

# ORIGINAL

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SUPREME COURT, U.S.

No. 22-266

IN THE  
Supreme Court of the United States

GARY S. CHRISTENSEN  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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**QUESTIONS PRESENTED**

**QUESTION 1**

Does this Court's holding in *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853 (2019) overturn every case holding the Internal Revenue Service is a "victim" entitled to restitution, and clarify that federal courts have no subject matter jurisdiction to order restitution in criminal tax cases?

**QUESTION 2**

Does a restitution order based on estimates rather than finally determined taxes render 26 U.S.C. § 6201(a)(4) unconstitutional, in that the statute bars criminal defendants from contesting IRS restitution assessments, depriving them of property without the due process afforded all other taxpayers?

### LIST OF PARTIES

The caption contains the names of all parties to the proceedings below.

### CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

### LIST OF DIRECTLY RELATED CASES

#### Underlying Criminal and Civil Cases re Writ of Error Coram Nobis:

*United States v. Gary Steven Christensen*, Case No. CR-14-08164-DGC (D.C.Ariz., 2014).

Order re Petition for Writ of Error Coram Nobis (Doc. 274):

*United States v. Christensen*, 2021 U.S. Dist. LEXIS 9306, 127 A.F.T.R.2d (RIA) 2021-627 (D. Ariz. Jan. 19, 2021).

Order denying Motion for Reconsideration (Doc. 276):

*United States v. Christensen*, 2021 U.S. Dist. LEXIS 49427 at \*1; 2021 WL 977167 (D. Ariz. Mar. 16, 2021).

*United States v. Gary Steven Christensen*, Case No. CV-20-08152-PCT-DGC (D.C.Ariz., 2020).<sup>1</sup>

Instant Appeal to the Ninth Circuit:

*United States v. Gary Steven Christensen*, Case No. 21-15515 (9th Cir. 2021).

Memorandum Opinion denying appeal (Doc. 12-1):

*United States v. Christensen*, 2022 U.S. App. LEXIS 5125 (9th Cir. Feb. 25, 2022).

Order denying Petitions for Panel Rehearing and for Rehearing En Banc. *United States v. Christensen*, Case No. 21-15515, Doc. 14 (May 31, 2022).

First Appeal:

*United States v. Gary Steven Christensen*, Case No. 16-10462 (9th Cir., 2016).

2255:

*United States v. Gary Steven Christensen*, Case No. CV-18-08235 (D.C.Ariz., 2018).

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<sup>1</sup>The Clerk of Court *erroneously* opened this separate civil action when the Petition for Writ of Error Coram Nobis was filed.

Second Appeal:

*United States v. Gary Steven Christensen*, Case No.  
20-10355 (9th Cir. 2020).

*United States v. Gary Steven Christensen*, Supreme  
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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Gary Christensen (“Christensen”) respectfully petitions for a writ of certiorari to review a judgment of the Ninth Circuit Court of Appeals.

### **OPINIONS BELOW**

The opinion of the Ninth Circuit Court of Appeals appears at Appendix A, and is unpublished at *United States v. Christensen*, 2022 U.S. App. LEXIS 5125 (9th Cir. Feb. 25, 2022). The order of the Ninth Circuit Court of Appeals entered May 31, 2022, denying Christensen’s petitions for panel rehearing and rehearing en banc, appears at Appendix B.<sup>1</sup>

### **JURISDICTION**

The Ninth Circuit Court of Appeals issued its opinion on February 25, 2022. Christensen filed petitions for panel rehearing and rehearing en banc on March 8, 2022. The Order denying rehearing was entered May 31, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **U.S. CONSTITUTION, Amendment XVI:**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived,

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<sup>1</sup> *United States v. Christensen*, Case No. 21-15515, Doc. 14 (May 31, 2022).

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 U.S.C.], and may order restitution in accordance with section 3663 [18 U.S.C.]. The procedures under section 3664 [18 U.S.C.] 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 U.S.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 U.S.C. § 7422]).

### STATEMENT OF THE CASE

Following Petitioner's convictions for tax evasion and willful failure to file tax returns in the U.S. District Court for Arizona, the trial court ordered restitution be made to the IRS in the amount of \$1,603,533, an amount calculated by the probation officer in the pre-sentencing report based upon *estimates* of tax loss presented at trial.<sup>2</sup> This amount included "relevant conduct" amounts for years not charged in the indictment.

