No.

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DONALD TARNAWA,

Defendants-Appellees.

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

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## QUESTIONS PRESENTED

1. Whether the controlling standard of review for modification under 18 USCA § 3664(k) should be *de novo* or abuse of description. The Panel Opinion recognized the Circuit-split that has arisen over this issue: "Our sister circuits seem to take different positions on whether to conduct appellate review *de novo* or for abuse of discretion." 26 F.4th 720, at 723 (footnotes citing cases omitted).

2. Whether a sentencing court modifying the judgment pursuant to § 3664(k) must articulate its consideration of the factors under § 3664(f)(2). The Panel Opinion noted a Circuit-split. In the Fourth Circuit, the controlling case is *United States v. Grant*, where the court held that "it is not sufficient that the district court merely consider [the defendant's financial resources, assets, projected income and other financial obligations under § 3664(f)(2)]; the court must actually demonstrate its consideration of them on the record." 715 F.3d 552, 558 (4th Cir. 2013) (citations omitted).

By contrast, the Panel Opinion specifically rejected the holding of *Grant*:

> [E]ven if the § 3664(f)(2) factors did apply to modifications under § 3664(k), ***Grant* conflicts with this court's precedents**. The Fifth Circuit holds that district courts "need not make specific findings [when originally imposing restitution] if the record provides an adequate basis to support the restitution order." *United States v. Blocker*, 104 F.3d 720, 737 (5th Cir. 1997).

26 F.4th 720, at 723 (emphasis added)

## RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Panel Opinion Of United States Court of Appeals for the Fifth Circuit:

*United States v. Tarnawa*, 26 F.4th 720 (U.S. 5th Cir. 2022).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Tarnawa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The Fifth Circuit's opinion is at: *United States v. Tarnawa*, 26 F.4th 720 (U.S. 5th Cir. 2022).

The order from the Eastern District of Texas is not published.

## JURISDICTION

The court of appeals issued its opinion execution on February 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

18 USCA § 3664(k) directs:

> (k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims

> owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

## STATEMENT OF THE CASE

### A. Indictment, Trial, and Sentencing

Nearly two decades ago, Donald Tarnawa was convicted of defrauding investors out of $27,636,962. A jury convicted Tarnawa of five counts of wire fraud, six counts of bank fraud, and 20 counts of money laundering.

More specifically, on September 11 2003, a Federal Grand Jury for the Eastern District of Texas, Sherman Division, returned a 31-count sealed indictment against Tarnawa. Counts One through Five charged Tarnawa with wire fraud in violation of 18 U.S.C. § 1343. Counts Six through Eleven charged Tarnawa with bank fraud in violation of 18 U.S.C. § 1344. Counts Twelve through Thirty-One charged Tarnawa with money laundering in violation of 18 U.S.C. § 1957(a). On August 18, 2004, a jury convicted Tarnawa on all counts. On April 28, 2005, Tarnawa was sentenced to 480 months' imprisonment., followed by five years of

supervised release. Representing himself *pro se* on appeal, the Fifth Circuit affirmed. *United States v. Tarnawa*, 182 F. App'x 294 (5th Cir. 2006).

The sentencing court further ordered Tarnawa to pay $13,491,048.00 in restitution to five victims, specifying:

> Restitution payments to being [sic] immediately. Any amount that remains unpaid when the defendant's supervision commences is to be paid on a monthly basis at a rate of at least ten percent of the defendant's gross income, to be changed during supervision, if needed, based on the defendant's changed circumstances pursuant to 18 U.S.C. § 3664(k). While incarcerated, it is recommended that the defendant participate in the [IFRP] at a rate determined by the Bureau of Prisons staff in accordance with the requirements of the Inmate Financial Responsibility Program.

### B. Eastern District of California Grants Relief Under 28 U.S.C. § 2241

The Bureau of Prisons transferred Tarnawa from Texas to California in August 2009. Tarnawa thereafter filed a 28 U.S.C. § 2241 habeas petition, contending that the warden impermissibly forced him to pay $30 a month toward restitution because the judgment did not establish a payment schedule and thereby unlawfully delegated authority to do so under the Mandatory Victim Restitution Act ("MVRA"). *Tarnawa v. Ives*, No. 2:09-CV-02429, 2011 U.S. Dist. LEXIS 35777, 2011

WL 1047701, at *1 (E.D. Cal. Mar. 18, 2011). The California district court granted Tarnawa's habeas petition in April 2013 and ordered the warden to exempt him from the IFRP "unless the sentencing court specifies the restitution schedule." *Tarnawa v. Ives*, No. 2:09-CV-02429, Dkt. 28 (E.D. Cal. Apr. 4, 2013).

