NO. _____

In the

Supreme Court of the United States

Brenda and Dennis Sensing.,

Petitioners,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
from the United States Court of
Appeals for the Fifth Circuit

Fifth Circuit Case No. 21-60662

Consolidated with

Fifth Circuit Case No. 21-60691

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There may be no other federal district court in the county that holds "show cause" hearings to collect restitution where the judge itself prosecutes the defendants. Defendants are not appointed counsel for these hearings. The Sixth Amendment guarantees a defendant the right to counsel at critical proceedings or at a point where the defendant faces a potential loss of liberty. The judge, at these show cause hearings, assumes the role of prosecutor and judge, interrogating the defendants. The Fifth Amendment guarantees a defendant due process of law which includes the right to a fair and impartial tribunal and proper notice of a hearing.

At the end of the show cause hearing, the district court enters a binding order that modifies restitution special conditions and requires defendants' compliance. If the defendants do not comply, a revocation proceeding is initiated.

With these cornerstone rights in mind, the questions presented are:

1. Can a district court initiate restitution collection proceedings or is collection the sole responsibility of the Attorney General pursuant to 18 U.S.C. § 3612(c)?

2. Does the right to counsel attach at a "show cause" hearing to collect restitution where the district court assumes the role of prosecutor and judge?

3. Does a defendant have the right to due process and to not incriminate themselves through sworn testimony at "show cause" restitution collection hearings?

4. Is *Bearden v. Georgia*, 461 U.S. 660 (1983) violated when a defendant is making consistent, monthly payments towards restitution, and then required to make additional substantial contributions (i.e., selling their vehicles without owning title)?

PARTIES TO THE PROCEEDING

Petitioners are Dennis and Brenda Sensing, who were the Defendants-Appellants in the court below. Respondent, the United States of America, was the Plaintiff-Appelleein the court below.

COURT PROCEEDINGS

United States v. Dennis Sensing, 1:15-CR-10083-01-JDB Western District of Tennessee; Judgment entered on March 1, 2019

United States v. Brenda Sensing, 1:15-CR-10082-01-JDB Western District of Tennessee; Judgment entered on March 1, 2019

United States v. Dennis Sensing, 3:20-MC-04 Northern District of Mississippi;

Show Cause Order entered on January 29, 2020

United States v. Brenda Sensing, 3:20-MC-06 Northern District of Mississippi;

Show Cause Order entered on January 29, 2020

United States v. Dennis Sensing, 3:20-MC-04 Northern District of Mississippi; Show Cause Order entered on November 23, 2020

United States v. Brenda Sensing, 3:20-MC-06 Northern District of Mississippi;

Show Cause Order entered on November 23, 2020

United States v. Dennis Sensing, 3:20-MC-04 Northern District of Mississippi; Show Cause Order entered on May 3, 2021

United States v. Brenda Sensing, 3:20-MC-06 Northern District of Mississippi;

Show Cause Order entered on May 3, 2021

United States v. Dennis Sensing, 3:18-CR-153-SA-RP Northern District of Mississippi;

Revocation Judgment entered on August 13, 2021

United States v. Brenda Sensing, 3:18-CR-154-SA-RP Northern District of Mississippi; Revocation Judgment entered on August 13, 2021

United States v. Brenda Sensing, consolidated with Dennis Sensing, Fifth Circuit Case Number 21-60662 and 21-60691, 2023 WL 167201 (5th Cir. Jan. 12, 2023)

United States v. Brenda Sensing, consolidated with Dennis Sensing, Fifth Circuit Case Number 21-60662 and 21-60691; Order Denying Petition for En Banc Rehearing

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dennis and Brenda Sensing, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion can be found in an unpublished opinion at *United States v. Sensing*, 2023 WL 167201 (5th Cir. Jan. 12, 2023). *See* Appendix A.

The district court revoked the Sensings' supervision and entered Revocation Judgment extending the Sensings' supervision by an additional three years on August 13, 2021. *See* Appendix B.

The district court entered three show cause Orders on January 29, 2020, November 23, 2020, and May 3, 2021. *See* Appendix C.

JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days after the entry of the Denial of En Banc Petition Rehearing. *See* Rule 13.3 of the Supreme Court Rules. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, FEDERAL STATUTE, FEDERAL REGULATION, AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

This petition involves the Fifth Amendment:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

***

This petition involves the Sixth Amendment, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to the Assistance of Counsel for his defence.

***

This petition involves 18 U.S.C. § 3612(c)

> (c) Responsibility for collection.--The Attorney General shall be responsible for collection of an unpaid fine or restitution concerning which a certification has been issued as provided in subsection (b). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid. Any money received from a defendant shall be disbursed so that each of the following obligations is paid in full in the following sequence:
>
> > (1) A penalty assessment under section 3013 of title 18, United States Code.
> >
> > (2) Restitution of all victims.
> >
> > (3) All other fines, penalties, costs, and other payments required under the sentence.

***

This petition involves 28 C.F.R. § 0.171

> (a) Each United States Attorney shall be responsible for conducting, handling, or supervising such litigation or other actions as may be appropriate to accomplish the satisfaction, collection, or recovery of judgments, fines, penalties, and forfeitures (including bail bond forfeitures) imposed in his district, unless the Assistant Attorney General, or his delegate, of the litigating division which has jurisdiction of the case in which such judgment, fine, penalty or forfeiture is imposed notifies the United States Attorney in writing that the division will assume such enforcement responsibilities.
>
> (b) Each U.S. Attorney shall designate an Assistant U.S. Attorney, and such other employees as may be necessary, or shall establish an appropriate unit within his office, to be responsible

for activities related to the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bail-bond forfeitures).