The Financial Litigation Unit of the Department of Justice used and is using garnishment proceedings to collect the restitution; Petitioner's attorney quit when his retainer was garnished. The IRS made a duplicative "Restitution Based Assessment" for \$1,591,424.27 under 62 U.S.C. § 6201(a)(4)(A), and is proceeding to collect it as well.

Petitioner filed, *pro se*, a petition for writ of error *coram nobis* challenging the restitution order on the following grounds: (1) the government's civil collection of a 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 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 alleged back taxes for years not covered by the convictions;

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<sup>2</sup> At sidebar, the prosecutor told the trial judge only estimates of tax loss would be presented. *U.S. v. Christensen*, Case No.3:14-CR-8164-DGC, Doc. 110-6 (Transcript 213:3-6, 217:23-25).

and (6) Christensen was ordered to pay restitution while incarcerated.

The trial court admitted it had committed “plain error” and granted the petition as to item (5), changing the “proper restitution amount” to \$579,706. The court denied the petition as to the other five errors.

Christensen is precluded by 26 U.S.C. § 6201(a)(4)(C) from challenging *any* of the underlying liability for the assessments the IRS made following the original restitution order, even the amounts which were assessed pursuant to the part of the order which has now been ruled “plain error.”

Subsequent to filing his petition for writ of error *coram nobis*, Petitioner discovered this Court has determined that federal agencies are presumed not to be “persons.” *See Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853, 1861 (2019). He raised this issue in his appeal, arguing that *United States v. Batson*, 608 F.3d 630 (9th Cir. 2010) was implicitly overruled by *Return Mail*.

*Batson* was a case of first impression as to whether a trial court could award restitution to the IRS. The Ninth Circuit held restitution to the IRS could be ordered as a condition of supervised release. Christensen argued that because the IRS is not a “person,” it could not be a “victim” as a matter of law, and therefore, the district court had no subject matter jurisdiction to impose restitution in any amount.

The Ninth Circuit gave no consideration to the effect of this Court’s decision in *Return Mail* upon the subject matter jurisdiction of the district courts. Instead, it decided the absence of subject matter jurisdiction can be waived:

Christensen's contention that *Batson* has been implicitly overruled by intervening authority is waived because he did not raise it below, *see Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009), and is unpersuasive, *see Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). (App. 2).

In addition, both the trial court and the Ninth Circuit cited to case law holding an *estimate* of tax loss may be the amount of restitution, contrary to its prior opinion in *United States v. Green*, 735 F.2d 1203, 1206-07 (1984), and the opinions of many other circuits, that restitution in tax cases can only be ordered for "actual tax loss."

It is axiomatic that "actual tax loss" is the correct amount of tax, and those amounts are set forth on income tax returns. Individuals are required to file income tax returns according to 26 U.S.C. § 6012(a), and Congress legislated at 26 U.S.C. § 6020(b) that if a required income tax return is not filed by an individual, the Secretary [IRS] must prepare and file it.

Petitioner's only apparent remedy in a criminal tax case in which actual tax loss was not computed by the IRS and presented in evidence is for the trial court or the court of appeals to ascertain, compute, assess (by issuing a restitution order) and collect the correct amount of tax, all of which are in direct violation of the Sixteenth Amendment, whereby the people gave Congress that power. Congress enacted the Internal Revenue Code, setting forth precisely who needs to do what to comply with the law. None of the laws enacted by Congress give the probation department, trial courts, or courts of appeals the power to ascertain the correct amount of tax. That authority is reserved to the taxpayer by filing an

income tax return, or by the Secretary of the Treasury and his delegates if a taxpayer does not file one.

#### **REASONS FOR GRANTING THE WRIT**

##### **I. District courts are without jurisdiction to order restitution because the IRS, as a matter of law, is not a victim.**

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 *United States v. Batson*, 608 F.3d 630 (9th Cir. 2010). In that case, the Ninth Circuit held that 18 U.S.C. § 3563(b)(2) and 18 U.S.C. § 3583(d) authorized such an order. In so deciding, the *Batson* Court stated: "The power to order restitution is not inherent in the federal courts; it is conferred only by statute." *Id.*, at 633.

