. 267) regarding the Court's Order, CR Doc. 265. The appeal was docketed as Case No. 20-10355.

On November 3, 2020, Christensen filed an Emergency Motion to Stay the garnishment proceedings in the Ninth Circuit Court of Appeals (Dkt. Entry 2) that was denied on December 4, 2020 without benefit of opinion. (Dkt. Entry 5). On December 7, 2020, Christensen filed a Motion to Reconsider the Panel's Decision, Dkt. Entry 6. Said motion was denied as moot on April 22, 2021, after the Ninth Circuit denied Christensen's appeal Dkt. Entry 19. On May 3, 2021, Christensen filed his Petition for Panel Rehearing and Rehearing En Banc, Dkt. Entry 20. On June 21, 2021,

Christensen filed a letter of additional citations, advising the Ninth Circuit of this Court's Opinion in *Return Mail, Inc . v. United States Postal Serv.*, 139 S.Ct. 1853 (2019), holding that federal agencies are not victims for purposes of restitution. The Ninth Circuit denied both Petitions on August 2, 2021, Dkt. Entry 22.

The Magistrate Judge at no time prepared a report or recommendation, in violation of the District Court's order to do so. Thereafter, almost a full seven months later, on January 5, 2021, the District Court issued its Order (CV Doc. 29) withdrawing the referral to the Magistrate Judge, and on January 19, 2021, granted in part, and denied in part, Christensen's Petition for Writ of Error Coram Nobis (CR Doc. 274, CV Doc. 30) admitting it had committed plain error in ordering restitution for years outside of the years for which Christensen was convicted. The District Court changed the amount of restitution from \$1,603,533 to \$579,706 (CR Doc. 274, p. 15), plus prejudgment interest in the amount of \$202,816.19. (CR Doc. 274, p. 16. The Court denied the Petition on all of the other issues.

On February 2, 2021, Christensen filed a Motion for Reconsideration re CR Doc. 274. (CR Doc. 276). That motion was denied on March 16, 2021 (CR Doc. 279).

Also on March 16, 2021, the District Court issued a Third Amended Judgment (CR Doc. 277). The Third Amended Judgment changed the amount of Restitution as noted in CR Doc. 274.

On March 22, 2021, Christensen filed a Notice of Appeal to the Ninth Circuit on the partial denial of his Petition for Writ of Error Coram (CR Doc. 280). The case was docketed as Case No. 21-15515.

ARGUMENT

I. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ORDER RESTITUTION BECAUSE THE IRS, AS A MATTER OF LAW, IS NOT A VICTIM

The issue whether a federal court may order restitution as a condition of supervised release for offenses set forth in Title 26 of the United States Code presented a question of first impression in the Ninth Circuit. In *Batson, supra*, the Ninth Circuit held that 18 U.S.C. § 3563(b)(2) and 18 U.S.C. § 3583(d) authorized such an order.

18 U.S.C. § 3563(b)(2) states the court may provide, as a further condition of a sentence of probation, that a defendant make restitution to a “victim” of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)). The statute does not define the term “victim.”

18 U.S.C. § 3563(b)(2) pertains to supervised release. It states in pertinent part that as an explicit condition of supervised release, the court shall order that the defendant make restitution in accordance with sections 3663 and 3663A. 18 U.S.C. § 3663(a)(1)(A) holds a Court may order a defendant to make restitution to any “victim” when sentencing a defendant to an offense under Title 18, or specific offenses under Title 21 and Title 49, other than an offense described in section 3663A(c)³, or if agreed to by the parties in a plea agreement. The term “victim” is specifically defined as a “person” directly and proximately harmed as a result of the commission of an offense

3 3663A(c) pertains to controlled substances.

for which restitution may be ordered. 28 U.S.C. § 3663(a)(2). The term “person” is not defined.

18 U.S.C. § 3663A(a)(1) provides that notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c)⁴, the court shall order, . . . that the defendant make restitution to the “victim” of the offense. The term “victim” is specifically defined as a “person” directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered. 28 U.S.C. § 3663A(a)(2). The term “person” is not defined.

The Ninth Circuit in *United States v. Ruffen*, 780 F.2d 1493 (9th Cir. 1986) and *United States v. Lincoln*, 277 F.3d 1112 (9th Cir. 2002), as well as numerous other Courts of Appeal, have relied upon the language contained at 18 U.S.C. § 3664(i) to find the United States, or an United States Federal Agency, is a “victim”:

In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

Lincoln, *id* at p. 1114.