(c) The Director of the Executive Office for United States Attorneys shall be responsible for the establishment of policy and procedures and other appropriate action to accomplish the satisfaction, collection, or recovery of fines, special assessments, penalties, interest, bail bond forfeitures, restitution, and court costs arising from the prosecution of criminal cases by the Department of Justice and the United States Attorneys. He shall also prepare regulations required by 18 U.S.C. 3613(c), pertaining to the application of tax lien provisions to criminal fines, for issuance by the Attorney General.

***

This petition involves Federal Rules of Criminal Procedure 32.1(c):

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

STATEMENT OF THE CASE

I. Background

The district court, in this case and in similar cases involving restitution where the defendant was serving a term of supervised release or probation, held hearings styled as "show cause hearings." These hearings were scheduled either due to delinquency in restitution payments or because the defendant's supervised release was set to expire and there was outstanding restitution. Here, the Sensings' supervised release was about to expire and the Sensings still owed restitution.

Procedurally, the district court and probation officer scheduled these hearings *sua sponte*. 18 U.S.C. § 3612 or 28 CFR § 0.171 were not pursued to begin these proceedings.

The clerk's office opened a separate, "miscellaneous court file (MISC)" with a different case number. *See* Appendix C. Everything in the show cause hearing was docketed in the separate miscellaneous case, detached from the criminal proceeding. Opening a miscellaneous case did not update the criminal proceeding's docket, meaning notice was not sent out to defense counsel. Defense counsel would only become aware of show cause hearings after having been appointed to represent the defendant at a revocation proceeding, which could be months or years after the initial show cause hearing.

The defendant was informed about show cause hearings by a phone call or text message from their probation officer who told the defendant that the district court

wanted to discuss restitution. The defendant never received a list of alleged violations or wrongdoings that would be discussed at the show cause hearing.

The probation officer stated that the show cause hearing would be a non-adversarial, financial review of their case. The defendant was not told that they may present evidence to the court at the show cause hearing. The defendant was not told they can bring witnesses to testify on their behalf at the show cause hearing. Most importantly, probation officers told defendants there was no potential for new charges or being locked up at the show cause hearing. The court described show cause hearings as "informal hearings involving one aspect of her criminal judgment."

At the show cause hearing, representatives from the Financial Litigation Unit ("FLU"), one or two probation officers, an Assistant United States Attorney, court staff, and the judge are present. There is no defense counsel present, unless one is retained by the defendant, which is rare since the majority of the defendants are indigent. The defendants are sworn in by the deputy clerk and all testimony would be subject to the penalty of perjury.

The district judge assumed the role of prosecutor at these hearings; for example, in the Sensings' three show cause hearings, the prosecutor asked zero total questions. Defendants answer the questions to the best of their knowledge, despite being afforded no opportunity to prepare and all answers being subjected to perjury. At the end of these hearings, the district court entered an Order with provisions that could and have included:

- turning over documentation,

- paying arrearages within a certain timeframe,
- unilaterally increasing payments towards restitution, and
- adding onerous conditions to sell property or other conditions that prevent the defendant from spending money,[1] such as:
    - Selling their vehicles;
    - Selling jointly owned property;[2]
    - Selling their residence;[3]
    - Forcing their decision to go to prison or halfway house with 70% income towards restitution;[4]
    - Emptying their wallet in the courtroom;[5]

[1] The MacArthur Justice Legal Clinic filed an Amicus Brief in the Fifth Circuit outlining other examples of show cause cases and their special conditions. *See* Appendix D.

[2] *United States v. Russell Wayne Haynie*, N.D. Miss. 1:20-MC-015 (2020) – Court ordered defendant to cash out his IRA and to sell land parcels owned jointly with two other individuals within 60 days. All proceeds from the IRA and sales are to be paid towards restitution. *See* Order from November 23, 2020.

[3] *United States v. Nathaniel Brown,* N.D. Miss. 4:21-MC-001 (2021) – Defendant shall sell or refinance his home within 15 days and shall apply $300,000.00 from the sell or refinance of home to restitution. Defendant shall stop paying on unsecured debts. *See* Order from March 8, 2021; *see also* May 3, 2021 and July 6, 2021; *see also United States v. Jairus Lee*, N.D. Miss. 3:21-MC-009 (2021) – Defendant ordered to refinance or sell his primary residence. Defendant ordered to sell his vehicle for a specified amount. *See* Order from March 8, 2021; *see also* May 3, 2021.

[4] *United States v. Detrick Doyle*, Fifth Circuit Cause No. 21-60950 (2022) (pending before the Fifth Circuit) – giving Defendant the option between prison and entering the halfway house for six months and giving 70% of his income towards restitution.

[5] *United States v. Henry E. McCaslin, Jr.*, N.D. Miss. 4:20-MC-007 (2020) – Defendant forced to empty wallet in courtroom ($630) and put towards restitution and to stop making payments towards vehicle. *See* Order from October 7, 2020.

