No. ____

In the Supreme Court of the United States

DAVID KATZ,
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

Daniel N. Marx*
FICK & MARX LLP
24 Federal Street, 4th Floor
Boston, MA 02110
(857) 321-8360
dmarx@fickmarx.com

**Counsel of Record for Petitioner*

QUESTION PRESENTED

After a six-day trial, a jury found Petitioner guilty of conspiracy to defraud the Internal Revenue Service ("IRS"), in violation of 18 U.S.C. 371. The jury's general verdict did not include factual findings relating to the tax loss (if any) that resulted from Petitioner's offense. The district court ordered Petitioner to pay $44.87 million in restitution to the IRS pursuant to the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. 3663A. The restitution amount was based on multiple disputed judicial findings of fact. Over Petitioner's Sixth Amendment objections, the district court made those factual findings at Petitioner's sentencing hearing on a preponderance standard. The Ninth Circuit affirmed, relying entirely on a prior circuit decision that the Sixth Amendment's jury trial right does not apply to criminal restitution, precedent that one member of Petitioner's appellate panel called "mistaken."

The question presented is:

Whether, in light of this Court's holding in *Ellingburg v. United States* that "MVRA restitution is criminal punishment," the Sixth Amendment requires a jury to find the disputed facts necessary to support the sentencing court's restitution order.

PARTIES TO THE PROCEEDING

Petitioner is David Katz, appellant below.

Respondent is the United States of America, appellee below.

There are no corporate parties to this proceeding or any related proceeding.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- United States v. David Katz, No. 3:21-cr-00455 (D. Or.) (judgment entered Feb. 3, 2025).
- United States v. David Katz, No. 25-981 (9th Cir.) (judgment entered July 1, 2026; rehearing en banc denied Aug. 10, 2026).

There are no other proceedings in state or federal court, or this Court, that are related within the meaning of Supreme Court Rule 14.1(b)(iii).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Katz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's final judgment, including the restitution order, is unreported and is reproduced in the Appendix to the Petition (Pet. App.) at 10a-13a.

The Ninth Circuit's unpublished decision below is available at 2026 WL 1952743 and reproduced at Pet. App. 1a-9a.

The Ninth Circuit's order denying rehearing en banc is reproduced at Pet. App. 18a.

JURISDICTION

The court of appeals entered judgment on July 1, 2026. Pet. App. 1a. Petitioner timely filed a petition for rehearing en banc on July 15, 2026. The Ninth Circuit denied the rehearing petition on August 10, 2026. Pet. App. 18a; see Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * ." U.S. Const., Am. VI.

The MVRA provides, in relevant part: "[W]hen sentencing a defendant convicted of an offense [against property], the court shall order * * * that the defendant make restitution to the victim of the offense * * * . The order of restitution shall require that [the] defendant[,] in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense[,] pay an amount equal to * * * the value of the property on the date of the damage, loss, or destruction * * * ." 18 U.S.C. 3663A(a)(1), (b)(1)(B); Pet. App. 21a, 22a-23a.

The MVRA further provides that "[a]ny dispute as to the proper amount * * * of restitution shall be resolved by the court by the preponderance of the evidence" and that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court * * * ." 18 U.S.C. 3664(e), (f)(1)(A); Pet. App. 27a-28a.

STATEMENT OF THE CASE

Last Term, this Court held that "MVRA restitution is criminal punishment." *Ellingburg* v. *United States*, 607 U.S. 163, 168 (2026). The question that *Ellingburg* leaves unresolved is whether the Sixth Amendment's jury trial right applies to criminal restitution that is pegged to the amount of loss resulting from the offense. That is the question this petition presents.

1. After a six-day trial, a jury found Petitioner guilty of conspiring to defraud the IRS, in violation of 18 U.S.C. 371. The most severe aspect of Petitioner's criminal punishment was the district court's order requiring Petitioner to pay $44.87 million in MVRA restitution to the IRS—a figure predicated on disputed findings of tax loss that the district judge alone made on a preponderance standard, over Petitioner's specific Sixth Amendment objections.[1]

2. Petitioner was the manager of Check Cash Pacific ("CCP"), a check cashing business in Portland, Oregon. See Pet. App. 2a. The government alleged that, from 2014 through 2017, construction companies in the greater-Portland area used CCP to facilitate a tax evasion scheme.

