No.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MICHAEL WELLS,

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*

BENJAMIN L. COLEMAN
Benjamin L. Coleman Law PC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 865-5106
blc@blcolemanlaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a criminal defendant has a Sixth Amendment right to a public jury, as opposed to an "anonymous" jury, in a federal criminal trial, and, if so, whether a trial court can compromise that right without making any findings whatsoever.

2. Whether the Fifth and Sixth Amendment rights established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny apply to a mandatory criminal restitution order; alternatively, whether a jury trial is required for a mandatory criminal restitution order under the Seventh Amendment.

STATEMENT OF RELATED CASES

- *United States v. James Michael Wells*, No. 13CR00008-SLG, U.S. District Court for the District of Alaska. Judgment entered April 22, 2021.

- *United States v. James Michael Wells*, Nos. 14-30146, 15-30036, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 11, 2018.

- *United States v. James Michael Wells*, Nos. 20-30009, 21-30121, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 14, 2022, rehearing and rehearing *en banc* denied February 23, 2023.

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JURISDICTION

The court of appeals filed its opinions on December 14, 2022 and denied a petition for rehearing and rehearing *en banc* on February 23, 2023. App. 1-2.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

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[1] "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit. "CR" refers to the clerk's record or docket in the district court.

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

On April 12, 2012, Richard Belisle and James Hopkins were shot to death at the Coast Guard Communication Station on Kodiak Island, Alaska. App. 6-7. Petitioner worked with the victims at the station; he had worked for the military in an active and civilian capacity for more than 40 years, almost all with the Coast Guard after a seven-year stint in the Navy during Vietnam. 7-ER-1200-18. Petitioner, who had no prior record, was arrested and indicted for the murders approximately one year later, in February 2013. App. 10-11; 1-ER-88-92. He was the only defendant charged; there were no co-conspirators. *Id.* A first trial was held in 2014 in Anchorage, Alaska, and the jury returned guilty verdicts, but the Ninth Circuit reversed the convictions. *See Wells*, 879 F.3d 900.

The district court held a second jury trial in Anchorage in 2019. Petitioner was in custody at the time of the trial, as he had been since his arrest in 2013. CR 17. The prior trial was without any allegations of juror interference, and there was

no evidence that petitioner would or even could tamper with the jury from his jail cell. Nonetheless, before the retrial, the district court issued an order prohibiting defense counsel from sharing the identities of the jurors with petitioner. App. 43-44. The district court provided no explanation for its order. *Id.* Thus, the jurors were referred to by numbers throughout the trial; for example, when polled upon returning their guilty verdicts, they were referred to by number. 8-ER-1654-55.

Pursuant to the guilty verdicts, the district court imposed a sentence of life imprisonment without the possibility of parole. App. 14. At sentencing, the district court also found by a preponderance of the evidence that the Hopkins estate was entitled to $1,178,758 and the Belisle estate was entitled to $742,882 in restitution. 1-ER-2-9, 14-32. The district court overruled petitioner's objections that the restitution order violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and the constitutional interpretation articulated in Justice Gorsuch's dissent from the denial of *certiorari* in *Hester v. United States*, 139 S. Ct. 509 (2019). CR 1439.

Petitioner filed a second appeal, and the Ninth Circuit affirmed his convictions but remanded his sentence. App. 33. Among other things, petitioner contended that the district court's unreasoned and unexplained order implementing an anonymous jury constituted plain error under the public trial guarantee of the Sixth Amendment. The Ninth Circuit did not entertain most of his arguments and rejected his claim, essentially reasoning: "Wells was on trial for a high-profile

double murder in a more sparsely populated geographic area. Especially after the earlier mistrial [sic], the case had received considerable publicity. It was thus not plain error for the district court to conclude that shielding jurors from greater public scrutiny was warranted." App.41.

Petitioner also appealed the district court's restitution order. The Ninth Circuit rejected his claim based on *Apprendi* and *Hester*, explaining that Ninth Circuit "precedent forecloses his argument" and its "precedent likewise forecloses [his] argument that the restitution order violated his Seventh Amendment right to a jury trial." App. 32 (citations omitted). The Ninth Circuit did, however, reverse the restitution order for reconsideration of whether its enforcement procedures complied with the Consumer Credit Protection Act and therefore "remand[ed] for further proceedings on that issue only." App. 32-33.