- Forgoing an all-expense paid business seminar from employer and having employer put that money towards restitution;[6]
- Cashing out IRAs;[7]
- Obtain a job that pays more than $7.25 an hour;[8] and
- Forbidding rent being paid or legal fees.[9]

There are numerous other cases from the northern district of Mississippi that involve special conditions requiring defendants to do similar things *without the assistance of counsel*.

Here, the district court ordered the Sensings to sell vehicles that they did not legally own because they did not have title and were still making monthly payments. The court additionally increased their monthly restitution payments even though the Sensings had not missed a single payment. At no point was defense counsel appointed for these show cause hearings or notified that show cause hearings were occurring.

If the defendant failed to comply with these modified conditions of restitution, the court would direct probation to file a petition to revoke supervision. The *same*

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[6] *United States v. James M. Harris*, N.D. Miss. 3:20-MC-008 (2020) –Defendant's request to travel to Las Vegas in March 2020 was denied. The Defendant's employer ordered to apply the sum of the estimated expenses of the trip toward the restitution in his case.

[7] *See Haynie*.

[8] *United States v. Max H. Miller*, N.D. Miss, 1:21-MC-004 (2021) – Defendant ordered to sell vehicle and trailers; also required to stop paying rent and legal fees and find employment that will pay him more than $7.25 an hour. *See* Order dated May 3, 2021.

[9] *Id*.

district court then would preside over the revocation hearing, even though it had heard all of the sworn testimony from the defendant at the show cause hearings.

II. Facts and Procedural history

This case originated in the Western District of Tennessee. ROA.21-60662.7.[10] Dennis and Brenda Sensing pled guilty to Conspiracy to Commit Health Care Fraud and Paying and Receiving Illegal Remunerations in 2015. ROA.21-60662.23. Both were sentenced to time served sentences and placed on 2 years of supervised release, with a condition of 10 months' home detention. Additionally, and relevant to this proceeding, the Sensings were ordered to pay $627,267.25 in restitution. The Judgment stated that, "The restitution shall be paid in regular monthly installments of not less than ten-percent of her gross monthly income and not less than $150.00 per month." ROA.21-60662.29.

The Sensings' supervision was transferred from the Western District of Tennessee to the Northern District of Mississippi on March 1, 2019.

The district court held three Show Cause hearings on January 23, 2020, November 12, 2020, and April 22, 2021. ROA.21-60662.58-59. The district court or clerk's office opened a separate MISC case, 3:20-MC-004 and 3:20-MC-006, for Dennis and Brenda Sensing, docketing all show cause notices and proceedings in that case, rather than the original criminal case. ROA.21-60662.58-60. The show cause docket entries in the criminal case were sealed and not available to view by defense counsel until defense counsel was appointed.

[10] This citation is to the Fifth Circuit Record on Appeal in the Brenda Sensing case.

On May 18, 2021, more than 16 months after the first show cause hearing was held, a petition to revoke supervised release was filed and a revocation proceeding initiated. The Federal Public Defender's office was appointed to represent Brenda; CJA Panel Attorney Victoria Washington was appointed to represent Dennis.

A. Report on Offender Under Supervision

On December 19, 2019, the probation officer filed a Report on Offender Under Supervision for both Brenda and Dennis Sensing. ROA.21-60662.273. In these reports, the probation officer recommended that both Brenda and Dennis be referred to a Show Cause Hearing before the district court due to opening lines of credit, a petit larceny charge, and student loans and, specifically, because their supervision was about to expire. ROA.21-60662.274; *see also* ROA.21-60662.277; ROA.21-60691.171, 173.[11]

B. January 23, 2020 Show Cause Hearing and Order

This was the first show cause hearing before the district court.[12] One of the first things said by the court to Brenda after being sworn in by the deputy, "You owe a lot of money, and you're scheduled to be released in May, and I don't see that happening here." ROA.21-60662.72, 75. The district court then told Brenda to strongly consider "voluntarily" extending her supervision a year, instead of going to prison, to which Brenda stated "If I don't have to [extend supervision], I don't want

[11] This citation is to the Fifth Circuit Record on Appeal in the Dennis Sensing case.

[12] The court conducted separate hearings for Brenda and Dennis for the January 23, 2020 show cause hearing, but subsequently consolidated the cases for the November 12, 2020 and April 22, 2021 show cause hearings.

to. I know I'll have to keep making payments. I mean, I'm assuming I'm making payments until I die." ROA.21-60662.75, 78.

After discussing the three violations that formed the basis of the show cause hearing – the petty larceny, student loans, and credit cards – which also formed the first three violations in the petition to revoke supervision, the district court questioned the Sensings about their finances. The Sensings owned two vehicles.

These vehicles were purchased before the Sensings' sentencing hearing. The court wanted to "save a payment, and that payment can go towards your restitution." Brenda explained, however, that there was about $15-16,000 owed against the F-150 and $19-20,000 owed against the Jeep, which would make it difficult for them to sell. The district court ordered the Sensings to sell one of their vehicles, either their Ford F-150 or Jeep Cherokee. ROA.21-60662.83-84.

In addition to selling the vehicles, the district court increased Brenda's monthly restitution from $150 to $250 per month and increased Dennis's monthly restitution payment from $150 to $1,000 per month. ROA.21-60691.85.

The Order reflected these changes. *See* Appendix C – January 29, 2020 Order.