### C. Government Files Motion In Eastern District of Texas District Court Rules Several Years Later

On June 11, 2013, the Government filed its Motion to Modify Payment Plan under 18 U.S.C. § 3664(k) to require Tarnawa to pay 50 percent of his earnings toward the restitution obligation. ROA.471-477. Please note that this Motion did not reveal any changed financial circumstances; to the contrary, this notice volunteered that it knew of none, and invited the Court to hold a hearing on the matter:

> Because, as matters now stand, Tarnawa is exempted from making any payments toward restitution, the United States respectfully requests that the Court modify Tarnawa's payment schedule to order payments during his incarceration to reflect his current economic circumstances. Alternatively, the United States requests that the Court set this matter for hearing to evaluate Defendant's changed economic circumstances and his ability to pay.

No such hearing was ever held. However, about seven years later, the sentencing court granted the government's motion and amended the

judgment to state:

> While incarcerated, it is recommended that the defendant participate in the [IFRP]. During the term of imprisonment, restitution is payable every three months in an amount, after a telephone allowance, equal to 50 percent of the funds deposited into the defendant's inmate trust fund account.

### D. Appeal In Fifth Circuit

Represented by appointed counsel, Tarnawa appealed to the Fifth Circuit arguing that the District Court's April 7, 2020 order should be vacated because 18 USC §3664(k)- which grants a district court the authority to modify a payment schedule upon receiving notification of a "material change in the defendant's economic circumstances"- was unsatisfied because when the Government filed its motion in 2013, it was clear that it did not know what Tarnawa's economic circumstances were; nor had the motion ever been supplemented in the intervening 7 years.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT-SPLIT IDENTIFIED BY THE PANEL OPINION AS TO THE STANDARD OF REVIEW UNDER 18 U.S.C. § 3664(K)

The Panel Opinion recognized the Circuit-split that has arisen over this issue: "Our sister circuits seem to take different positions on whether to conduct appellate review *de novo*[3] or for abuse of discretion[4]." 26 F.4th 720, at 723.

Footnote 3 expounded:

> *See United States v. Grant*, 235 F.3d 95, 99 (2d Cir. 2000); *United States v. Bratton-Bey*, 564 F. App'x. 28, 29 (4th Cir. 2014) (per curiam) (citing Grant, 235 F.3d at 99); *United States v. Baxter*, 2019 WL 661502, at *1 (D.C. Cir. 2019) (per curiam) (citing *United States v. Simpson-El*, 856 F.3d 1295, 1296 (10th Cir. 2017) (assuming without deciding that a *de novo* standard of review applied)).

Footnote 4 expounded:

> *See United States v. Knight*, 315 F. App'x. 435, 436-37 (3d Cir. 2009) (citation omitted); *United States v. Holley*, No. 19-5492, 2020 U.S. App. LEXIS 2887, 2020 WL 2316052, at *2 (6th Cir. Jan. 29, 2020) (per curiam) (citing *United States v. Dale*, 613 F. App'x 912, 913 (11th Cir. 2015) (per curiam)); *United States v. Boal*, 534 F.3d 965, 968 (8th Cir. 2008) (citing *United States v. Vanhorn*, 399 F.3d 884, 886 (8th Cir. 2005) (per curiam)); *United States v. McClamma*, 146 F. App'x. 446, 448 (11th Cir. 2005) (per curiam) (citing *Vanhorn*, 399 F.3d at 886). The different standards may depend on whether a court is interpreting the statutory language to determine if there

> is jurisdiction to modify as opposed to review of the exercise of discretion where the statute allows it.

Tarnawa submits that his case is the ideal vehicle on which to grant *certiorari* on this issue because the standard of appellate review is largely derivative of what form of hearing- or degree of specificity in findings by the trial court- are required before a conclusion of "changed financial circumstances" can fairly be reached under § 3664(k).

Professor Goodwin argues as follows:

> [A] reasonable argument could be made that if the manner of payment were to be changed to the defendant's detriment, the defendant should be afforded the right to be heard at least, or even be present. Analogy might be made to the supervision statutes. The payment of restitution is a condition of supervision, and FED. R. CRIM. P. 32.1, requires that if a proposed change in a supervision condition is to the defendant's disadvantage, a hearing is required.
>
> A factor lending itself toward a hearing, or at a minimum of notice to the parties, is 18 U.S.C.A. § 3664(k) that, by directing that the victim and government are notified of any alleged change in the circumstances of the defendant prior to the court taking action, implies that notice within an adversarial process is envisioned. Whether or not there is a hearing, the court should reasonably notify both parties of a proposed change, in the event either has additional information that might bear on the change.