ARGUMENT

I. This Court should grant review to confirm that a defendant has a Sixth Amendment right to a public jury in a federal criminal trial and that a court cannot compromise that right without making any findings whatsoever.

A. Courts disagree on the source of the right to a public jury, which has led to imprecise and conflicting standards and outcomes

The district court ordered an "anonymous jury," as it shielded the jurors' identities from petitioner and the public. The rise of anonymous juries is generally traced to *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) and a string of other

federal prosecutions in New York starting in the late 1970's. *See United States v. Scarfo*, 850 F.2d 1015, 1021-22 (3d Cir. 1988). In *Barnes*, 604 F.2d at 133-43, a majority of a Second Circuit panel concluded that withholding the names of jurors was permissible, although it mostly based its ruling on the nature of peremptory challenges and a trial court's discretion to choose the procedures for conducting voir dire.

Subsequent courts have largely ignored that Judge Meskill dissented in *Barnes*, *id.* at 168-75, and then Judge Oakes, joined by Judge Timbers, called for rehearing *en banc*, commenting that the *Barnes* majority "adopted an entirely new rule of law that so far as I know stands without precedent in the history of Anglo-American jurisprudence." *Id.* at 175 (Oakes, J., dissenting from rehearing). Despite this tenuous origin, the use of anonymous juries quickly gained approval in the lower courts, and they continue to increase in frequency. See Note, *A Jury of Your [Redacted]: The Rise and Implications of Anonymous Juries*, 103 Cornell L. Rev. 1621, 1623 (2018).

The cases initially considering anonymous juries were decided before this Court clarified its Sixth Amendment public trial jurisprudence in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), *Waller v. Georgia*, 467 U.S. 39 (1984), and ultimately *Presley v. Georgia*, 558 U.S. 209 (2010). While the lower courts generally agree that a federal criminal defendant has a right to a public jury,

their rationales as to where the right emanates from demonstrate significant confusion, and most have ignored this Court's Sixth Amendment public trial jurisprudence.

Lower courts sometimes mention a defendant's Sixth Amendment right in conducting an "anonymous jury" analysis, but they do not specifically state that a defendant has a Sixth Amendment right to a public jury, nor do they apply this Court's public trial cases. *See, e.g.*, *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003). Courts often mention that anonymity can affect a defendant's ability to select a jury, and anonymous juries can suggest that a defendant is dangerous thereby compromising his Fifth Amendment right to the presumption of innocence. *Id.* at 971; *see United States v. Edmond*, 52 F.3d 1080, 1090 (D.C. Cir. 1995); *United States v. Ross*, 33 F.3d 1507, 1519-20 (11th Cir. 1994).

Other courts ground the right to a public jury in statutory law. Some courts cite 28 U.S.C. § 1863, which requires district courts to devise plans that fix the time when the names of jurors shall be disclosed to the parties and the public; if disclosure to the public is part of the plan, the statute allows a court to keep the jurors' names confidential "where the interests of justice require." 28 U.S.C. § 1863(b)(7); *see, e.g.*, *United States v. Ramirez-Rivera*, 800 F.3d 1, 35 (1st Cir. 2015); *United States v. Deitz*, 577 F.3d 672, 684 (6th Cir. 2009). Other courts cite a statute providing that a list of the potential jurors and their place of abode shall be

disclosed at least three days before a capital trial, unless "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432; *see Scarfo*, 850 F.2d at 1023.

Given this confusion regarding where the right emanates from, there is disagreement and confusion on the appropriate standard to guide the inquiry. The majority rule states that it is permissible to seat an anonymous jury if "(1) there are strong grounds for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused." *Ramirez-Rivera*, 800 F.3d at 35; *see, e.g.*, *United States v. White*, 810 F.3d 212, 225 (4th Cir. 2016); *Shryock*, 342 F.3d at 971; *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995). To determine whether the first prong is satisfied, these courts have generally articulated five factors to guide the inquiry: (1) the defendant's involvement with organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer a lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. *See, e.g.*, *Shryock*, 342 F.3d at 971.

The Third and Seventh Circuits have taken a different approach. In a pre-*Presley* opinion, the Third Circuit retreated from its initial observations in *Scarfo*, concluding that anonymous juries also implicate the First Amendment and therefore this Court's public trial cases govern. *See United States v. Wecht*, 537 F.3d 222, 234-39 and n.30 (3d Cir. 2008). The *Wecht* opinion was not unanimous, however, as Judge Van Antwerpen dissented, reasoning that although the majority correctly looked to this Court's public trial cases, it incorrectly applied them. *Id.* at 251-63.