As to Dennis's hearing, the court said the same thing, "You are scheduled to be discharged in May of 2020, and I am telling you now, based upon what I know, that is not likely, okay?" ROA.21-60691.82. After finding out that Dennis was collecting money from veterans benefits and disability, the court increased his monthly restitution from $150 to $1,000 per month. ROA.21-60691.84-85. The court then

ordered Dennis to sell one of the vehicles, saving a monthly payment that would then be applied towards restitution.

C. "Voluntary" Order Extending Supervised Release by One Year

On May 5, 2020, as was suggested by the court, the Sensings met with probation to discuss "voluntarily" extending their supervision by one year, rather than have revocation proceedings initiated. The Sensings signed the voluntary extension because the court wanted an extension and the Sensings were never informed they could refuse the extension.

This extension was expected to resolve Brenda's three violations discussed in the first show cause hearing and Dennis's one violation of opening new lines of credit.

D. November 12, 2020 Show Cause Hearing and Order

At the second show cause hearing, the probation officer volunteered that the Sensings should get rid of a car payment to cut their expenses, but offered no reasonable plan or assistance to help make this happen. ROA.21-60662.107. Dennis explained to the court why the F-150 could not be sold – it leaked oil and no one would be willing to pay the vehicle's entire lien for the title. ROA.21-60662.111-12. The Sensings informed the court that they had already posted the vehicle on Craigslist and Facebook and took it to CarMax to try and sell. ROA.21-60662.112. The F-150 had a lien against it for approximately $12,000. ROA.21-60662.113.

As for the Jeep, the Sensings followed the Court's order and got rid of one of the vehicles. They traded the Jeep for a Dodge Ram truck because that was the only way to get rid of the Jeep and to follow the court's order. Due to the trade-in, the

Dodge Ram had a lien against it in the amount of $53,000 which includes some of the rollover from the Jeep. ROA.21-60662.114-15.

The district court told the Sensings to sell both trucks and figure out a way, stating:

> And to be honest with [the Sensings], that just your problem. It's not the Court's problem. I don't mean to sound rude when I say it, but if you're left with a balance after it brings all it can bring for fair market value, we've solved two problems. We've gotten rid of $900 per month payment so that can go toward your restitution. And then if we sell this other truck, we've gotten rid of $474 regardless of what you might owe.
>
> ROA.21-60662.116.

The court went so far as to suggest that the Sensings call the lending companies, who have a lien against the truck, and "negotiate and bargain with them," but explaining that they are in over their heads and could only pay $7,500 instead of $13,000 that they owe. ROA.21-60662.117, 124.

The Order reflected these changes. *See* Appendix C – November 23, 2020 Order.

E. April 22, 2021 Show Cause Hearing and Order

At the final Show Cause Hearing, it was revealed that the Sensings had entered into a one-year extension of supervised release (defense counsel had not been made aware of this one-year extension). ROA.21-60662.131; ROA.21-60662.279; ROA.21-60691.174.

The only reason for this show cause hearing was due to the Sensings' failure to sell the vehicles. ROA.21-60662.132. The Sensings informed the court numerous

times that they were upside down on the F-150 by about $11,000. ROA.21-60662.134-35. After hearing this, the court, again, ordered the selling of the F-150.

The court inquired about the Dodge Ram and how much was owed against it. ROA.21-60662.137. The Dodge Ram had over $51,000 owed, which included the Jeep that the court previously ordered the Sensings to sell. Hearing this, the court ordered the Sensings to sell not just the F-150, but also the Dodge Ram. ROA.21-60662.139.

The Order reflected these changes. *See* Appendix C – May 3, 2021 Order.

F. August 10, 2021 – Brenda Sensing's Revocation Hearing and Order

On May 25, 2021, more than fourteen months since the initial show cause hearing, Dennis and Brenda Sensing had counsel appointed to represent them for a supervised release revocation hearing, due to their failure to comply with the show cause Orders, specifically the refusal to sell their vehicles. ROA.21-60662.42.

The petition to revoke Brenda reflected four allegations, including the three violations that formed the basis of the one-year "voluntary" extension and the fourth violation alleging the Sensings failed to sell both of their vehicles. ROA.21-60662.280-82. As to Dennis, there were two allegations, including the first violation that formed the basis for his one year "voluntary" extension and the failure to sell the two vehicles. ROA.21-60691.175-76.

The probation officer agreed that the first, second, and third violations had been resolved when Brenda signed the one-year extension of her supervised release (and the same for Dennis when he signed his extension). ROA.21-60662.153-56. Failing to sell the vehicles was the main contested allegation. ROA.21-60662.152.

As to any notice about the show cause hearings, the probation officer called and texted the Sensings. ROA.21-60662.174-75, 179. There was never a formal document of notice, a summons, subpoena, complaint, or motion filed ordering the Sensings to court. Only at the third show cause hearing did the Sensings receive any official notification from the court in the form of a Notice.

The probation officer agreed that at no point was either Sensing in default on their restitution payments. ROA.21-60662.175, 180.

Finally, regarding the "voluntary" extension of supervision, the probation officer agreed that Brenda did not want to extend her supervision. ROA.21-60662.176. He explained the reasoning behind the extension:

> Well, just that their case was about to expire, and, you know, it was my understanding that it was – **you know, that was the *Court's wish*, is that she be extended on supervision voluntarily**.
>
> ROA.21-60662.176 (emphasis added).

Brenda testified as a witness herself. When asked about the "voluntary" extension of supervision, Brenda stated that she felt like she did not have a choice but to sign it. ROA.21-60662.186. Brenda said that the probation officer told them that was what the court wanted – an extension of supervision – so both Dennis and Brenda signed the extension. ROA.21-60662.186.