3. According to the government, the tax evasion scheme essentially operated as follows: first, general contractors wrote checks to shell companies masquerading as licensed subcontractors; second, those phony

[1] Petitioner also was convicted of filing false currency transaction reports, in violation of 31 U.S.C. 5324. That offense, however, is not one to which the MVRA applies. The restitution order was based entirely on the 371 conspiracy charge.

subcontractors would then cash the checks at CCP; third, the phony subcontractors would transfer the cash to the general contractors' construction workers; fourth, the general contractors would deduct as business expenses the checks they wrote to the phony subcontractors.

4. The government alleged that, during the four-year conspiracy period, the phony subcontractors cashed at CCP ~$177 million in checks that dozens of general contractors had written to them. Treating all of that cash as untaxed wages paid under the table to workers who should have been classified as W-2 employees, the government calculated that the general contractors and their workers evaded $44.87 million in payroll and income taxes.

5. The government charged Petitioner with conspiring to defraud the IRS, in violation of 18 U.S.C. 371. The government did not accuse Petitioner of failing to pay taxes that he or CCP owed. Instead, its theory was that Petitioner knew that the subcontractors were phony, that the cash the subcontractors received from CCP was being used to pay the general contractors' workers, and that no payroll or income taxes were being paid on those cash wages. The government alleged that Petitioner agreed to permit the phony subcontractors to cash the general contractors' checks at CCP because CCP received a 2% transaction fee on each check. The government argued that CCP's transaction-fee income indirectly benefitted Petitioner because CCP was owned by his parents and he was eligible to receive an annual bonus if the business did well.

6. The government's trial witnesses included two individuals who managed the phony subcontractors, the owners of two general contractors that had written ~$12 million in checks to the phony subcontractors,[2] and an IRS revenue agent who testified that the phony subcontractors essentially had never paid taxes. The government did not, however, introduce:

> (i) any evidence regarding the tax returns or tax payments of the dozens of alleged coconspirator general contractors whose owners *did not* testify;
>
> (ii) any testimony from construction workers who allegedly received their wages in cash; or
>
> (iii) any evidence, such as tax returns or tax deficiency notices, showing that any construction worker actually failed to pay payroll or income taxes he owed.

The IRS revenue agent also admitted on cross-examination that she never looked at any of the general contractors' or construction workers' tax returns and, therefore, had no knowledge about whether they failed to pay taxes they owed. In short, a reasonable jury tasked with making factual findings on tax loss easily could have concluded that the government failed to prove any substantial tax loss.

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[2] Assuming that the entire ~$12 million in cash received from CCP for these checks was used to pay the wages of construction workers who these two general contractors should have classified as W-2 employees, the testimony established at most that these two general contractors failed to withhold ~$2.1 million in payroll taxes.

7. To find Petitioner guilty of conspiracy to defraud the IRS, the jury was not required to find that *any* tax loss resulted from the offense. See, *e.g.*, *United States* v. *Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) ("The government need not suffer pecuniary loss by the fraud."). Instead, it was sufficient for the jury to find that Petitioner agreed with at least one other person to impair, impede, or obstruct the IRS through dishonest or deceitful means. *Id.* Moreover, under established Ninth Circuit precedent, the issue of tax loss bearing on restitution was for the district court—not the jury—to decide. See *United States* v. *Green*, 722 F.3d 1146, 1149 (9th Cir. 2013). The government did not ask for a special verdict addressing the issue of tax loss.

8. The jury found Petitioner guilty. Its general verdict did not include any factual findings—either explicit or implicit—relating to the issue of tax loss. At sentencing, however, the government sought $44.87 million in MVRA restitution, its estimate of the payroll and income taxes the conspiracy evaded. That figure rested on several disputed factual assertions that neither the evidence nor the jury's verdict resolved, including that:

> (i) every dollar of cash the phony subcontractors transferred to the construction workers represented the workers' taxable wages, and none represented a reimbursement of costs and expenses the workers had incurred for supplies and materials;
>
> (ii) the general contractors should have treated all of the construction workers as W-2 employees for tax purposes;

(iii) the general contractors did not pay any payroll taxes on those wages; and

(iv) the construction workers did not pay any payroll or income taxes on those wages.