Similarly, in a post-*Presley* case, the Seventh Circuit has explicitly cited this Court's public trial test, as established in *Waller* and *Presley*, in the anonymous jury context. *See United States v. Blagojevich*, 612 F.3d 558, 564 (7th Cir. 2010). In *Waller* and *Presley*, this Court stated: "The right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Presley*, 558 U.S. at 213 (quoting *Waller*, 467 U.S. at 45). To determine whether these "rare" circumstances are established, a court must apply a four-factor test:

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than

> necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Presley, 558 U.S. at 214 (quoting *Waller*, 467 U.S. at 48). Thus, the Seventh Circuit concluded that a district court must apply *Presley/Waller* to the anonymous jury inquiry and therefore "before closing any part of the criminal process to the public (the part at issue in *Presley* was voir dire), a judge not only must make the findings required by *Waller* but also must consider alternatives to secrecy, whether or not the lawyers propose some." *Blagojevich*, 612 F.3d at 565.

There is a difference between the Sixth Amendment *Waller/Presley* standard and the standard that the majority of lower courts have employed when considering anonymous juries. In particular, the *Waller/Presley* standard requires courts to make explicit findings, to consider alternatives, and to issue orders that are no broader than necessary, whereas the majority test for anonymous juries in the lower courts has no such requirements, as demonstrated by the analysis in this case. Indeed, the outcome in this case conflicts with opinions in the Third and Seventh Circuits, which have followed the requisite Sixth Amendment standard.

The analysis of the lower courts here was similar to the district court's flawed analysis in *Wecht*, where the Third Circuit reversed in a case involving the high-profile corruption trial of a well-known county coroner. The district court in

Wecht reasoned that an anonymous jury would prevent the media from harassing the jurors, but the Third Circuit held that the "prospect that the press might publish background stories about the jurors is not a legally sufficient reason to withhold the jurors' names from the public." *Wecht*, 537 F.3d at 240.

The Third Circuit explained that even though the case involved a prominent defendant, the district court's explanation "amount[ed] to the sort of 'conclusory and generic' finding that we have held to be insufficient to overcome the presumption of openness." *Id.* "The participation of jurors 'in publicized trials may sometimes force them into the limelight against their wishes,' but '[courts] cannot accept the mere generalized privacy concerns of jurors' as a sufficient reason to conceal their identities in every high-profile case." *Id.* (citation omitted). The Ninth Circuit's "publicity" rationale in this case was as generic, if not more generic, than the one in *Wecht*, and, if the generic analysis that was articulated below were sufficient, then an anonymous jury could be employed in any purported high-profile case.

Similarly, in *United States v. Mansoori*, 304 F.3d 635, 651 (7th Cir. 2002), the Seventh Circuit held that the district court erred in empaneling an anonymous jury in a drug case even though it involved "a large-scale, gang-related operation with ready access to firearms . . . ." The Seventh Circuit explained: "True, the defendants may have had the ability to intimidate jurors through associates who

were not incarcerated, but that is true of many defendants. What demonstrates the need for jury protection is not simply the means of intimidation, but some evidence indicating that intimidation is *likely*. No such evidence is presented here. Nor is there evidence that the defendants had engaged in a pattern of violence unusual enough to cause jurors to fear for their safety." *Id.* (emphasis added) (citations omitted). Here, there was no evidence that petitioner had fellow gang members or even coconspirators, and he certainly did not have the ability himself to intimidate or harass the jurors from his jail cell.[2]

This Court should grant review to resolve the conflicting approaches in the lower courts. This Court should confirm the conclusion of the Third and Seventh Circuits that the Sixth Amendment test governs the anonymous jury inquiry, and it should hold that the lower courts plainly erred because they failed to apply the test clearly established by this Court's precedent.

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[2] Even circuits that have not adopted the Sixth Amendment standard have reversed anonymous-jury orders where the justification was not nearly as lacking as the one here. For example, in *United States v. Sanchez*, 74 F.3d 562 (5th Cir. 1996), the district court used an anonymous jury for the trial of an officer who threatened to arrest prostitutes to coerce them to engage in sex acts. The district court relied on "the potential fears of jurors adjudicating the guilt or innocence of a police officer" and stated there was nothing "more frightening to the populous than having a rogue cop on their hands." *Id.* at 564-65. The Fifth Circuit reversed, as nothing showed that the defendant would attempt to harm the jurors, and the "decision erroneously rested on the 'mere allegations or inferences of potential risk.'" *Id.* at 565.