Brenda attempted to sell the vehicles at car dealerships, online services, Carvana, CarMax, and Craigslist prior to the revocation hearing. ROA.21-60662.197-98. Brenda stated she turned over that information to the probation officer whom

she believed would have informed the court since he was her probation officer and stayed in contact with the court. ROA.21-60662.198-99.

The district court revoked the Sensings' supervision and imposed an additional three years of supervision. The court referred to show cause hearings as "informal hearings" which do not require the filing of a complaint nor did the hearings require proper notice to the defendants. ROA.21-60662.214. The court did not address the right to counsel at show cause hearings, stating that there was no case law to support that position. ROA.21-60662.214.

Further, the district court took the position that Federal Rule of Criminal Procedure 32.1 did not apply in this instance because the court did not modify the amount of restitution and therefore was within its parameters to hold an "informal discussion" with the defendant about their assets, money, bank accounts, and checking accounts. ROA.21-60662.215. The court did not believe counsel was mandatory at a show cause hearing because the Sensings' liberties were never at stake, calling defense counsel's position an "exaggeration" and "simply inaccurate." ROA.21-60662.215.

As to the voluntary extension of supervision, the court found the probation officer credible; it did not find Brenda credible as to her assertion that the court forced her to sign the waiver because her supervision was almost complete. ROA.21-60662.215-16. The court noted that it did not have any evidence or testimony regarding how upside down the Sensings' were on their vehicles. ROA.21-60662.217.

The court found that Brenda violated her supervision on all four counts of the petition and sentenced her to time served with an extension of her supervision by three years. ROA.21-60662.219-220. Specifically, as to Count 4, the court stated:

> With respect to Number 4, the Court finds that [Brenda Sensing] was ordered by the Court to sell two vehicles. She failed to justify why those should not be sold, and, in fact, as it sits today, those vehicles are still in their names.

ROA.21-60662.219-20.

The Judgment reflected this sentence of three years' supervision. *See* Appendix B – Brenda Sensing Judgment.

G. August 10, 2021 – Dennis Sensing's Revocation Hearing and Order

The district court incorporated the testimony from Brenda's revocation hearing. ROA.21-60691.138. As to the first violation of opening credit card statements without permission, Dennis admitted the violation, but denied the number of accounts opened because some were merged with Brenda. ROA.21-60691.139. Dennis denied the fourth violation, the failure to sell the vehicles.

Dennis corrected all of the credit card accounts, closing them after being instructed to do so by the court at the show cause hearing. ROA.21-60691.143. Regarding the vehicles, defense counsel incorporated the same arguments from Brenda's hearing, arguing res judicata, collateral estoppel, and constitutional rights. The court revoked Dennis's supervision, extending it by three years. *See* Appendix B – Dennis Sensing Judgment.

The Judgment reflected this sentence of three years' supervision. ROA.21-60662.59-63.

III. Fifth Circuit Opinion

After oral argument, the Fifth Circuit issued an unpublished opinion on January 12, 2023. *See* Appendix A. Rather than ruling on the constitutional and statutory violations, the Court affirmed the district court based on a harmless error analysis, stating "Therefore, even if there were deficiencies in the show-cause hearings, such errors were harmless with respect to the court's ultimate decision to revoke their supervised release." 2023 WL 167201 *2 (5th Cir. Jan. 12, 2023).

This was the first time the Sensings had the opportunity to raise any objections to or appeal the show cause violations.

The Fifth Circuit denied the Sensings Petition for Rehearing En Banc on February 13, 2023.

REASONS FOR GRANTING THIS PETITION

The district court has so far departed from the accepted and usual course of judicial proceedings, that it calls for an exercise of this Court's supervisory power, by sidestepping statutorily imposed restitution collection authority via uncounseled "show cause hearings" which violate the Constitution and Federal Rule of Criminal Procedure 32.1. These issues are of fundamental societal and legal significance as any violations of the Constitution and federal statutes should be resolved.

The Fifth Circuit failed to address these substantive issues.

I. This case presents recurring, unprecedented violations of a defendant's right to counsel and contravenes Supreme Court precedent and the federal code.

A. The Sixth Amendment mandates the right to counsel when a defendant faces a loss of liberty or is involved in a critical proceeding.

The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel. U.S. Const. amend. VI; *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

The right to counsel attaches "at or after the initiation of adversary judicial proceedings against the defendant," *i.e.*. a critical proceeding, or upon a potential loss of life or liberty. *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *see also Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008); s*ee also Zerbst*, 304 U.S. at 463. This Court has made clear that "the loss of liberty" involved in revocation hearings "is a serious deprivation," even though such proceedings are not a part of the criminal prosecution itself.[13] *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (discussing *Morrissey v. Brewer*, 408 U.S. 471 (1972)); *see also United States v. Hodges*, 460 F.3d 646, 651 (5th Cir. 2006); *see also* Federal Rule of Criminal Procedure 32.1.

These newly created show cause hearings deprive defendants, like the Sensings, of their Constitutional rights to assistance of counsel. The evidence and testimony adduced at those show cause hearings were used in three different manners:

[13] No court has addressed whether the right to counsel attaches to a "show cause hearing" where the testimony taken can be used revoke supervision.