In 2019, this Court’s ruling in *Return Mail*, *supra*, effectively overturned all of that case law. There the Supreme Court held, that in the absence of a statutory definition of the term “person” a federal agency is not a “person.”

The patent statutes do not define the term “person.” In the absence of an express statutory definition, the Court applies a ‘longstanding interpretive presumption that “person” does not include the sovereign,’ and thus excludes a federal agency like the Postal Service. *Vermont*

4 See n.3, *id.*

Agency of Natural Resources v. United States ex rel. Stevens, 529 U. S. 765, 780-781, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000); *see United States v. Mine Workers*, 330 U. S. 258, 275, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *United States v. Cooper Corp.*, 312 U. S. 600, 603-605, 61 S. Ct. 742, 85 L. Ed. 1071 (1941); *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192 (1877).

Return Mail, supra at pp. 1861-62. So too, there is no statute applicable in this case that defines the term “person.” That leaves the task of reconciling 18 U.S.C. § 3664(i) with *Return Mail, supra*, such as to not hold it to be unconstitutional on its face.

In reaching its decision in *Return Mail, supra* this Court held that a government agency must make an affirmative showing of statutory intent to include the Federal Government as a “person.”⁵ The United States Postal Service (USPS) set forth three reasons to show congressional intent to include the Federal Government as “persons” in AIA proceedings: (1) the Federal Government is recognized as a “person” in other patent statutes, (2) the Federal Government has a long history of participation in the patent system, and (3) it would be unfair to disallow the Federal Government to participate in AIA proceedings, while allowing civilians to do so. This Court rejected all three arguments.

There are two specific ways provided for by Congress that would make the United States, or a federal agency, a “victim” despite not being a “person.” The first is 18 U.S.C. § 3663(a)(1)(A) that allows a defendant, in a plea agreement, to agree

5 The power to order restitution is not inherent in the federal courts; it is conferred only by statute. That there is no statutory intent to include the IRS as a victim is buttressed by the fact that neither the Victim and Witness Protection Act nor the Mandatory Victims Restitution Act included restitution for violations of Title 26. *Batson, supra* at p. 631.

to pay restitution. The Second is 18 U.S.C. § 3664(g)(2) that allows a victim to assign his/her interest in restitution payments to the Crime Victims Fund in the Treasury.

Here, there was no plea agreement and no assignment by the IRS to the Crime Victims Fund in the Treasury. Furthermore, even if the Internal Revenue Service was a “victim,” it is precluded by statute from assigning a restitution order because Congress specifically directed the IRS to assess a restitution order and to collect it as a civil tax. 26 U.S.C. § 6201(a)(4).

In that the IRS, a federal agency “not unlike the Postal Service,” is not a “person” as a matter of law, it cannot be a “victim.” The District Court lacked jurisdiction, therefore, to issue an order of restitution in this case. Issuing an order in the absence of jurisdiction is plain error that can be raised at any time, even for the first time on appeal. *In re Harlow Props., Inc.*, 56 B.R. 794 (B.A.P. 9th Cir. 1985); *Kieslich v. United States (In re Kieslich)*, 258 F.3d 968 (9th Cir. 2001); *Holmes v. NCO Fin. Servs.*, 538 F. App'x 765 (9th Cir. 2013).

II. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ORDER RESTITUTION BECAUSE THE IRS HAS AT NO TIME MADE A FINAL DETERMINATION OF ANY TAX LOSS FOR ANY OF THE YEARS FOR WHICH CHRISTENSEN WAS CONVICTED, WHICH FAILURE, THE NINTH CIRCUIT HAS RULED PRECLUDES AN ORDER OF RESTITUTION AS A MATTER OF LAW.

The Ninth Circuit, and numerous other Courts of Appeal, have specifically held that for an order of restitution in a criminal tax to be valid, there must first be a final determination of a defendant’s civil tax liability:

Most circuit courts have suggested that a district court may not validly impose such a condition unless the amount of the tax liability has been

“finally determined.” *See United States v. Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983); *United States v. Touchet*, 658 F.2d 1074, 1076 (5th Cir. 1981) (*per curiam*); *United States v. Weber*, 437 F.2d 1218, 1220 (7th Cir.), *cert. denied*, 402 U.S. 1008, 29 L. Ed. 2d 430, 91 S.Ct. 2189 (1971); *United States v. White*, 417 F.2d 89, 94 (2d Cir. 1969), *cert. denied*, 397 U.S. 912, 25 L. Ed. 2d 92, 90 S. Ct. 910 (1970); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894, 9 L. Ed. 2d 126, 83 S. Ct. 193 (1962); *United States v. Stoehr*, 196 F.2d 276, 284 (3d Cir. 1952).

