No. _____

In the Supreme Court of the United States

PRINCE CHARLES NANA YAW OWUSU BOATENG, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Under the Mandatory Victims Restitution Act, when an offense does not involve as an element a scheme, conspiracy, or pattern of criminal activity, can a court look to the parties' mutual understanding of an underlying scheme to impose restitution beyond the loss resulting from the conduct related to the count of conviction?

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V.

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

Petitioner, Prince Charles Nana Yaw Owusu Boateng 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 August 27, 2021.

PARTIES TO THE PROCEEDING

The caption names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are:

- *United States v. Owusu Boateng*, No. 5:17-CR-880-1 (W.D. Tex. July 20, 2020) (judgment)

- *United States v. Owusu Boateng*, No. 20-50630 (5th Cir. Aug. 27 & Sept. 21, 2021) (unpublished opinion and order denying petition for panel rehearing)

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A copy of the unpublished opinion of the court of appeals, *United States v. Owusu Boateng*, (5th Cir. Aug. 27, 2021) (per curiam), is attached to this petition as Appendix A.

A copy of the order denying the petition for panel rehearing, *United States v. Owusu Boateng*, (5th Cir. Sept. 21, 2021), is attached to this petition as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 27, 2021. Owusu timely filed a petition for panel rehearing, which the Fifth Circuit denied on September 21, 2021. Pet. App. B. This petition is filed within 90 days after the denial of rehearing. *See* Sup. Ct. R. 13.3; The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Section 3663A of Title 18 of the U.S.C., the Mandatory Victim Restitution Act, is attached to this petition as Appendix C.

STATEMENT

Owusu was indicted for two counts of access device fraud, with each count based on a different credit card. *See* 18 U.S.C. §

1029(a)(5). Pursuant to a plea agreement, he pleaded guilty to one count, and the government dismissed the other. The credit card in the count of conviction was associated with $5,191.33 in unauthorized charges. The credit card in the dismissed count was associated with $5,840.70 in unauthorized charges. The district court ordered restitution of the combined amount: $11,032.03.

Both the Mandatory Victims Restitution Act (MVRA) and the discretionary Victim Witness Protection Act (VWPA) permit restitution greater than the loss from the offense conduct only when the offense "involves as an element a scheme, conspiracy, or pattern of criminal activity" or when the parties agree in a plea agreement to the additional restitution. 18 U.S.C. § 3663(a)(2), (3); 18 U.S.C. 3663A(a)(2), (3).

On appeal, Owusu argued the district court plainly erred by imposing restitution that exceeded the loss caused by the count of conviction. His offense did not have a scheme, conspiracy, or pattern element, and he did not agree to pay extra restitution. Because the loss exceeded the statutory maximum, the appeal waiver did not bar Owusu's appeal. The Government responded that the restitution order was correct because Owusu had agreed to pay restitution for relevant conduct. Owusu disagreed, arguing the plain language of the plea agreement did not include a clear

agreement to pay additional restitution, and that circumstances surrounding the plea and sentencing corroborated the parties' understanding that there was no agreement to pay for the loss resulting from both charged counts.

The Fifth Circuit held that the MVRA authorized restitution for loss related to both credit cards.[1] The Fifth Circuit recognized that "[a]ccess device fraud does not require proof of a scheme, conspiracy, or pattern of criminal activity as an element." Pet. App. A 8. But it found restitution greater than loss for the count of conviction proper because Owusu was "convicted of fraud pursuant to a plea agreement[.]" Pet. App. A 8. This allowed the court to "'look[ ] beyond the charging document'" and "'define[ ] the underlying scheme by referring to the mutual understanding of the parties.'" Pet. App. A 8 (quoting *United States v. Adams*, 363 F.3d 363, 366 (5th Cir. 2004)).

Owusu petitioned for panel rehearing, arguing the decision conflicted with the statute and the general rule that a restitution

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[1] The Fifth Circuit found that any agreement to pay for relevant conduct was made under the VWPA. Pet. App. 7. The VWPA requires a district court to consider a defendant's financial circumstances before imposing restitution. *Id.* (citing 18 U.S.C. § 3663(a)(1)(B)). Because the district court did not consider Owusu's financial circumstances, the MVRA was "the only potential authority for" ordering restitution of $11,032.03. *Id.* at 8.

award can encompass only those losses that resulted directly from the offense of conviction unless the offense of conviction has, as an element, a scheme, conspiracy, or pattern of criminal activity. *See* § 3663A(a)(2); *Hughey v. United States*, 495 U.S. 411 (1990). The Fifth Circuit denied the petition. Pet. App. B.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with this Court's precedent limiting restitution to loss directly resulting from the offense of conviction.