Petitioner argued that the government had failed to introduce evidence, either at trial or in its sentencing submission, sufficient to find those facts under any standard of proof. To preserve the issue for appeal, Petitioner also specifically argued that the Sixth Amendment requires a jury to find beyond a reasonable doubt the facts supporting an MVRA restitution order, including the amount of tax loss resulting from the conspiracy of which the jury had found Petitioner guilty. See Pet. App. 21a.

9. At the conclusion of Petitioner's sentencing hearing, the district court found that the government had proven the $44.87 million tax loss by a preponderance of the evidence. See Pet. App. 14a-15a. The district court ordered Petitioner to pay that amount in restitution to the IRS, in addition to a 48-month term of imprisonment.[3] See Pet. App. 15a-16a. The district court did not expressly address Petitioner's Sixth Amendment argument.

10. On appeal, Petitioner presented his Sixth Amendment challenge again. Prior to the submission of Petitioner's opening brief, this Court granted certiorari in *Ellingburg*. Petitioner argued in his opening brief that the Ninth Circuit should defer deciding the

[3] Petitioner has completed his term of imprisonment and is now residing in a BOP-affiliated halfway house. The $44.87 million restitution order is therefore the only meaningful component of Petitioner's sentence that remains.

Sixth Amendment issue until this Court issued its decision in *Ellingburg*. In its answering brief, the government argued that the Ninth Circuit's decision in *Green* foreclosed Petitioner's argument and that there was no need to wait for *Ellingburg*. The government did not assert harmless error as an alternative ground for affirmance, thereby forfeiting any harmlessness argument. Shortly after Petitioner filed his reply brief, this Court issued the decision in *Ellingburg*. In a notice of supplemental authority, Petitioner urged the panel to revisit *Green* in light of *Ellingburg*.

11. The panel concluded that *Ellingburg* is not "clearly irreconcilable" with *Green* and, therefore, that the panel remained bound by *Green*. Pet. App. 6a. Judge Christen issued a concurring opinion, writing that *Green* "is mistaken" and contradicts this Court's *Apprendi* precedents. *Id.* at 7a-9a.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment issue this petition presents was the elephant in the room in *Ellingburg*. See Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below at 30-31, Ellingburg v. United States, No. 24-482 (U.S. Aug. 22, 2025) ("And because the MVRA requires judges to find by a preponderance of the evidence facts that increase the maximum amount of restitution, MVRA restitution would violate the Sixth Amendment were it criminal punishment[.]" (internal citation omitted)). Allowing the issue to percolate further in the courts of appeals will not help crystallize it, nor will it assist this Court's resolution of it. This Court is unlikely to have a better vehicle than Petitioner's case to resolve the issue. The Court should grant the petition.

I. *Apprendi* and Its Progeny Dictate That a Defendant Has the Right to a Jury Determination of the Facts Necessary to Support the MVRA Restitution Amount.

This Court's Sixth Amendment precedents establish a straightforward rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The "statutory maximum" for that purpose "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted). The same rule governs facts that increase a mandatory minimum: "[a]ny fact that, by law, increases the

penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013). And the rule is not limited to imprisonment; it "applies to the imposition of criminal fines." *Southern Union Co.* v. *United States*, 567 U.S. 343, 360 (2012).

Applied to MVRA restitution after *Ellingburg*, these principles lead to a single answer: all the facts necessary to support the sentencing court's restitution order, including the restitution amount, must be found by a jury beyond a reasonable doubt or admitted by the defendant.