The VWPA (18 U.S.C. § 3663) and the MVRA (18 U.S.C. § 3663A) are two statutes which confer jurisdiction to order restitution to victims of offenses. The *Batson* Court summarized these two restitution statutes thusly:

The VWPA, on the one hand, grants courts the *discretion* to order restitution for certain offenses set forth in Titles 18, 21, and 49 of the United States Code. 18 U.S.C. § 3663. The MVRA, on the other hand, *requires* courts to order restitution to any person who suffered a physical injury or pecuniary loss as a direct or proximate result of the commission of (1) a crime of violence, (2) an offense against property under 21 U.S.C. §

856(a) or Title 18, or (3) an offense under 18 U.S.C. § 1365, relating to the act of tampering with consumer products. *Id.* § 3663A.

*Batson*, at 633.

18 U.S.C. § 3663(a)(1)(A) (VWPA) provides that a district court *may* order restitution to any “victim” of the federal crimes enumerated. The term “victim” is specifically defined as a “person” directly and proximately harmed as a result of the commission of a relevant offense. § 3663(a)(2). The term “person” is not further defined.

MVRA, at 18 U.S.C. § 3663A(a)(1), provides that, notwithstanding any other provision of law, when sentencing a defendant convicted of a relevant offense, the court *shall* order restitution to the “victim.” Again, “victim” is specifically defined as a “person” directly and proximately harmed as a result of the commission of an offense. § 3663A(a)(2). The term “person” is not further defined.

The *Batson* court recognized that these statutes do not confer jurisdiction to order restitution for the commission of an offense under Title 26, and so turned to 18 U.S.C. § 3563(b)(2) (the “probation” statute) and 18 U.S.C. § 3583(d) (the “supervised release” statute) for authorization.

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 *Batson* court stated that:

Those limitations confine restitution under the VWPA and the MVRA to particular offenses. The express exemption from these

limitations forecloses Batson's contention that the district court's restitution authority is confined to the offenses covered by the VWPA and the MVRA. The district court is therefore authorized by § 3563(b)(2) to order restitution as a condition of probation to the victim of any criminal offense, including those in Title 26, for which probation is properly imposed.

*Batson*, at 634.

18 U.S.C. § 3583(d) provides that as an explicit condition of supervised release, the court *shall* order that the defendant make restitution in accordance with §§ 3663 and 3663A, "or any other statute authorizing a sentence of restitution." Title 26 of the United States Code contains no authorization for court-ordered restitution with respect to tax offenses. Also under this section, however, the court may order "any condition set forth as a discretionary condition of probation in section 3563(b)." The Batson court considered this sufficient to declare that the court also had discretion to order restitution for criminal offenses under Title 26 in the case of supervised release.

Nevertheless, § 3563(b)(2) (the probation statute upon which the supervised release restitution authority hangs) clearly states that restitution is to be ordered made "to a victim of the offense," and the removal of the limits of § 3663(a) and § 3663A(c)(1)(A) do not affect the definition of a *victim* as a *person* who is directly and proximately harmed from the commission of an offense. It appears that the Batson court failed to apply the plain meaning of the *entire* statute, in that it failed to analyze the meaning of the word "victim" in § 3563(b)(2). The commonly understood legal definition of "victim," is a

“person harmed by a crime, tort, or other wrong.”  
*Black’s Law Dictionary*, 7<sup>th</sup> Ed.

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 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*, at 1114 (quoting § 3664(i)).

Section 3664, however, governs the *procedures* for issuance and enforcement of restitution orders, and does *not* define the types of “cases” in which the United States may be deemed a victim. Instead, it prescribes a process to follow *if* and when the United States can be considered a “victim.” No statute defines the United States, nor any federal agency, as a person or victim, with respect to Title 26 offenses.

Thus, this Court’s 2019 ruling in *Return Mail* effectively overturned any cases holding the United States or the IRS a “victim.” This 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 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*, at 1861-62.

So too, there is no statute applicable in this case, or contained in the Internal Revenue Code, that defines the IRS as a “person.” That leaves the task of reconciling 18 U.S.C. § 3664(i) with *Return Mail*, so as to avoid holding that section unconstitutional on its face.