B. The Sixth Amendment public trial standard applies, and the Ninth Circuit incorrectly affirmed the use of an anonymous jury

Although many lower courts have ignored this Court's public trial cases, those opinions make clear that an anonymous jury infringes on the openness that is essential to the jury selection phase of the case. *See Press-Enterprise*, 464 U.S. at 505-09 (recounting the historical tradition that emphasizes the open and public nature of jury selection). Furthermore, although the Third Circuit's opinion in *Wecht* and the Seventh Circuit's opinion in *Blagojevich* were in the context of First Amendment claims made by the press, *Presley* made clear that the defendant is entitled to the same, if not greater, constitutional protections under the Sixth Amendment. "[T]here is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. 'Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.' There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit." *Presley*, 558 U.S. at 213 (citation omitted).

Given *Presley*, the anonymous jury inquiry should be governed by the *Waller* standard and factors, not the test and factors articulated by the majority of the lower courts. Under the *Waller* standard, "trial courts are required to consider

alternatives . . . even when they are not offered by the parties . . . ." *Presley*, 558 U.S. at 214. Furthermore, "generic risk[s]" that are "unsubstantiated by any specific threat or incident" are not sufficient to justify an infringement on the public trial guarantee. *Id.* at 215. "If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could [use an anonymous jury] almost as a matter of course." *Id.*

It is clear that the lower courts in this case failed to comply with the *Presley/Waller* standard. Obviously, the district court's order failed to comply with the constitutional standard, as it was not based on any findings or reasoning whatsoever, App. 43-44, thereby plainly failing all four prongs of the Sixth Amendment test. The Ninth Circuit's rationale was not much better.

The Ninth Circuit stated that the district court could have found that the case, which was being tried in a purportedly "sparsely populated" area, had received "considerable" media coverage. App. 41. Putting aside whether Anchorage with an approximate population of 300,000 is "sparsely populated" and whether the limited media coverage of this case could be described as "considerable," whatever that may mean, the Ninth Circuit's rationale does not explain why the jurors' identities needed to be shielded *from petitioner*. The Ninth Circuit was presumably articulating a hypothetical concern that the jurors could have been harassed by the public or media, but petitioner could do no such thing

from his jail cell. In short, the only factor mentioned by the Ninth Circuit had no logical connection to shielding the jurors' identities *from petitioner*. For this reason alone, the Ninth Circuit's reasoning was badly and obviously flawed.

Moreover, even as to the public and media, the generic rationale hypothesized by the Ninth Circuit is insufficient to justify an anonymous jury. The "prospect that the press might publish background stories about the jurors is not a legally sufficient reason to withhold the jurors' names from the public." *Wecht*, 537 F.3d at 240. The Ninth Circuit also did not consider reasonable alternatives to juror anonymity, as it did not, for example, consider whether juror sequestration would have been sufficient. *See Blagojevich*, 612 F.3d at 565. In short, the Ninth Circuit relied on "generic risk[s]" that were "unsubstantiated by any specific threat or incident" in contravention of the public trial guarantee. *Presley*, 558 U.S. at 215.

In sum, the lower courts in this case failed to consider alternatives to an anonymous jury as required under the Sixth Amendment public trial standard, and their findings were non-existent (in the case of the district court), generic (in the case of the Ninth Circuit), and otherwise failed the *Presley/Waller* standard by a wide margin. This case did not even present a close call; the district court's error was plain or obvious, and the Ninth Circuit's reasoning contravenes this Court's longstanding precedent. For this additional reason, this Court should grant review.

C. The issue presented is important, and this case is a good vehicle for review

It has been nearly 50 years since the Second Circuit's original and divided anonymous jury opinion in *Barnes*. Given the increased use of anonymous juries, this Court should now confirm that Sixth Amendment rights are implicated and what circumstances justify their use. There is no need for further "percolation" in the lower courts, as their positions are firmly entrenched. Indeed, this Court decided *Presley* more than a decade ago, and the majority of the lower courts still maintain their flawed anonymous jury analysis, despite the pre-*Presley* opinion in *Wecht* and the post-*Presley* opinion in *Blagojevich*.