The requirement of a final determination derives from the language in § 3651 that limits restitution to actual damages. The amount of taxes owed is ordinarily not determined in a criminal proceeding, such as that here, but in a separate civil proceeding or by the defendant's acquiescence in the government's assessment of deficiency. *See Stoehr*, 196 F.2d at 284.

Courts have been concerned that requiring a defendant to pay a specific amount of back taxes as a condition of probation would “hamper the determination by legal process of the [defendant's] civil liability.” *White*, 417 F.2d at 94. A defendant would be forced to pay the back tax before he had an opportunity to challenge the government's assessment of his tax liability. Here the condition was not enforced until after Green had agreed to the assessment of tax liability.

In virtually all tax cases invalidating probation conditions, the district court had required the defendant to pay a specific amount of tax. *See, e.g.*, *Franks*, 723 F.2d at 1487 (\$100,000); *Touchet*, 658 F.2d at 1076 (deficiencies charged in indictment); *White*, 417 F.2d at 94 (existing liabilities as computed by IRS). Here, the court did not require the payment of a specific sum, but only the amount of back taxes “due and owing.”

Both the Fourth and the Seventh Circuits have approved conditions similar to this one. *See Weber*, 437 F.2d at 1218; *Taylor*, 305 F.2d at 188. In *Weber*, the district court ordered the defendant to “make settlement in full with the Internal Revenue Service for taxes owed” and explicitly recognized the defendant's right to contest any tax assessed. The Seventh Circuit held that the settlement of tax liabilities for the three years covered by the indictment was a legitimate condition of probation under § 3651. *Id.* at 1220.

In *Taylor*, the Fourth Circuit struck down a condition that required the payment of taxes before a formal determination had been made. The

court held, however, that the district court could reframe the condition to require payment in full, within a specified time, of all taxes “(1) found by a jury to have been evaded (2) shown by defendant's returns to be due, or (3) determined and assessed by the Commissioner.” *Id.* at 188. The court said:

The district court may still require, as a condition of probation, the payment of all taxes and penalties lawfully determined to be due and collectible. The only limitation is that the **amounts of payments** should be referable to a more formal determination than the District Court's calculations based upon otherwise affirmed computations of a Revenue Agent.

Id. (emphasis added). That means that, although the district court may not require the payment of a specific sum before a final determination of tax liability, it may require payment of back taxes and refer the determination of the specific amount to a subsequent proceeding.

Green, supra at pp. 1206-07.

As noted in the statement of the case, *supra* at p. 5, the government chose not to present evidence of a final determination of tax, none having been made, but instead only provided testimony of estimated tax loss as part of its case in chief.

18 U.S.C. § 3664(a) puts the burden on the probation officer to obtain and include in its presentence report a complete accounting of the loss, assuming there was an actual “person” who is a “victim.” To accomplish that, section (d)(1) authorizes said probation officer to request that information from the prosecutor and section (d)(2)(A)(iii) mandates said probation officer, prior to submitting the presentence report, to provide notice to all identified victims the amounts subject to restitution and the opportunity for said victims to submit information concerning the amount of the victim's losses. Section (d)(5) provides if the victim's losses are not ascertainable, no

later than ten days prior to sentencing, the prosecutor or the probation officer shall inform the court, who then has ninety days to make a final determination of the amount of the loss. Section (e) places the burden of proof as to the amount of the loss on the prosecutor. See also FED. R. CRIM. P. 32(c)(1)(B) requiring the probation officer to conduct an investigation and submit a report that contains sufficient information for the court to order restitution if the law permits.

At no time were the procedures outlined at 18 U.S.C. § 3664 followed nor was a sufficient presentence report submitted to the District Court. Instead the probation department, submitted only the estimate of tax loss, including for years outside of the conviction, in its presentence report. The legally insufficient report was adopted in full by the District Court, thereby committing fundamental error as recognized by the District Court in its order partially granting the Petition for Writ of Error Coram Nobis. (CR Doc. 274, pp. 13-14.)

What should have happened, but did not, was for the probation officer to contact the prosecutor and the IRS to request whether a final determination of Christensen's civil tax liability had been determined, and if not, to notify the District Court, who would then have had up to 90 days to order the IRS to present evidence of a legal determination of actual tax loss.