1. to modify the Sensings' conditions of supervised release at the show cause hearings;

2. to extend the Sensings' supervision; and

3. to form the basis to revoke the Sensings' supervision.

Modifying conditions of restitution and extending one's supervision are liberties that require the assistance of counsel.

If this Court allows district courts the ability to hold show cause hearings and enter binding orders that modify the conditions of restitution payments without the assistance of counsel, then the Sixth Amendment would no longer apply after a criminal judgment is entered. Defendants would be left to fend for themselves without counsel at any type of hearing before a court initiates formal revocation proceedings.

Basing the revocation on any violation from one or more of these show cause orders requires the right to counsel. The court held three show cause hearings to acquire information and obtain sworn testimony to enter Orders requiring restitution compliance. Violations of these Orders form the basis of the petition to revoke supervised release.

B. The plain language of Federal Rule of Criminal Procedure 32.1(c) requires that defendants have a right to counsel when the court modifies or extends supervised release.

Federal Rule of Criminal Procedure 32.1(c)(1) provides that defendants have a right to appointment of counsel before modifying the conditions of their supervised release:

> (1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which **the person has the right to counsel** and an opportunity to make a statement and present any information in mitigation.

The defendant has certain procedural protections, including the right to notice and the right to counsel in a proceeding to revoke parole, probation, or supervised release. *Scarpelli*, 411 U.S. at 778 (holding that due process entitles the probationer to written notice of the claimed violations of probation; disclosure of the evidence against him; the opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses; a neutral and detached hearing body; and a written statement by the factfinders as to the evidence relied on and reasons for revoking [] probation); *see also United States v. Correa-Torres*, 326 F.3d 18, 22-23 (1st Cir. 2003) (noting that the protections of Rule 32.1 "serve a variety of interests" including "safeguard[ing] the defendant's obvious stake in preserving his liberty," and "the sovereign's more nuanced interest in ensuring that important legal determinations are informed by an accurate account of verified facts."); *Hodges*, 460 F.3d at 651; *see also United States v. Eskridge*, 445 F. 3d 930, 932-33 (7th Cir. 2016) (same); *United States v. Jones*, 818 F.3d 1091, 1098 (10th Cir. 2016) (upholding Rule 32.1 rights and protections); *United States v. Dennis*, 26 F.4th 922, 927 (11th Cir. 2022); *see* Fed. R. Crim. P. 32.1(b)(2).

While show cause hearings are not explicitly referenced in Rule 32.1, each show cause restitution collection hearing resulted in a *modified* show cause Order with conditions to either pay more money per month or required the selling of vehicles that were not legally owned to satisfy restitution. These show cause hearings are

essentially pre-revocation hearings without any of the aforementioned rights and all of the penalties and additional special conditions to sell their belongings and pay more restitution.

Defendants cannot be assumed to fully understand or navigate the legal process, especially in a hearing that could have future implications on possible imprisonment. This Court stated, "[t]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *See e.g.*, *Zerbt*, 304 U.S. at 462–63. Further, the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

II. This case presents recurring, unprecedented violations of the Fifth Amendment and contravenes Supreme Court precedent.

The Supreme Court has determined that due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *Mullane v. Central Hanover Bank,* 339 U.S. 306 (1950). The Sensings contend that the district court violated all three of these guaranteed due process rights.

A. District court judges cannot assume the role of prosecutor.

One of the fundamental rights of a litigant under our judicial system is the right to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. *In re Murchison,* 349 U.S. 133, 136 (1954); *see also United States v. Wade*, 931 F.2d 300, 304 (5th Cir. 1991).

Going back more than sixty years, this Court has consistently ruled that judges must be impartial and non-biased. In *Wong Yang Sung v. McGrath,* Immigration Service had been conducting hearings in deportation cases wherein the presiding inspector was required to conduct an interrogation of the alien and the witnesses for the Government, cross-examine the alien's witnesses, and if necessary present additional evidence that supported the charges against the alien and also submitting findings of fact and conclusions of law to the Commissioner of Immigration. 339 U.S. 33 (1950) (superseded by statute).

Such a hearing did not conform to the Administrative Procedure Act, stressed the unfairness of a procedure that commingled the prosecutorial function of the presiding inspector with his decision-making function. Furthermore, to construe the Act as permitting such a practice might bring the prior procedures "into constitutional jeopardy." *Id.* at 50. This Court stated: "[W]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Id.*

Five years later in *In re Murchison*, 349 U.S. 133, this Court held that the Due Process Clause of the Fourteenth Amendment prevented a judge that had previously acted as a "one-man grand jury" in investigating individuals for suspected crimes, from subsequently trying the same individuals for contempt that occurred at the grand jury proceeding. The Court, speaking through Justice Black, stated that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course

requires an absence of actual bias in the trial of cases." *Id*. at 136. In other words, "justice must satisfy the appearance of justice." *Id*.

Commenting on the procedure wherein the judge performs the accusatory role of a grand jury, a factual situation not too dissimilar from the facts of the instant case, Justice Black stated that a judge that acts both as the accuser and as the final adjudicator cannot be totally without bias:

> [h]aving been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.
>
> *Id*. at 137.

Twenty-five years later, neutrality of a judge was stressed in *Marshall v. Jerrico, Inc.*, reaffirming that there are "Constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions." 446 U.S. 238, 243-44 (1980). Justice Marshall opined:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.... At the same time, it preserves both the appearance and reality of fairness "generating the feeling, so important to a popular government, that justice has been done," .... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
>
> *Id*. at 242.