A. *Ellingburg* Eliminates the Premise That MVRA Restitution Is Not Criminal Punishment.

Apprendi, of course, applies only to criminal punishment. For two decades, the courts of appeals' refusal to apply *Apprendi* to restitution leaned heavily on the premise that restitution is a civil or compensatory remedy rather than criminal punishment. See, *e.g.*, *Green*, 722 F.3d at 1150; *United States* v. *Behrman*, 235 F.3d 1049, 1053-54 (7th Cir. 2000). *Ellingburg* clearly vitiates that premise: "MVRA restitution is criminal punishment." *Ellingburg*, 607 U.S. at 168.

Once restitution is understood as criminal punishment, nothing in the text or history of the Sixth Amendment, or in this Court's cases construing it, supports carving restitution out of the jury trial guarantee. As this Court explained in *Southern Union*, its *Apprendi* precedents have never distinguished one form of criminal punishment from another. 567 U.S. at 350. Indeed, requiring a jury to find the disputed facts necessary to support the sentencing court's

MVRA restitution order aligns with the relevant historical practices.

At common law, a court could order restitution only of stolen goods that were charged in the indictment and found stolen by the jury. See *Hester* v. *United States*, 586 U.S. 1104, 1107-08 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing 1 J. Chitty, Criminal Law 817-820 (2d ed. 1816), and 1 M. Hale, Pleas of the Crown 545 (1736)). Early American practice was the same: courts held that, in prosecutions for larceny, the jury typically had to find the value of the stolen property before restitution to the victim could be ordered. *Id*. at 1108 (citing, *e.g.*, *Schoonover* v. *State*, 17 Ohio St. 294 (1867); *Jones* v. *State*, 13 Ala. 153 (1848); *State* v. *Somerville*, 21 Me. 20 (1842); *Commonwealth* v. *Smith*, 1 Mass. 245 (1804)). As Justice Gorsuch observed after canvassing this history, "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." *Ibid*.

B. For *Apprendi* Purposes, the Loss Resulting From the Offense Is the MVRA's Mandatory Minimum and Statutory Maximum.

After *Ellingburg*'s resolution of the criminal punishment question, the sole remaining premise for the courts of appeals' refusal to apply *Apprendi* to MVRA restitution is that the MVRA lacks any "statutory maximum." See, *e.g.*, *Green*, 722 F.3d at 1150-51; see also *Dohrmann* v. *United States*, 442 F.3d 1279, 1281 (11th Cir. 2006); *United States* v. *Leahy*, 438 F.3d 328, 337-38 (3d Cir. 2006) (en banc); *United States* v.

Carruth, 418 F.3d 900, 904 (8th Cir. 2005). Courts of appeals continue to cling to this premise even in the face of this Court's decision in *Southern Union*. See *United States* v. *Vega-Martinez*, 949 F.3d 43, 55 (1st Cir. 2020); *United States* v. *Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016); *United States* v. *Burns*, 800 F.3d 1258, 1261–62 (10th Cir. 2015); *United States* v. *Bengis*, 783 F.3d 407, 413 (2d Cir. 2015); *United States* v. *Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012).

The "no statutory maximum" premise cannot survive a close reading of the MVRA, nor can it be reconciled with this Court's *Apprendi* precedents. The MVRA does not give sentencing courts a range of discretion within which to select a restitution amount. It fixes the amount by reference to a single fact: the amount of the victim's loss. The court "shall order" restitution, 18 U.S.C. 3663A(a)(1), and in a property-loss case the order "shall require" the defendant to "pay an amount equal to" the value of the property lost, 18 U.S.C. 3663A(b)(1)(B). The court likewise "shall order restitution to each victim in the full amount of each victim's losses as determined by the court." 18 U.S.C. 3664(f)(1)(A). The loss amount therefore operates as both a statutory floor and statutory ceiling. Because the court must award the "full amount" of the victim's loss, the loss amount is a mandatory minimum: the court may not order less. Under *Alleyne*, a fact that increases a mandatory minimum must be found by a jury beyond a reasonable doubt. 570 U.S. at 103. And because the order must be in "an amount equal to" the loss, the loss amount is also the ceiling: the court may not order more. Under *Blakely*, the relevant maximum is the punishment the court

could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303.