That only the IRS has legal authority to make the final determination of actual tax loss, and how it is done in both cases where an individual files a tax return and where the individual fails to file a tax return is fully briefed in the Petition for Writ of Error Coram Nobis (CR Doc. 274) commencing at p. 3 and continuing to p. 10. As set

forth therein, in the case of a non-filer, the IRS must first issue a notice of deficiency per 26 U.S.C. § 6212. A taxpayer is then entitled to file a Petition in Tax Court, after which the IRS must assess the tax determined and then issue several notices before collection is authorized by law. This process takes more than 90 days unless the IRS makes a jeopardy assessment.

The record before this Court clearly establishes a lack of final determination of Christensen's civil tax liability for any year, much less the years for which he was convicted. The lack of a final determination precluded the issuance of an order of restitution. *See Green, supra.*

III. A CRIMINAL TAX RESTITUTION ORDER, IN THE ABSENCE OF A FINAL DETERMINATION OF TAX LOSS, DENIES DEFENDANTS EQUAL PROTECTION AND DUE PROCESS OF LAW

The Sixteenth Amendment to the United States Constitution gave Congress the authority to lay and collect taxes on income. Christensen fully briefed the laws passed by Congress to ascertain, compute, assess and collect taxes in his Petition for Writ of Error Coram Nobis, CR Doc. 274, pp. 3-10. Every taxpayer is entitled to the benefit of those procedures. In situations like the case at bar, all criminal defendants are denied the equal protection of those laws.

Furthermore, 26 U.S.C. §§ 6201(a)(4) is the assessment authority of the IRS with respect to Court ordered restitution in a criminal tax case. 26 U.S.C. § 6201(a)(4)(A) commands the IRS assess and collect the amount of restitution made under an order pursuant to section 3556 of Title 18. 26 U.S.C. § 6201(a)(4)(C) specifically prohibits a criminal defendant from challenging the amount of the

restitution assessment. The denial of due process and equal protection was and is the basis for the Ninth Circuit's opinion in *Green, supra*, and other Court of Appeals decisions, holding a criminal tax restitution order must be based on a final determination of tax liability.

So too, 26 U.S.C. § 6201(a)(4) directs the IRS to collect restitution orders. Neither the United States Attorney nor its Financial Litigation Unit are employees of the IRS, and hence have no authority to collect taxes assessed by the IRS through garnishment, or any other process. Collection of assessed taxes is a sole function of the IRS.

IV. THE DISTRICT COURT'S ORDER OF RESTITUTION WAS ILLEGAL IN THAT THE ORDER CALLED FOR IMMEDIATE PAYMENT OF THE RESTITUTION, WHICH COULD ONLY BE ORDERED AS A CONDITION OF SUPERVISED RELEASE, EVEN ASSUMING THE ORDER WAS OTHERWISE LEGAL

There is no question but that the District Court's Judgment (CR Doc. 140), Second Amended Judgment (CR Doc. 231) and Third Amended Judgment (CR Doc. 277) all ordered Appellant's restitution "due immediately". So too, as noted *supra* at p. 6, on November 4, 2016, the government sent Christensen a Demand for Payment pursuant to 28 U.S.C. § 3205(b)(1)B) stating that restitution in the amount of \$1,604,283 is due immediately. This was more than three years before Christensen was admitted to supervised release. (CV Doc. 23, p. 3.) In making said orders, the District Court and the Ninth Circuit violated *Batson, supra*.

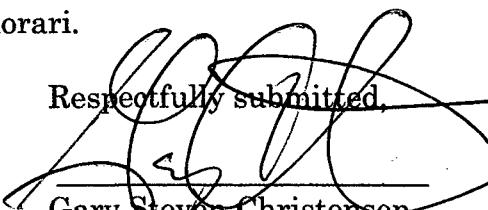
CONCLUSION

Despite being made aware of this Court's ruling in *Return Mail*, and in violation of its own precedential decisions directly on point, the Ninth Circuit has approved restitution orders that constitute plain error. This case has national implications on the important issue of when restitution may be ordered in criminal tax cases.

The IRS is not a "person," and thus not a "victim," precluding restitution in the first instance. So too, even if the IRS was a victim, a restitution order based on anything less than a final determination by the IRS of the actual tax loss is a fundamental error depriving all criminal defendants of equal protection and due process, as there is no legal recourse to challenge an incorrect, much less, wholly illegal, restitution order.

Having openly, knowingly and intentionally violated Supreme Court precedent and its own decisions directly on point, the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings in sanctioning the District Court's departure of established law, this Court must exercise its supervisory control and grant this Petition for Writ of Certiorari.

Respectfully submitted,


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PETITIONER'S APPENDIX

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