The issue presented is important, as it implicates several fundamental aspects of our public jury trial system. Among other things, anonymous juries affect a defendant's ability to select a fair and impartial jury, and they deprive a defendant and the public of a verdict that "is both personalized and personified when rendered by 12 known fellow citizens." *Sanchez*, 74 F.3d at 565. The use of anonymous juries also defeats the public's right to know the individuals deciding some of the most important controversies in our society.

The trend in the lower courts is to utilize anonymous juries more frequently in high-profile trials, but those are arguably the cases where the need for accountability should be at its greatest. Anonymity diminishes the public's

confidence in the impartiality of the jury and thus whether the result of the trial was correct and just. Investigations of jurors in one high-profile trial revealed that some had lied in providing information to the court, *see Blagojevich*, 612 F.3d at 561, and openness allows the ability to investigate matters concerning juror misconduct and thereby enhances confidence in the system. *See Wecht*, 537 F.3d at 241-42. These interests are important to our criminal justice system.

Finally, this case also presents a good vehicle for review. The district court did not articulate any findings whatsoever in support of its decision to empanel an anonymous jury, demonstrating how freely and improperly lower courts are compromising the First and Sixth Amendment right to a public trial through the use of anonymous juries. Thus, even under a plain-error standard, the error here was certainly plain or obvious given the complete lack of findings.[3] Furthermore, a violation of the right to a public trial is a structural error, *see, e.g.*, *Weaver v. Massachusetts*, 582 U.S. 286, 296 (2017), and therefore petitioner should be entitled to a new trial. *See Greer v. United States*, 141 S. Ct. 2090, 2100 (2021); *United States v. Marcus*, 560 U.S. 258, 262-63 (2010).

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[3] The Fed. R. Crim. P. 52(b) test for plain error requires an (1) error, (2) that is plain, and (3) that affects substantial rights; if all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725 (1993).

II. This Court should grant review to resolve the confusion in the lower courts as to whether *Apprendi* applies to a mandatory criminal restitution order, and whether alternatively a jury trial is guaranteed under the Seventh Amendment.

A. Justice Gorsuch's opinion in *Hester* explains why review should be granted

The *Apprendi v. New Jersey*, 530 U.S. 466 (2000) line of cases now hold that the Fifth and Sixth Amendments require all facts necessary to sustain maximum and mandatory minimum penalties to be proved to a jury beyond a reasonable doubt. Justices Gorsuch and Sotomayor have explained why this Court should review whether *Apprendi* applies to criminal restitution, *see Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., dissenting from denial of *certiorari*), and this Court should grant review to correct the flawed view of the lower federal courts, which continue to apply a restitution exception to *Apprendi* even after this Court held that *Apprendi* applies to fines. *See Southern Union Co. v. United States*, 567 U.S. 343 (2012).

The primary argument as to why *Apprendi* does not apply in this context is that restitution has no "statutory maximum." However, this Court has "used the term 'statutory maximum' to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." *Hester*, 139 S. Ct. at 510 (citing *Blakely v. Washington*, 542 U.S. 296, 303 (2004)). "In that sense, the statutory maximum for restitution is usually *zero*, because a court

can't award *any* restitution without finding additional facts about the victim's loss. And just 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." *Id.* The no-statutory- maximum rationale is also undercut by *Alleyne v. United States*, 570 U.S. 99 (2013), where this Court held that *Apprendi* applies to mandatory minimums, not just statutory maximums. After *Alleyne*, the no-statutory-maximum rationale has no force.

The "backup argument" for exempting restitution from *Apprendi*'s protections has "problems of its own." *Hester*, 139 S. Ct. at 510. The government has alternatively contended that restitution is only a civil compensatory remedy, but restitution "is imposed as part of a defendant's criminal conviction[,]" and federal statutes "describe restitution as a 'penalty' imposed on the defendant as part of his criminal sentence, as do [Supreme Court] cases." *Hester*, 139 S. Ct. at 510-11 (citing *Paroline v. United States*, 572 U.S. 434, 456 (2014); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)). "Besides, if restitution really fell beyond the reach of the Sixth Amendment's protections in *criminal* prosecutions, [the Court] would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases." *Hester*, 139 S. Ct. at 511.