Here, the jury's general verdict reflected no finding of any tax loss. See p. 5, *supra*. On the verdict alone, then, the maximum restitution the district court could have ordered was zero. Every dollar of the $44.87 million order rested on facts the district judge found by a preponderance of the evidence, as 18 U.S.C. 3664(e) directs. That is exactly what *Apprendi*, *Blakely*, and *Alleyne* forbid. See *Hester*, 586 U.S. at 1106-07 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

C. The Courts of Appeals Already Apply *Apprendi* to Loss-Based Criminal Fines Under 18 U.S.C. 3571(d).

The anomaly of the current regime is clearest when MVRA restitution is compared to the alternative fine provision of 18 U.S.C. 3571(d). That provision authorizes a fine of up to twice the gross gain or gross loss resulting from the offense. The courts of appeals have recognized that, because the gain or loss amount raises the maximum fine authorized, it is a fact that must be found by a jury beyond a reasonable doubt (or admitted by the defendant) before a court may impose a fine above the otherwise applicable maximum. See, *e.g.*, *United States* v. *Pfaff*, 619 F.3d 172, 175-76 (2d Cir. 2010); *United States* v. *LaGrou Dist. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006); *United States* v. *Bane*, 720 F.3d 818, 830-31 (11th Cir. 2013). Ironically, the Fourth Circuit in *Day* reached that conclusion while holding in the very next breath that *Apprendi* is inapplicable to MVRA restitution because

the MVRA has no statutory maximum. See 700 F.3d at 731 ("[F]or Day's $3 million fine to be consistent with *Apprendi*, either the jury's verdict or Day's own admissions must establish that Day enjoyed a gross gain of $1.5 million through his wire fraud scheme (or that his victims suffered a loss of the same amount)."); *id.* at 732 ("[*T*]*here is no prescribed statutory maximum* in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense. As a consequence, the rule of *Apprendi* is simply not implicated to begin with by a trial court's entry of restitution." (italics in original; internal citation omitted)).

There is no principled basis for treating MVRA restitution differently than a fine under section 3571(d)'s "twice the gross gain or loss" provision. A section 3571(d) fine and MVRA restitution are both criminal punishments, and both are pegged to the same fact: the loss resulting from the offense. If anything, the MVRA is the stronger case for jury factfinding. Under section 3571(d), the loss amount sets only a ceiling, below which the judge retains discretion. Under the MVRA, the loss amount fixes the punishment itself, operating as both floor and ceiling. It makes no sense that a defendant whose loss-based fine exceeds the default maximum is entitled to a jury finding on loss, yet a defendant whose restitution order is set entirely by loss currently receives none.

II. There Is No Benefit to Further Percolation of the Issue in the Courts of Appeals.

Other than the D.C. Circuit, every circuit that could address this Sixth Amendment issue has done

so. They have held uniformly—and wrongly—that *Apprendi* does not apply to MVRA restitution.[4] Although many of those decisions adopted the "not criminal punishment" premise that *Ellingburg* vitiates, nearly all of them also rested on the alternative "no statutory maximum" premise that *Ellingburg* does not address. Accordingly, regardless of how mistaken they are, those precedents remain binding within their circuits even after *Ellingburg*. Petitioner's case illustrates the problem: because *Ellingburg* is not "clearly irreconcilable" with every ground on which *Green* decided the Sixth Amendment issue, the panel considered itself bound by *Green*. Pet. App. 6a ("[W]e cannot disturb the district court's restitution order.").

The Court should not avoid this Sixth Amendment issue any longer. Because *Ellingburg* does not speak to the "no statutory maximum" premise that the circuits have incorrectly embraced, *Ellingburg* is unlikely to cause the lower courts to address the issue anew. Petitioner's case is a perfect example of this: the panel disposed of the Sixth Amendment issue not by analyzing its merits, but by pointing to the pre-*Ellingburg* circuit precedent by which the panel deemed itself bound. Deferring Supreme Court review of the issue will not result in the lower courts "consider[ing] carefully the Sixth Amendment's application to criminal restitution." *Rimlawi* v. *United States*, 604 U.S. 1150, 1151 (2024) (Gorsuch, J., dissenting from denial

[4] The D.C. Circuit has recognized the issue, see *United States* v. *Pole*, 741 F.3d 120, 130-31 (D.C. Cir. 2013), but has not had occasion to decide it.

of certiorari). Instead, the lower courts will take this Court's silence to constitute endorsement.