The Fifth Circuit has thoroughly addressed this issue in two cases. *In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990); *Am. Airlines*, 968 F.2d at 531.

In *In re Davidson*, during a show cause hearing for contempt, the court allowed the plaintiff to read a statement asking for defendants to be held in contempt; no prosecutor was present. 908 F.2d at 1250. The judge interrogated the defendant and defense counsel throughout the Show Cause hearing. *Id.* at 1251. The court ultimately found both parties in contempt. *Id.*

The Fifth Circuit reversed the case, stating, "[t]he manner in which this hearing was handled convinces us that either (i) the district court judge tacitly appointed plaintiff's counsel as prosecutor or (ii) the district court judge himself acted as prosecutor. Either constitutes reversible error." *Id*. The Court stated that the district court judge could not prosecute the contempt and at the same time act as judge. *Id.*

In *American Airlines*, the Fifth Circuit reversed because the district court judge, *sua sponte,* initiated a contempt proceeding, questioned the witnesses and acted as prosecutor, and then decided all factual and legal issues. *American Airlines,* 968 F.2d at 531 (citing *In re Davidson*). The Fifth Circuit found the court's actions reversible, stating, "To do so deprives the defendant in a criminal contempt proceeding of an impartial decisionmaker. The judge in this case erred in assuming these dual roles." *Id.*

Other Circuits have also reversed when the tribunal acts as prosecutor or has been shown to have actual bias or prejudice. *See e.g.*, *United States v. Neal*, 101 F.

3d 993, 998 (4th Cir. 1996) (holding that a judge assumed a prosecutorial role because the district judge investigated the incriminating facts through extrajudicial means, introduced evidence against Neal, and otherwise presented the Government's case); *see also United States v. Griffin*, 84 F. 3d 820, 829 (7th Cir. 1996) (noting that the "crucial determinant" of whether appropriate procedural protections have been afforded in a criminal contempt proceeding is "the extent of the judge's intrusion" into the authority of the executive branch to prosecute crimes).

Similarly, other Circuits have recognized it is axiomatic that the prosecution of crimes is not a proper exercise of the judicial function. Among those procedures that are fundamental to our adversary system is the use of an independent prosecutor to pursue charges against a criminal defendant rights afforded. *United States v. Cross*, 128 F.3d 145, 148 (3d Cir. 1997) (affirming conviction but acknowledging the right to an impartial and disinterested tribunal); *see also United States v. Rowan*, 510 F. App'x 870, 872 (11th Cir. 2013); *Liu v. Bd. of Immigr. Appeals*, 167 F. App'x 871, 874 (2d Cir. 2006); *Wang v. Attorney General of the United States*, 423 F.3d 260, 267 (3d Cir. 2005); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1059 (9th Cir. 2005); *Iliev v. INS*, 127 F.3d 638, 643 (7th Cir. 1997).

The separation of powers among the branches of government is a foundational principle to our system of government; the idea of lodging in one individual the power to prosecute and sit in judgment "summons forth ... the prospect of the most tyrannical licentiousness." *International Union, UMWA v. Bagwell*, 512 U.S. 821, 831 (1994) (internal quotation marks omitted). The assumption of the role of

prosecutor by the district court is the kind of error that this Court has long understood to undermine the integrity of court proceedings: "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.... [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments...." The Federalist No. 78, at 491 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (internal quotation marks omitted).

In this proceeding, the district judge presided over three show cause hearings and then presided over the final revocation proceeding. The district court judge initiated the three show cause proceedings, interrogated the *pro se* defendants as prosecutor, issued Orders modifying restitution, forced the defendants to extend supervision, and then presided over the revocation hearing where it ultimately revoked the defendants' supervision.

B. Due Process requires that defendants are given proper notice concerning the nature of the hearing.

The due process clause is implicated when the government deprives an individual of life, property, or liberty. *See* U.S. Const. amend. V. Due process requires that the government provide "notice and opportunity for hearing appropriate to the nature of the case" before depriving persons of their property. *Mullane*, 339 U.S. at 313. To satisfy the requirements of due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 314.

The only notice provided to the Sensings came from the probation officer in the form of a text message or phone call. ROA.21-60662.174. Surely, a text message cannot satisfy the notice requirement under the Due Process clause? In *Taylor v. Hayes*, the Supreme Court pointed out that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence. 418 U.S. 488, 498 (1974).

Other types of hearings require more than a simple text message or phone call to satisfy proper notice. Federal Rule of Criminal Procedure 42 sets forth the specific rights that a defendant must have prior to facing the court in criminal contempt proceedings. The court must give the person notice in open court, *in an order to show cause*, or in an arrest order, and must include the time and place of the trial; allow the defendant a reasonable time to prepare a defense; and state the essential facts constituting the charged criminal contempt and describe it as such. Fed. R. Crim. P. 42(a)(1). For all intents and purposes, show cause restitution collection hearings are contempt hearings but without the rights.

C. The Fifth Amendment protects individuals against self-incrimination.

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." *See* U.S. Const. amend. V. The privilege against self-incrimination protects the person claiming it from being compelled to give "answers that would in themselves support a conviction" or that "would furnish a link in the chain of evidence needed to prosecute the claimant" for a crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Thus, the Fifth Amendment "privileges [an individual] not to answer official questions put to him in any ... proceeding, civil or criminal, **formal or informal**, where answers **might incriminate him in future criminal proceedings**." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (emphasis added); *see also Kastigar v. United States*, 406 U.S. 441, 444–45 (1972) (The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory[.]").