Furthermore, exempting restitution from *Apprendi* protections is "difficult to reconcile with the Constitution's original meaning." *Hester*, 139 S. Ct. at 511. At

common law, "the jury usually had to find the value of the stolen property before restitution to the victim could be ordered[,]" and "it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption." *Id.* (citing several cases from the nineteenth century and Barta, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 472-76 (2014)).

While *Hester* convincingly explains why this Court should grant review, developments in lower-court precedent and this Court's precedent since *Hester* have made the need for review all the more important. As set forth below, there is now a conflict in the lower courts on the question. Moreover, the post-*Hester* opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019) has undermined the no-statutory-maximum rationale, and *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020) demonstrates that "restitution," as defined under the governing federal statutes and as imposed in this case, is penal and goes beyond traditional equitable restitution, thereby triggering the Seventh Amendment.

B. Developments since *Hester* support granting review

Although the federal courts of appeals have not budged since *Hester*, as the opinion below demonstrates, *see Wells*, 55 F.4th at 800 n.4, at least one State court of last resort has created a conflict among the lower courts. In *State v. Davison*,

973 N.W. 2d 276 (Iowa 2022), the defendant was ordered to pay restitution as a result of his murder conspiracy and assault convictions. The Supreme Court of Iowa held that the mandatory restitution order violated *Apprendi* and *Southern Union*, explaining that it was at least partly "punitive" and that the $150,000 order was "not a modest amount." *Id.* at 287.

Also since *Hester*, the Supreme Court of Kansas has described the confusion in the lower courts when invalidating parts of the State's statutory scheme for restitution. That court noted that "[a]t least 11 of 13 federal United States Circuits Courts of Appeal have refused to extend *Apprendi* and its progeny to orders of restitution," but that the circuits have taken a "nonuniform approach" and this Court "has remained silent" on the question. *State v. Arnett*, 496 P.3d 928, 933 (Kan. 2021). Given the confusion, the Supreme Court of Kansas held that its restitution statutes violate the State's constitution, explaining: "By allowing the judge to determine the legal damages proximately caused by the crime, rather than a jury, and then converting that determination into a civil judgment for the victim, the statutory scheme bypasses the traditional function of the jury to determine civil damages . . . ." *Id.* at 937; *see State v. Robison*, 496 P.3d 892, 900 (Kan. 2021).

Justice Standridge, joined by Justice Rosen, issued a separate opinion explaining that *Apprendi* should apply to restitution. *See Arnett*, 496 P.3d at 938-45. She reasoned that this "Court's silence tells us nothing" and that the denials in

cases like *Hester* "in no way implies" that *Apprendi* does not apply to restitution. *Id.* at 941-42.

Justice Standridge further canvassed the federal circuit precedent and found that it was all over the map and not particularly helpful: "In looking to the federal circuits, six of these courts either (1) fail to analyze *Southern Union* and how it may affect the analysis, (2) only cursorily do so, or (3) incorrectly do so." *Id.* at 942. Likewise, with respect to State courts exempting restitution from *Apprendi*: "[O]nly seven of these cases are state supreme court opinions, five of which were handed down before *Southern Union*. Almost all these cases provide no real analysis of the issue, instead basing their holdings on the various rationales of the federal circuit courts." *Id.* "When viewed collectively, these cases may appear to provide overwhelming support for finding that *Apprendi* does not apply to restitution orders. However, when read individually, these cases fail to provide a consistent or clear rationale for why *Apprendi* should not apply to restitution." *Id.* at 943. Indeed, "many of the courts blindly follow other decisions without any independent analysis of their own." *Id.*

While confusion has persisted in the lower courts since *Hester*, subsequent developments in this Court's jurisprudence have also undermined the two reasons proffered for exempting restitution from *Apprendi* and the jury trial right, thereby solidifying the issue as an appropriate candidate for review. As mentioned, the

first rationale is that restitution has no purported statutory maximum, but the post-*Hester* opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019) gutted whatever merit remained of this tenuous justification.

In *Haymond*, this Court held that a mandatory minimum prison sentence imposed for a violation of supervised release violated *Apprendi*. The defendant in *Haymond* was convicted of a child pornography offense that carried a statutory maximum penalty of 10 years, and he was sentenced to approximately 3 years; he then violated his supervised release, and a provision in 18 U.S.C. § 3583 required a court to impose a minimum sentence of at least 5 years if it found such a violation by a preponderance of the evidence. This Court held that the 5-year minimum term violated the Fifth and Sixth Amendments under *Alleyne* and rejected the argument that there was no constitutional problem because the original conviction authorized a term of up to 10 years. *See Haymond*, 139 S. Ct. at 2380-81 ("A mandatory minimum 5-year sentence that comes into play only as a result of additional judicial factual findings by a preponderance of the evidence cannot stand.").