Over 30 years ago, this Court held a restitution award could be "only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey*, 495 U.S. at 413. Like Owusu, Hughey pled guilty, pursuant to a plea agreement, to unauthorized use of one credit card. *Id.* at 413. The district court, however, imposed restitution related to dismissed counts. *Id.* at 414. This Court granted certiorari to resolve a circuit split about whether a court could "require an offender to pay restitution for acts other than those underlying the offense of conviction." *Id.* at 415. The Court held it cannot. *Id.* at 413.

Hughey analyzed a restitution statute that provided "'a defendant convicted of an offense' may be ordered to 'make restitution to any victim of such offense.'" *Hughey*, 495 U.S. at 415–16 (quoting

18 U.S.C. § 3579(a)(1) (1982)).[2] The Court interpreted this language as limiting restitution to the offense of conviction. *Id.* at 413.

After *Hughey*, Congress amended the definition of victim in the VWPA to include, "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[.]"[3] § 3663(a)(2). The MVRA, which Congress passed in 1996, has the same definition. § 3663A(a)(2).

Courts have correctly described these amendments as only partially overruling *Hughey*. "[O]nly when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity **as an element of the offense**, may the restitution order include acts of related conduct for which the defendant was not convicted. Otherwise, *Hughey* … continue[s] to prohibit the inclusion of loss not caused by the specific conduct that is the basis of the offense of conviction." *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir.

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[2] The restitution provisions were recodified, and § 3579(a) now appears at 18 U.S.C. § 3663. *Hughey*, 495 U.S. at 413 n.1.

[3] In 1990, Congress broadened the definition of victim for offenses with the scheme, conspiracy, or patten element. Crime Control Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4789. In 1996, Congress included persons proximately injured by the criminal conduct. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 205(a)(1)(F), 110 Stat. 1214, 1230.

1999) (cleaned up; emphasis added).[4] Courts also agree that *Hughey*'s holding "applies to cases arising under the MVRA." *Maturin*, 488 F.3d at 661 n.2; *see, e.g.*, *United States v. Mendenhall*, 945 F.3d 1264, 1267 (10th Cir. 2019) ("*Hughey*'s limitation applies equally to restitution orders under 18 U.S.C. § 3663A").

The decision below conflicts with *Hughey* and the statute's clear language. It is a stark departure from the near uniform interpretation of loss allowed under the MVRA.

The Fifth Circuit recognized that Owusu's count of conviction does **not** have a scheme, conspiracy, or pattern of criminal activity element. Pet. App. A 8; *see* 18 U.S.C. § 1029(a)(5); *United States v. Yijun Zhou*, 838 F.3d 1007, 1012 (9th Cir. 2016) (finding that a similar statute, 18 U.S.C. § 1029(a)(2), does not have an element

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[4] *Accord United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996); *In re Loc. #46 Metallic Lathers Union*, 568 F.3d 81, 85–86 (2d Cir. 2009); *United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996); *United States v. Henoud*, 81 F.3d 484, 488–89 (4th Cir. 1996); *United States v. Maturin*, 488 F.3d 657, 662 (5th Cir. 2007); *United States v. Davis*, 170 F.3d 617, 627 (6th Cir. 1999); *United States v. Turino*, 978 F.2d 315, 319 (7th Cir. 1992); *United States v. Manzer*, 69 F.3d 222, 230 (8th Cir. 1995); *United States v. Berger*, 251 F.3d 894, 899 n.2 (10th Cir. 2001); *United States v. Dickerson*, 370 F.3d 1330, 1340 (11th Cir. 2004).

of a scheme, conspiracy, or pattern of criminal activity).[5] Under this Court's precedent that should resolved the question: restitution could not apply based on the dismissed count. Yet the Fifth Circuit held restitution beyond the loss resulting from the count of conviction was proper simply because Owusu was "convicted of fraud pursuant to a plea agreement" and the parties had a "mutual understanding" of a credit card scheme that encompassed the loss from the dismissed count. Pet. App. A 8 (cleaned up).

No other circuit allows a court to look to the parties' mutual understanding of a scheme to impose restitution greater than the loss resulting from the offense of conviction when that offense does not have a scheme, conspiracy, or pattern element. That is because the statute clearly limits providing broader restitution to when the offense has "as an element a scheme, conspiracy, or pattern of criminal activity[.]" § 3663A(a)(2).