Waiting for a potential circuit split would almost certainly mean waiting for an en banc rehearing that may never come. There is no value to this. The Sixth Amendment question is purely legal, the relevant arguments are fully developed, and the issue was expressly flagged by the Court-appointed amicus during oral argument in *Ellingburg* itself. See Oral Arg. Tr. at 62, Ellingburg v. United States, No. 24-482 (U.S. Oct. 14, 2025) ("[A district court] has to find by a preponderance of the evidence that particular items of loss have been proved. Clearly, that's fact finding. * * * [F]or any non-zero amount of restitution, the *Apprendi* rule obviously would require a jury trial.").

Until this Court intervenes, federal district courts across the country will continue to enter restitution orders—often far exceeding any term of imprisonment or fine in their practical consequences—that are supported only by judge-found facts proven by a preponderance of the evidence, including in cases (like Petitioner's) where the defendant exercised his right to a jury trial. The Court should not tolerate that systemic violation of such an important constitutional right.

III. Petitioner's Case Presents a Clean and Ideal Vehicle for Resolving the Issue.

This case is an ideal vehicle for resolving the Sixth Amendment issue.

First, unlike several prior petitions presenting this issue, there is no question that Petitioner squarely preserved his Sixth Amendment challenge at every stage: Petitioner argued in his sentencing

memorandum in the district court that the Sixth Amendment requires a jury to find beyond a reasonable doubt the facts supporting an MVRA restitution order, including the amount of the victim's loss. And he pressed the issue on appeal and in his petition for rehearing en banc. Pet. App. 6a, 17a, 19a-20a.

Second, the issue was squarely decided: the panel resolved it on the merits based on prior circuit precedent, and Judge Christen wrote separately to explain why that precedent "is mistaken." Pet. App. 6a, 7a-9a.

Third, the question is outcome-determinative. The jury's general verdict contained no finding of any tax loss, so the entire $44.87 million restitution order depends on judicial factfinding. And the government did not argue harmless error below, so no alternative ground stands in the way of relief.

Fourth, the error mattered. Under the government's theory, the actual tax evaders were the general contractors and their construction workers. The jury received no evidence regarding the tax filings of any of the construction workers. And the jury heard testimony from the owners of only two of the general contractors involved in the scheme—testimony that *at most* supported ~5% of the $44.87 million restitution obligation that the district court imposed. See n.1, *supra*. The government offered no evidence about the tax returns or payments of the dozens of general contractors whose owners did not testify, no testimony from the construction workers, and no evidence that those workers failed to pay taxes they owed. A properly instructed jury applying the reasonable-doubt standard could readily have found little or no tax loss.

Fifth, the stakes are substantial: the $44.87 million restitution order was the most severe aspect of Petitioner's punishment. See p. 3, *supra*. If the restitution order is allowed to stand, the government will be statutorily entitled to seize essentially all of Petitioner's current assets (including his retirement accounts) and garnish his future income until the entire restitution obligation is satisfied. See 18 U.S.C. 3613.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel N. Marx
FICK & MARX LLP
24 Federal Street, 4th Floor
Boston, MA 02110
(857) 321-8360
dmarx@fickmarx.com

November 9, 2026

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED JUL 1 2026
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	No. 25-981
Plaintiff-Appellee,	D.C. No. 3:21-cr-00455-IM-1
v.	MEMORANDUM*
DAVID A. KATZ,	
Defendant-Appellant.	