In rejecting the government's similar statutory-maximum argument, the lead opinion in *Haymond* succinctly stated: "we have been down this road before." *Haymond*, 139 S. Ct. at 2379. This Court emphasized that "following the government down this road . . . lead[s] to the same destination" as in cases like *Alleyne*. *Id*. at 2381. In dismissing the argument that the revocation sentence did

not trigger an increase in a maximum sentence, *Haymond* reasoned: "As this Court has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Haymond*, 139 S. Ct. at 2379 (citation omitted). Justice Breyer concurred, emphasizing the mandatory nature of the sentence at issue. *Id.* at 2396 (Breyer, J., concurring). In this case, the district court imposed *mandatory* restitution under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, and thus the reasoning in *Haymond* and *Alleyne* applies.

The second rationale that a *criminal* restitution order is actually a *civil* compensatory remedy has also been undermined since *Hester* in *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020). Even if civil, the federal restitution statutes exceed the limits of equitable restitution articulated in *Liu*, as did the order in this case, violating the Seventh Amendment. Simply placing a "restitution" label on a monetary sanction in a criminal judgment should not dictate the constitutional outcome.[4]

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[4] While cases like *Paroline* and *Pasquantino* refute the "civil" characterization, *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) also found that restitution orders in criminal cases are "penal." Indeed, in interpreting the former federal criminal restitution statutes before *Apprendi*, the lower courts had unanimously held that a criminal defendant was not entitled to a jury trial under the Seventh Amendment by adopting the government's argument that restitution is "penal." *Id.* at 53 n.14. Thus, it comes

The post-*Hester* opinion in *Liu* further clarifies that a mandatory criminal restitution order is penal, and, even if it is civil, a defendant is still entitled to a jury trial under the Seventh Amendment because such orders are not limited to traditional equitable restitution. Simply placing the label of "restitution" on the exercise does not mean that the monetary judgment is not a penalty or that a jury finding is not constitutionally required under the Seventh Amendment. *See Hester*, 139 S. Ct. at 511; *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990); *Tull v. United States*, 481 U.S. 412, 417 (1987). As *Liu* makes clear, a critical inquiry is whether the "restitution" imposed is consistent with the traditional limitations on *equitable* restitution. *See Liu*, 140 S. Ct. at 1942-50. That is because "not all relief falling under the rubric of restitution is available in equity." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-13 (2002).

"To be sure," most purported restitution awards "exceed the bounds of traditional equitable principles." *Liu*, 140 S. Ct. at 1946. As *Liu* recognized, this Court confronted such a situation just a few years ago in the form of a disgorgement order and explained that, as applied in practice, disgorgement orders

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as a bit of a surprise that the government is now arguing that restitution is not penal. The Third Circuit, for one, has recognized the hypocrisy. *See United States v. Leahy*, 438 F.3d 328, 333-35 (3d Cir. 2006) (*en banc*).

were often a "penalty" because they were "imposed by the courts as a consequence for violating . . . public laws." *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 1643 (2017). Like restitution, a disgorgement order can be "imposed for punitive purposes" and is "paid to the district court, and it is 'within the court's discretion to determine how and to whom the money will be distributed.'" *Id.* at 1643-44. Because such orders "'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty" and are not simply compensatory or equitable. *Id.* at 1645.

This description in *Kokesh* neatly fits federal criminal restitution orders. As a threshold matter, *mandatory* restitution was imposed in this case under the MVRA, *see* 18 U.S.C. § 3663A, which would seem to fly in the face of an *equitable* remedy. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). The restitution order entered against petitioner was imposed for the violation of public laws, and it is to be paid to the court. Paying restitution is a condition of supervised release, and a failure to pay "can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 139 S. Ct. at 510. Thus, a federal criminal restitution

order is penal. *See Kelly*, 479 U.S. at 53. And, even if a mandatory criminal restitution order were somehow a civil remedy, it is not limited to traditional equitable restitution under *Liu*, and therefore a defendant is entitled to a jury trial under the Seventh Amendment. *See, e.g.*, *Tull*, 481 U.S. at 417.

