

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSHUA GLOWACKI, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

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PETITION FOR WRIT OF CERTIORARI

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Dated: February 14, 2023

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## QUESTIONS PRESENTED

After Petitioner pled guilty to a child pornography offense the district court awarded restitution of \$10,000 to one victim, over Petitioner's objection. Does the defendant in a criminal case have the right to have a jury determine facts to support a restitution order?

Does probable cause exist to issue a search warrant for evidence of possession of child pornography when the affidavit for search warrant does not allege that the defendant downloaded child pornography or even accessed a site providing child pornography?

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio (Eastern Division) and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Joshua Glowacki, N.D. Ohio Case No.1:21-cr-258, Judgment of Sentence entered March 25, 2022.
- United States of America v. Joshua Glowacki, Case No. 22-3279, 2023 U.S. App. LEXIS 871 (6th Cir. January 13, 2023)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

Joshua Glowacki respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed Glowacki's conviction and sentence in an opinion not recommended for publication filed on January 13, 2023. *United States v. Joshua Glowacki*, Case No. 22-3279, 2023 U.S. App. LEXIS 871 (6th Cir. January 13, 2023) (Pet. App, 1a).

### JURISDICTION

The Sixth Circuit's opinion was filed on January 13, 2023. There was no petition for rehearing. The mandate issued on February 7, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment's right to trial by jury. The amendment says:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .

U.S. Const. amend. VI.

## STATEMENT OF THE CASE

After officers executing a search warrant found 12 images of child pornography on Glowacki's cell phone the government charged him with two child pornography offenses. (Presentence Investigation Report ("PSR"), R. 50, Page ID # 326, Indictment, R. 20, Page ID # 105–09).

Glowacki moved to suppress the evidence, but when the district court denied the motion he entered into a plea agreement and pled guilty to one child pornography charge. In the plea agreement Glowacki reserved the right to appeal the denial of his motion to suppress and to appeal any punishment in excess of the statutory maximum. (Plea Agreement, R. 47, Page ID # 295–96).

The district court sentenced Glowacki to serve 15 years in prison (the statutory minimum for his crime of conviction) and, over his objection, ordered him to pay \$10,000 in restitution to one victim who was identified in some of the images found on Glowacki's cell phone. (Sentencing Tr., R. 69, Page ID # 455–56).

Glowacki appealed from the district court's denial of his motion to suppress and the district court's restitution order. The Sixth Circuit Court of Appeals affirmed the denial of the motion to suppress and dismissed his restitution appeal, finding that the claim was waived by the plea agreement.

United States v. Joshua Glowacki, 2023 U.S. App. LEXIS 871 at \*16–17, 19–20, 23–24.

### REASONS FOR GRANTING THE WRIT

When deciding if it will grant a petition for certiorari, the Court considers if the petition presents an important issue “that has not been, but should be, settled by [the] Court.” Sup. Ct. R. 10(a). Here there are two such issues—who should determine restitution: judge or jury, and if sending bitcoin to a suspected child pornography website establishes probable cause to issue a search warrant, without proof of access or downloading.

#### 1. Restitution.

The Sixth Circuit and other circuits have held that judges, not juries, can determine restitution and that a criminal restitution award does not implicate the right to trial by jury, because the right only applies to facts that affect the statutory maximum penalty and the restitution statute has no maximum penalty. *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016).

But this reasoning ignores this Court’s holding that restitution in a criminal case is a criminal penalty. *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). Restitution is not divorced from a criminal prosecution, but is part and parcel of it. (See Brief of Respondent United States at 8, *Hester v.*

United States, Case No. 17-9082, 139 S. Ct. 509 (2019).

In *Southern Union Co. v. United States*, 132 S.Ct. 2324 (2012), relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that criminal fines are penalties, and that the Sixth Amendment requires that a jury must determine them beyond a reasonable doubt—not a judge by a preponderance of the evidence. The Court said that requiring juries to find the amount of a criminal fine beyond a reasonable doubt was necessary to preserve the jury's role as a bulwark between the State and the accused on trial for an alleged offense. *Southern Union Co.*, 132 S. Ct. at 2350–51. “In stating Apprendi’s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial fact-finding that increases maximum criminal ‘[s]entences,’ ‘penalties,’ or ‘[p]unishments.’” *Id.* (citations omitted).