In reaching its decision in *Return Mail*, this Court held that a government agency must make an affirmative showing of statutory intent to include the Federal government as a “person.” 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 methods by which Congress made the United States, or a federal agency, to be treated as a “victim” despite not being a “person.” The first is 18 U.S.C. § 3663(a)(1)(A), which allows a defendant to agree to pay restitution as part of a plea agreement. The second is 18 U.S.C. § 3664(g)(2), which allows a real victim to *assign* his

interest in restitution payments to the Treasury's Crime Victims Fund.

In Petitioner's case, there was no plea agreement and no assignment by the IRS to the Crime Victims Fund. Furthermore, assuming *arguendo* that the Internal Revenue Service was designated a "victim" by statute (it is not) it is still precluded by statute from *assigning* a restitution order. Instead, Congress has specifically directed the IRS to *assess* a restitution order and to collect it as a civil tax. 26 U.S.C. § 6201(a)(4).

The Ninth Circuit refused to follow *Return Mail* under the guise that Petitioner waived the jurisdictional argument by not raising it below, citing to *Padgett* and *Miller*, *supra*. *Padgett* is inapposite because there the underlying issue was not raised in the opening brief. Here, Christensen raised the jurisdictional issue in his opening brief. In *Miller*, the Ninth Circuit held that higher intervening authority must be followed, which supports Christensen's position that the Ninth Circuit must apply Supreme Court precedent to him and all other similarly situated criminal defendants, and acknowledge the absence of statutory jurisdiction to order restitution for convictions under Title 26.

The Ninth Circuit knows that subject matter jurisdiction cannot be waived, and 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).

The Ninth Circuit's determination that it may proceed in the absence of subject matter jurisdiction and ignore decisions of this Court is such a radical departure from binding precedent that it warrants this Court's supervisory intervention. Moreover, the

demonstrable *lack* of statutory intent to define the IRS as a victim or a person affects the rest of the circuits, who are similarly ordering restitution without authority. And with the recent announcement that the IRS will be adding tens of thousands more agents, the time is ripe to clarify that Congress did not intend to allow the IRS to claim to be a victim for the purpose of court-ordered restitution.

“Restitution” amounts ordered to be paid to the IRS in the absence of clear statutory authorization deprive criminal defendants of their property without the due process required by the Fifth Amendment, and impose excessive fines in violation of the Eighth Amendment. These violations are compounded where, as here, the district court sets the amounts of tax due *outside* of the provisions of the Internal Revenue Code.

**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 Petitioner 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 case to be valid, there must first be a final determination of a defendant’s tax liability. According to the Ninth Circuit:

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 (1970); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962); *United States v. Stoehr*, 196 F.2d 276, 284 (3d Cir. 1952).

The requirement of a final determination derives from the language in 18 U.S.C. § 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 a 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 18 U.S.C. § 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.

*United States v. Green*, 735 F.2d 1203, 1206-07.

As previously noted, the government in Christensen's case 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 pre-sentence report a "complete accounting" of the loss, assuming the existence of an actual "person" who is a "victim." To accomplish that, § 3664(d)(1) authorizes said probation officer to request that information from the prosecutor and paragraph (d)(2)(A)(iii) mandates said probation officer, prior to submitting the pre-sentence report, notify all identified victims of the amounts subject to restitution and the opportunity to submit information concerning the amount of their losses. Paragraph (d)(5) provides that if the victim's losses are not ascertainable, the prosecutor or probation officer shall inform the court no later than ten days prior to sentencing, and the court has ninety days to make a final determination

of the amount of the loss. Section 3664(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 in Petitioner's case, nor was a sufficient pre-sentence report submitted to the district court. Instead the probation department submitted only the estimate of tax loss — including many years outside of the tax periods for which Christensen was convicted — in its pre-sentence report. The legally insufficient report was adopted in full by the district court, a fundamental error, as recognized by the same court in its order partially granting Christensen's petition for writ of error *coram nobis*.

The probation officer should have contacted the prosecutor and the IRS to inquire if a final determination of Christensen's civil tax liability had been determined. Since it had not been determined, the prosecutor should have then notified 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.

Title 26 of the United States Code provides all Congressional provisions for making the final determination of actual taxes. Where a person fails to file a required return, the IRS prepares and signs a return for them (26 U.S.C. § 6020(b)). Where a person files a required return, the IRS may issue a notice of deficiency per 26 U.S.C. § 6212, asserting that more tax is due. Upon receipt of a notice of deficiency, a taxpayer is entitled to the pre-payment remedy of filing a petition in Tax Court to determine

the correct amount of tax due (26 U.S.C. §§ 6213 and 6214). The IRS must assess the tax determined (26 U.S.C. § 6215) and issue several notices before collection is authorized by law (26 U.S.C. §§ 6203, 6330). This process takes more than 90 days, unless the IRS makes a jeopardy assessment.