In sum, at common law, restitution in a criminal case had to be determined by the jury beyond a reasonable doubt, and the Constitution should be interpreted accordingly. *See Hester*, 139 S. Ct. at 511. This Court's precedent now makes clear that criminal restitution is a penalty, and, even if considered a civil remedy, the Seventh Amendment applies because a mandatory criminal restitution order does not comply with traditional equitable restitution. Particularly given these additional considerations as clarified by post-*Hester* precedent, this Court should now grant review.

C. The time is right for review, and this case is an excellent vehicle

"Restitution plays an increasing role in federal criminal sentencing today. . . . [F]rom 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution. . . . The effects of restitution orders, too, can be profound." *Hester*, 139 S. Ct. at 510. The issue raised in this petition is clearly "important[,]" *id.*, and it is well preserved in this case and now ripe for review.

After *Hester*, the invalidity of the view of the lower federal courts has become more clear based on *Liu* and *Haymond*, but they refuse to budge. *See*

Wells, 55 F.4th at 800 n.4. Below, petitioner argued the points made by Justice Gorsuch in *Hester*, and they did not even generate a mention in the Ninth Circuit's published opinion, *id.*, and even though the Ninth Circuit's prior precedent "itself has conceded that allowing judges, rather than juries, to decide the facts necessary to support restitution orders isn't 'well-harmonized' with this Court's Sixth Amendment decisions." *Hester*, 139 S. Ct. at 510 (quoting cited, *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013)).

Absent intervention by this Court, the lower federal courts are content to leave things as is, despite the views of some dissenting judges, *see, e.g.*, *Leahy*, 438 F.3d at 339-48 (McKee, J., concurring in part and dissenting in part, with four other judges joining); *United States v. Carruth*, 418 F.3d 900, 905-06 (8th Cir. 2005) (Bye, J., dissenting), and scholars who continue to criticize the prevailing rule. *See* 6 LaFave, Israel, King & Kerr, *Criminal Procedure* § 26.6(c) (4th ed. 2019); Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93 (2014). A frustrating feature of this state of affairs is that the lower federal courts have ignored differences between criminal and equitable restitution and have often developed their view based on the most cursory analysis. *See, e.g.*, *Leahy*, 438 F.3d at 345 (McKee, J., concurring in part and dissenting in part) ("the cases . . . from other circuit courts are not very helpful"). For example, Ninth Circuit precedent was originally created by a three-word declaration that the restitution

statutes are "unaffected by *Blakely*" with a supporting citation to a pre-*Apprendi* case stating that restitution is different from the Sentencing Guidelines. *See United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004) (citing *United States v. Baker*, 25 F.3d 1452, 1456 (9th Cir. 1994)). Other Ninth Circuit cases simply piggy-backed on *DeGeorge*, despite its perplexing and unsatisfying explanation. *See Green*, 722 F.3d at 1149 (citing the *DeGeorge* followers).

In *Hester*, 139 S. Ct. at 509, Justice Alito concurred in the denial of the writ, expressing his continued belief that the *Apprendi* line of cases represents a "questionable interpretation of the original meaning of the Sixth Amendment" and therefore "counsels against further extension of these suspect precedents." As mentioned, the *Apprendi* line of precedent was reaffirmed yet again after *Hester* in *Haymond*. Moreover, it is actually the current federal restitution statutes and the order in this case that represent an "extension" of the original meaning of "restitution."

In sum, this case presents the right posture, and it presents the right timing. The post-*Hester* opinions in *Haymond* and *Liu* have enhanced the merits of petitioner's claim. As Judge O'Scannlain explained in an opinion eventually adopted by this Court, the form of "restitution" ordered here is a penalty and different from "traditional forms of equitable restitution." *Federal Trade Commission v. AMG Capital Management, LLC*, 910 F.3d 417, 433-35 (9th Cir.

2018) (O'Scannlain, J., specially concurring), *rev'd*, 141 S. Ct. 1341 (2021). Criminal restitution should have at least the same if not greater restrictions as civil restitution or disgorgement, and this Court should grant review, as it has recently done in civil cases implicating similar issues.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

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Respectfully submitted,

BENJAMIN L. COLEMAN
Benjamin L. Coleman Law PC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 865-5106
blc@blcolemanlaw.com

Counsel for Petitioner