There is no real way to distinguish between criminal fines and criminal restitution. Indeed, the Court in *Southern Union* observed that many statutes historically combined criminal fines and criminal restitution. *Id.* at 2354.

The need to have the jury make the decision is made plain by the mandatory nature of the restitution statute, 18 U.S.C. § 2259. It says that the court must determine the full amount of the victim’s loss and order the

defendant to pay an amount reflecting his role in causing the losses, but no less than \$3000. 18 U.S.C. § 2259(b)(2) and (4). The statute is mandatory. That contrasts with the federal sentencing guidelines, which do not violate the constitutional right to a jury trial because they are advisory. *United States v. Booker*, 543 U.S. 220 (2005).

Lower courts have held that the right to a jury trial only applies to statutes that spell out a statutory maximum penalty. *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013); *United States v. Jarjis*, 551 F. App'x 261 (6th Cir. 2014). But facts that increase a mandatory sentence floor invoke the *Apprendi* rule as much as those that increase a mandatory ceiling. *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In most cases, the loss amount is not pled in the indictment, so someone has to find facts to support a restitution award. *Apprendi*'s requirement that the jury find facts to support the penalty should apply to the determination of restitution. It denies reality to say that facts beyond those pled in the indictment that are required to impose restitution are not really additional facts. Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional: Will the Courts Say So After Southern Union v. United States?* 64 Ala. L. Rev. 803, 826–28 (2013).

“When a finding of fact alters the legally prescribed punishment so as to

aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” Alleyne, 133 S. Ct. at 2162.

Thus, since the restitution statute does not spell out a maximum penalty, courts may only impose restitution based on the facts the jury has found or the defendant has admitted. The statutory maximum for restitution is usually zero because the court can’t award any restitution without finding additional facts about the victim’s loss.

As Justice Gorsuch observed in his dissent from the denial of certiorari in Hester:

[J]ust as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

Hester v. United States, 139 S. Ct. at 510 (Gorsuch, J., dissenting).

For a judge to find facts that justify a restitution award violates the rule that a jury must find all of the facts necessary to authorize punishment.

Haymond v. United States, 139 S.Ct. 2369, 2381 (2019).

Restitution is an ever increasing part of criminal prosecutions, yet when it comes to restitution, the lower courts have refused to follow this Court’s holdings in Apprendi, Southern Union, and Alleyne. United States v. Kachkar, No. 19-12685, 2022 U.S. App. LEXIS 19124 at \*30 (11th Cir. July 12, 2022) (collecting post-Southern Union cases declining to extend Apprendi

to restitution).

The Court should grant the petition to make clear that the right to jury determination of facts applies to restitution.

## 2. Probable cause to issue a search warrant.

Must an affidavit for a search warrant allege downloading of child pornography in order to establish probable cause?

The Court should consider what quantum of allegation is enough to permit a search warrant for child pornography when the case involves payment for one-time access to an internet site.

The Sixth Circuit found sufficient probable cause to support a search warrant, even though there was no direct evidence that Glowacki subscribed to or accessed a child pornography website. There was only circumstantial evidence that Glowacki sent bitcoin to pay for one-time access to a site associated with a site providing child pornography. The Sixth Circuit said that this information, coupled with Glowacki's previous conviction relating to child pornography, was enough. The court relied on a series of older cases that involved subscriptions to child pornography sites. *United States v. Glowacki*, 2023 U.S. App. LEXIS 871 at \*12–15.

The Court should require more. There is a difference between subscribing to a known criminal site and paying for one-time access to a site

associated with a criminal site. Without evidence that Glowacki actually downloaded material from the site, there was not probable cause to believe that he possessed child pornography. A subpoena to Glowacki's internet provider could have provided evidence that the site responded to Glowacki's payment.

Nor should Leon's "good faith" exception to the exclusionary rule apply.<sup>1</sup> Without an allegation that Glowacki accessed the site or downloaded material from the site, how could an officer reasonably rely on the affidavit?

The Court should grant certiori to make clear the minimum requirements to establish probable cause in internet-related cases.

### CONCLUSION

The Court should grant the petition for writ of certiorari.

Dated: February 14, 2023

Respectfully submitted,

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<sup>1</sup>United States v. Leon, 467 U.S. 897, 922–23 (1984).

## APPENDIX

Sixth Circuit opinion filed January 13, 2023. .... 1a