A defendant should have notice that their testimony in open court could be used to incriminate them in future criminal proceedings. Harping back to *Zerbst*, when the court asked questions to the Sensings, the Sensings felt compelled to answer, not knowing that would they said could be used against them at the their future revocation hearing or as a basis to revoke them. The right to effective assistance of counsel would have benefited the Sensings at the show cause hearings because the court utilized their sworn testimony against them at the final revocation hearing. *Cronic*, 466 U.S. at 658.

III. The lower court continues to impede the proper operation of 18 U.S.C. § 3612(c) and 28 C.F.R. § 0.171.

There is no statutory provision that would allow the court, *sua sponte*, to initiate the process to collect restitution, modify restitution orders, or enforce a restitution order without prior initiation from the United States Attorney's Financial Litigation Unit.

The Attorney General has the duty to enforce orders of restitution, not the court. *See* 18 U.S.C. § 3612(c) (Responsibility for collection.--The Attorney General

shall be responsible for collection of an unpaid fine or restitution concerning which a certification has been issued as provided in subsection (b)); *see also* 18 U.S.C. § 3664; *see also* 28 C.F.R. § 0.171 (Each United States Attorney shall designate a Financial Litigation Coordinator—Assistant United States Attorney to be responsible for activities related to the satisfaction, collection, or recovery of judgments, fines, restitution, penalties, assessments, court costs and bail bond forfeitures.).

The First through Tenth Circuits have acknowledged that the Attorney General is in charge of restitution collection, citing 18 U.S.C. § 3612(c) as the authority. *See e.g.*, *United States v. Witham*, 648 F.3d 40, 45 (1st Cir. 2011); *see also United States v. Lauersen*, 648 F.3d 115, 116 (2d Cir. 2011); *see also Douglas v. Martinez*, 416 F. App'x 168, 170 (3d Cir. 2010); *see also United States v. Sheets*, 814 F.3d 256, 260 (5th Cir. 2016); *see also United States v. Comer*, 93 F.3d 1271, 1282 (6th Cir. 1996); *see also In re Buddhi*, 658 F.3d 740, 742 (7th Cir. 2011) (same); *see also United States v. Boal*, 534 F.3d 965, 969 (8th Cir. 2008); *see also United States v. Yielding*, 657 F.3d 722, 726 (8th Cir. 2011) (holding Attorney General is responsible, rather than the courts, for collection of unpaid restitution); *see also Ward v. Chavez*, 678 F.3d 1042, 1060 (9th Cir. 2012) (dissent) ("The responsibility for collecting restitution obligations is committed to the Attorney General. 18 U.S.C. § 3612(c). But the statutes do not give the Attorney General judicial authority. Rather, if a defendant refuses to pay voluntarily—either because he lacks the ability to pay or because of mere contempt of the court—the statutes direct the Attorney General to seek assistance from the court.").

This is another separation of powers violation where the district court has overstepped its boundary and encroached on the executive branch's duty to collect restitution. The district court will continue to violate § 3612(c) until ordered to stop.

IV. This case presents recurring, unprecedented violations of *Bearden v. Georgia*.

This Court has held that debtor's prisons are unconstitutional in *Bearden v. Georgia*. 461 U.S. 660 (1983); *see also United States v. Ellis*, 907 F. 2d 12 (1st Cir. 1990) (noting that debtor's prisons are unconstitutional); *see also United States v. Burgum*, 633 F. 3d 810, 814 (9th Cir. 2011) (holding that the defendant's inability to pay restitution could not be an aggravating factor at sentencing); *United States v. Parks*, 89 F. 3d 570, 572 (9th Cir. 1996) ([The defendant] may be receiving an additional eight months on this sentence due to poverty. Such a result is surely anathema to the Constitution").

Bearden v. Georgia required a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose. 461 U.S. 660, 666–67 (1983).

The revocation of probation at issue in *Bearden* implicated physical liberty and effectively "turned a fine into a prison sentence." 461 U.S. at 674. Similarly, the driving force behind revoking the Sensings' supervision was the collection of restitution, turning the revocation hearing into a debtor's prison issue. ROA.21-60662.136-39; (*see also* violation 4 – failure to sell the vehicles).

Bearden eliminated the prospect of sending people to jail solely based on being indigent and failing to make payments. If a person cannot be sent to jail for failing to make payments, surely a person cannot be sent to jail for paying $1,250 monthly payments (which is what the Sensings were consistently paying)? The court was dissatisfied with collecting $1,250 per month, calling these non-substantial payments. ROA.21-60662.131. In one sentence, the district court made known its intentions at the very first show cause hearing in January: "You owe a lot of money, and you're scheduled to be released in May, and I don't see that happening." ROA.21-60662.75.

This was simply about the court wanting the Sensings to contribute every penny they possibly could towards restitution. ROA.21-60662.116, 124.

Not only did the district court force more restitution out of the defendants, but the district court attempted to put the defendants into *more* debt by forcing them to sell a vehicle they did not own and assume the remaining debt. This seems to belie the rights promised under Due Process, fundamental fairness, and the Eighth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and allow him to proceed with briefing on the merits and oral argument.

Dated: May 12, 2023

Respectfully submitted,

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