Other circuits recognize that—even when offenses are characterized as a "scheme" or involve a fraudulent intent—restitution is

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[5] *Accord United States v. Gordon*, 480 F.3d 1205, 1211 (10th Cir. 2007); *United States v. Acosta*, 303 F.3d 78, 87 (1st Cir. 2002); *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996). Only the first element differs between § 1029(a)(2) and (a)(5). Section 1029(a)(2) prohibits "traffic[king] in or us[ing] one or more authorized access devices" whereas (a)(5) prohibits "effect[ing] transactions, with 1 or more access devices issued to another person or persons[.]"

limited to the offense conduct when those offenses do not have, as an **element**, a scheme, conspiracy, or pattern, unless the parties agree otherwise. *See, e.g.*, *Gordon*, 480 F.3d at 1211 (restitution for credit card fraud limited to the loss associated with count of conviction because § 1029(a)(2) has no scheme, conspiracy, or pattern element); *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996) (same, despite defendant's "theft of the credit cards represent[ing] a pattern of criminal activity that was a necessary step" to use the cards); *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 (4th Cir. 1995) ("Because the elements of perjury do not include a scheme, conspiracy, or pattern of criminal conduct, the broadened "victim" definition "does not expand the class of victims" of the defendant's perjury.); *United States v. Doherty*, 39 F.3d 1182 (6th Cir. 1994) (per curiam; unpublished) ("Although this court has characterized money laundering as a "scheme," the offenses for which Doherty was convicted do not themselves include a scheme, conspiracy, or pattern of criminal activity as essential elements. Hence, … restitution can only be ordered for the amounts proven to relate to the money laundering transactions charged in the indictment."). Even when the underlying conduct appears to involve a scheme, conspiracy, or pattern, these circuits recognize

restitution is limited to the offense of conviction if the offense does not actually have such an element.

Time and again this Court has reminded lower courts that when it says "element[ ], it meant just that and nothing else." *Mathis v. United States*, 136 S. Ct. 2243, 2255 (2016) (discussing categorical approach). The Court should remind the Fifth Circuit that when Congress plainly says "element," § 3663A(a)(2), it means element.

II. The Court should grant certiorari because this important issue reoccurs.

In the last three years, the Fifth Circuit has twice said a court can impose restitution based on the parties' mutual understanding of a scheme even when the offense of conviction does not have a scheme element. In 2019, the Fifth Circuit analyzed whether the parties had a mutual understanding of the scheme even though the offense did not have a scheme element. *United States v. Mathew*, 916 F.3d 510, 516 (5th Cir. 2019) (addressing a conviction for unlawfully transferring authentication features, in violation of 18 U.S.C. § 1028(a)(3), (b)(2)(B), and (c)(1)). In *Mathew*, the court found that the parties did not have a mutual understanding, so the incorrect analysis did not affect the result. *Id.* at 517. But in Owusu's case, it does.

In both cases, the Fifth Circuit cited *United States v. Adams*, 363 F.3d 363, 364 (5th Cir. 2004), to support looking to the parties' mutual understanding of the scheme for restitution even when the offense did not have a scheme, conspiracy, or pattern element. *Mathew*, 916 F.3d at 517; Pet. App. A 8. But *Adams* involved an offense with a fraudulent scheme element—wire fraud. 363 F.3d at 365; *see* 18 U.S.C. § 1341. Because it had a scheme element, imposing restitution for losses resulting from that scheme was proper. § 3663A(a)(2).

The Fifth Circuit is now misusing *Adams* to impose restitution for loss unrelated to the count of conviction, simply because the offense was "fraud" and the defendant pleaded pursuant to a plea agreement. Pet. App. A 8. That conflicts with *Hughey* and with other circuits, and it is plainly incorrect under the statute. *See supra* 4–9.

The Court should resolve this circuit split and correct the Fifth Circuit before other defendants who plead guilty pursuant to plea agreements are subjected to unlawful restitution orders. Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (cleaned up). Well over 90% of federal defendants plead

guilty,[6] and "[r]estitution plays an increasing role in federal criminal sentencing today." *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). In fiscal year 2020, 10% of criminal defendants sentenced nationwide were ordered to pay restitution, and the amount of restitution ordered exceeded $6.3 billion.[7]

These restitution orders have profound effects. "Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting). Here, the potential immigration consequences are grave. *See* 8 U.S.C. § 1101(a)(43)(M)(i) (aggravated felony includes fraud with loss over $10,000). Owusu's restitution should be limited to the loss resulting from the count of conviction, as it would be in every other circuit.

Given the importance of this issue for Owusu and other defendants, the Court should grant certiorari and clarify the MVRA's

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[6] John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, FactTank: News in the Numbers (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[7] U.S. Sentencing Comm'n, 2020 Annual Report and Sourcebook of Federal Sentencing Statistics 65–66, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf.

limits on restitution when an offense does not have a scheme, conspiracy, or pattern of criminal activity element.

CONCLUSION

FOR THESE REASONS, Owusu asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender

Attorney for Defendant-Appellant

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