Appeal from the United States District Court
for the District of Oregon
Karin J. Immergut, District Judge, Presiding

Argued and Submitted June 10, 2026
Portland, Oregon

Before: CHRISTEN, HURWITZ, and BADE, Circuit Judges;

Concurrence by Judge Christen.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

David A. Katz appeals his convictions and sentence for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and for knowingly filing false Currency Transaction Reports (CTRs), in violation of 31 U.S.C. § 5324(a)(2), (d)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Sufficient evidence supports Katz's conspiracy conviction. *See United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1229 (9th Cir. 2017) ("Claims of insufficient evidence to support a jury verdict are reviewed de novo."). The evidence at trial established that Katz knew that his co-conspirator was using a fake driver's license and fake Social Security numbers. The evidence also established that between 2014 and 2017, Check Cash Pacific, a firm for which Katz served as a manager and compliance officer, filed hundreds of CTRs, reporting millions of dollars of payroll checks cashed by Katz's co-conspirator, all of which contained the co-conspirator's fake name and fake Social Security numbers. A rational juror could therefore conclude that Katz agreed to defraud the United States by obstructing the lawful functions of the Internal Revenue Service (IRS) by deceitful or dishonest means.[1] *See id.* ("Evidence supporting a conviction is sufficient if, 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of

[1] Contrary to Katz's contention, the buyer-seller defense does not apply to his conspiracy conviction. *See United States v. Lennick*, 18 F.3d 814, 819–20 (9th Cir. 1994); *United States v. Rodman*, 776 F.3d 638, 644 (9th Cir. 2015).

the crime beyond a reasonable doubt.'" (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

2. The district court did not abuse its discretion by giving deliberate ignorance instructions on the charges of conspiracy and filing false CTRs. *See United States v. Yi*, 704 F.3d 800, 804 (9th Cir. 2013) ("A district court's decision to give a particular jury instruction is reviewed for abuse of discretion."). "[A] party is entitled to an instruction to help it prove its theory of the case, if the instruction is 'supported by law and has foundation in the evidence.'" *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc) (quoting *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002)). "When a party requests instructions on alternative theories, the district judge must consider the instructions separately and determine if the evidence could support a verdict on either ground." *Id.*; *see Griffin v. United States*, 502 U.S. 46, 59 (1991).

At trial, the evidence established that Katz cashed millions of dollars in checks for the scheme from approximately 2007 to 2017. Katz also set a special rate for the scheme and regularly communicated with his co-conspirator, including instructing him to go to a different store location "[i]f the check was over $5,000." The evidence also established that Katz gave his co-conspirator advance notice that the IRS was investigating the scheme and asked his co-conspirator to provide a recorded statement to protect him from the investigation. And Katz did not question his co-conspirator when he filled out a new customer profile card in 2015 using a different Social Security number than the one he had been using for the prior eight years. It was therefore reasonable for the district

court to determine that "the jury could rationally find willful blindness." *See Heredia*, 483 F.3d at 922.

3. The district court did not abuse its discretion in excluding evidence relating to the Woodburn fraudulent document operation under Federal Rule of Evidence 403. *See United States v. Espinoza*, 880 F.3d 506, 511 (9th Cir. 2018) ("We review the district court's exclusion of evidence for abuse of discretion."). The evidence Katz sought to introduce relating to the Woodburn operation was "at most marginally probative." *See United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). Indeed, there was no evidence that the fake license at issue was purchased from the Woodburn operation or that it was a high-quality fake license. There was also no evidence that the Woodburn operation only produced high-quality fake licenses. Because "we are left with only speculation, not proof," and the "evidence, if admitted, would have created a substantial risk of confusion," the district court did not abuse its discretion in excluding it under Rule 403. *United States v. Espinoza-Baza*, 647 F.3d 1182, 1190 (9th Cir. 2011); *see id.* ("Under our precedent, even 'a small risk of misleading the jury' substantially outweighs the probative value of minimally probative evidence." (quoting *Hitt*, 981 F.2d at 424)); *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004) ("We may affirm an evidentiary ruling on any ground supported by the record, regardless of whether the district court relied on the same grounds or reasoning we adopt.").