Once an assessed amount is paid, the taxpayer may make a claim for refund (26 U.S.C. § 6511), and contest the amount of the tax in district court — a post-payment remedy. This is just a portion of the vast authority granted to the IRS by Congress in order to establish the correct amount of tax due.

The record before this Court clearly establishes a lack of final legal determination of Christensen's civil tax liability. According to *Green, supra*, that means the restitution order is illegal and should be abated.

Both the District Court and the Ninth Circuit cite to *United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010) (quoting *United States v. Bussell*, 504 F.3d 956, 960 (9th Cir. 2007)) for the proposition that a "reasonable estimate" is sufficient in an income tax case. In *Ali*, the "victim" was Microsoft and the crimes were mail and wire fraud, not tax. In *Bussel*, the crime was bankruptcy fraud, not tax. In *Ali*, the district court relied upon spreadsheets created by the IRS to determine the amount of loss suffered by Microsoft, the difference between the full retail price of the software charged by defendants and the price the defendants paid for the software. *Bussel* actually supports Petitioner:

Under the Victim and Witness Protection Act (VWPA), 18 U.S.C.S. § 3663(a), the district court may order restitution for criminal offenses committed prior to 1996. In considering restitution, the district court must take into account: (I) the amount of the

loss sustained by each victim as a result of the offense; and (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate. 18 U.S.C.S. § 3663(a)(1)(B)(i). *The amount of restitution under the VWPA is limited to the victim's actual losses.* Because restitution can only include losses directly resulting from a defendant's offense, a restitution order must be based on losses directly resulting from the defendant's criminal conduct. Actual loss for restitution purposes is determined by comparing what actually happened with what would have happened if the defendant had acted lawfully. [emphasis added.]

*Bussell*, 504 F.3d at 958. If Christensen had filed a tax return the actual tax loss would be the amount shown on the return (assuming the return was accurate), not an estimate.

The Ninth Circuit ignored not only its own precedent, but the decisions of several other courts of appeal, warranting intervention by this Court. If the Ninth Circuit continues in this morally hazardous vein without being checked by this Court, it will deprive criminal defendants of their property without due process — taking not just the "fruits of their crime," but arbitrarily and capriciously determined amounts which constitute windfalls for the IRS (rather than correct amounts of taxes due).

### **III. A criminal tax restitution order in the absence of a final determination of tax**

**deprives defendants of property without due process.**

The Sixteenth Amendment to the United States Constitution gave Congress the authority to lay and collect taxes on income without regard to the source of the income taxed. Congress passed Title 26 to ascertain, compute, assess, and collect taxes. Every taxpayer is entitled to the benefit of those procedures. In criminal tax cases (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 to 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 that restitution order. In this case, Christensen is precluded from challenging the IRS assessment of the "plain error" portion of the trial court's order, an illegal assessment of more than \$1,000,000.

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

Again, 26 U.S.C. § 6201(a)(4) commands 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 through garnishment or any other process. Collection of assessed taxes is an exclusive function of the IRS.

In this case there is over \$1,000,000 in taxes assessed still claimed to be due, despite the district court having vacated its restitution order with respect to that amount (assessed for tax years for which Christensen was not convicted). Because it was assessed by the IRS pursuant to the restitution order in the first instance, Christensen is now *precluded* from challenging the underlying liability by the operation of 26 U.S.C. § 6201(a)(4)(A) through (C). At this point, the intervention of this Court is needed to restore Christensen's right to challenge, as any ordinary taxpayer, the non-restitution assessment amount — the Ninth Circuit having closed its eyes to reality.

### CONCLUSION

The issues presented herein are relevant to each and every criminal tax defendant, prosecution and sentence in the country. This Court's decision in *Return Mail* controls whether district courts have subject matter jurisdiction to declare criminal "restitution" for *any* federal agency, *including* the IRS. Since the Ninth Circuit has refused to consider the key jurisdictional issue, this Court's guidance is sorely needed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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