Catharine M. Goodwin, *Federal Criminal Restitution*, § 14:17 (August 2021).

The Eleventh Circuit held in *United States v. Portillo* that the

defendant's presence was preferred, even if not required, when the court made changes to the restitution order four years after sentencing. 363 F.3d 1161, 1166 (11th Cir. 2004), cert. denied, 543 U.S. 975, 125 S. Ct. 448, 160 L. Ed. 2d 350 (2004) ("it may be preferable to have the defendant present when the court corrects clerical errors in the judgment…"). Tarnawa would contend that the impact is heightened in the circumstances of his own case, where the restitution order was modified nearly two decades after the original sentencing [the judge who tried the case and signed the original judgment died a few years later] and the 'new' judge on his case did not rule until the motion had sat on his desk for seven years.

Unless this Court grants *certiorari*, there will be no limit to how stale the information in a motion to modify restitution can be when a court rules without any input from the defendant/restitution debtor.

## II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT-SPLIT AS TO WHAT KIND OF A CHANGE IS SUFFICIENT TO CONSTITUTE A MATERIAL CHANGE IN A DEFENDANT'S ECONOMIC CIRCUMSTANCES

### A. *United States v. Grant*, 235 F.3d 95 (2d Cir. 2000)

In *United States v. Grant*, 235 F.3d 95 (2d Cir. 2000) the pretrial record before the magistrate judge contained some information about a frozen state inmate fund held by the defendant. The government did not ask, and the sentencing court did not on its own, order payment from that fund. When the fund was later unfrozen by the state, the government asked the court to order payment from it, which the court ordered.

In response to the defendant's appeal, the government argued that the court's subsequent decision to order payment from the fund was a sufficient change in defendant's circumstances to permit the court to issue the new order. The Second Circuit denied that argument, finding the court's change of mind insufficient to justify the new order. However, the state's unfreezing of the defendant's funds was a material change in the defendant's circumstances, and therefore the court's order was upheld. "The release of the account and the consequent availability of the funds meet the statutory test for a 'material change in the defendant's

economic circumstances that might affect the defendant's ability to pay restitution.' 18 U.S.C. § 3664(k)." *Id.* at 101.

### B. *United States v. Grant*, 715 F.3d 552 (4th Cir. 2013)

In *United States v. Grant*, the Fourth Circuit reversed the court's change in payment conditions for a defendant where there had not been a showing of a change in the defendant's circumstances. The government asked the court to add a condition, post-sentencing, that the defendant pay her tax refunds toward the restitution ordered, but the appellate court found there was no new circumstance justifying such a change. "[T]he district court's authority to speed up the rate by which a defendant satisfies her restitution obligation is not boundless, and when a court imposes payment obligations that are untethered from the defendant's ability to meet those obligations, the court exceeds its authority." *Id.* at 558.

### C. Argument and Analysis

The Panel Opinion was clear why the Fifth Circuit rejects the Fourth Circuit's logic in *Grant*:

> [E]ven if the § 3664(f)(2) factors did apply to modifications under § 3664(k), *Grant* conflicts with this court's precedents. The Fifth Circuit holds that district courts "need not make specific findings

> [when originally imposing restitution] if the record provides an adequate basis to support the restitution order." *United States v. Blocker*, 104 F.3d 720, 737 (5th Cir. 1997) (citing *United States v. St. Gelais*, 952 F.2d 90, 97 (5th Cir.), cert. denied, 506 U.S. 965, 113 S. Ct. 439, 121 L.Ed.2d 358 (1992)). Put another way, "[s]entencing judges are accorded broad discretion in ordering restitution and are not required to make specific findings on each factor listed in § 3664." *United States v. Impson*, 129 F.3d 606, 1997 WL 680365, at *1 (citations omitted) (5th Cir. 1997) (per curiam). Thus, Tanawa's first argument for vacating the modified judgment fails.

Because the disposition of Tarnawa's appeal would be different had he been originally sentenced in the Fourth Circuit rather than the Fifth, this Court should grant *certiorari* so as to create a uniform rule in an unclear area of law across the country.

The differences across the regional courts of appeals regarding he treatment of this issue was averred to in the Panel Opinion: "Because § 3664(k) expressly provides a mechanism to avoid that result, Tarnawa should not be allowed to exploit his conditional exemption from the IFRP to limit or deny compensation o the victims. Particularly is this true because Tarnawa himself sought the habeas order that only conditionally exempted him from what the California courts considered a technically-unauthorized IFRP order." 26 F.4th 720, at 725-726. By taking this issue

up on certiorari, future 'arbitrage' on the basis of regional appellate treatment can be alleviated.

## CONCLUSION

This Court should grant the writ of certiorari.

Respectfully submitted,

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