4. The district court also did not abuse its discretion in refusing to provide a spoliation instruction based on the destruction of documents from the investigation of the Woodburn operation. *See*

United States v. Sivilla, 714 F.3d 1168, 1172 (9th Cir. 2013) ("We review a district court's refusal to give an adverse inference instruction, when properly raised by the appellant, for abuse of discretion."). Katz does not argue that the government knew that the evidence from the Woodburn operation was relevant to this case before it was destroyed. The government also established Katz's knowledge through other evidence at trial, including his co-conspirator's use of different Social Security numbers, and Katz had other ways to challenge his co-conspirator's credibility. Because "the balance between 'the quality of the Government's conduct and the degree of prejudice to the accused'" does not "weigh[] in favor of the defendant," a spoliation instruction was not warranted. *See United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (quoting *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc)).

5. Because Katz has failed to demonstrate that the district court erred, there was no cumulative error. *See United States v. Gutierrez*, 995 F.2d 169, 173 (9th Cir. 1993); *United States v. Berry*, 627 F.2d 193, 201 (9th Cir. 1980).

6. Katz's argument that restitution ordered under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, is criminal punishment and therefore subject to the *Apprendi* rule is foreclosed by our precedent. *See United States v. Green*, 722 F.3d 1146, 1149 (9th Cir. 2013) ("Our own court . . . has categorically held that *Apprendi* and its progeny—*Blakely* [*v. Washington*, 542 U.S. 296 (2004)] and *United States v.*

Booker, 543 U.S. 220 (2005)—don't apply to restitution."). Because the Supreme Court's decision in *Ellingburg v. United States*, 607 U.S. 163 (2026), is not clearly irreconcilable with our decision in *Green*, we cannot disturb the district court's restitution order. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

AFFIRMED.

FILED JUL 1 2026
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Katz, No. 25-981

CHRISTEN, Circuit Judge, concurring:

I concur fully in the panel's memorandum disposition, but I write separately to argue that restitution issued pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, violates the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Our caselaw holds otherwise, *United States v. Green*, 722 F.3d 1146, 1148-51 (9th Cir. 2013), and the memorandum disposition correctly follows that binding precedent, *see Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). But in my view, that precedent is mistaken.

In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. For *Apprendi* purposes, the term "statutory maximum" means "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Put another way, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04. The principles of *Apprendi* "ensur[e] that the judge's authority to sentence

derives wholly from the jury's verdict." *Id.* at 306; *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002).

When a judge orders restitution pursuant to the MVRA, the jury's verdict alone does not permit the judge to impose that restitution "*without* any additional findings." *Blakely*, 542 U.S. at 304. Fixing a restitution amount requires fact-gathering, 18 U.S.C. § 3664(a), and fact-finding, *id.* § 3664(e), with disputes "as to the proper amount or type of restitution" to be "resolved by the court by the preponderance of the evidence," *id.* The court ultimately orders restitution "in the full amount of each victim's losses as determined by the court." *Id.* § 3664(f)(1)(A). In the absence of this judicial fact-finding, the maximum amount of restitution that can be imposed—"solely on the basis of facts reflected in the jury verdict," *Blakely*, 542 U.S. at 303 (emphasis omitted)—is typically zero dollars. Any increase in that amount requires finding additional facts. Because those facts increase the penalty for a crime, *Apprendi* demands that they be found by a jury. *See* 530 U.S. at 490.[1]

I am not alone in expressing this view—several dissents have made the same argument in greater detail. *Hester v. United States*, 586 U.S. 1104, 1105-07 (2019) (Gorsuch, J., dissenting from the denial of certiorari); *United States v. Leahy*, 438 F.3d 328, 339-48 (3d Cir. 2006) (en banc) (McKee, J., concurring in part and dissenting in part); *United States v. Carruth*, 418 F.3d 900, 904-06 (8th Cir. 2005) (Bye, J., dissenting). But I am outnumbered—indeed, the

[1] The Supreme Court has held that "the MVRA makes abundantly clear that restitution is criminal punishment." *Ellingburg v. United States*, 607 U.S. 163, 167 (2026).

circuits appear to be unanimous in concluding that *Apprendi* does not apply to restitution.[2] I think that conclusion is wrong, and therefore urge the court to reconsider its precedent in an appropriate case.

[2] *United States v. Milkiewicz*, 470 F.3d 390, 403-04 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 118-20 (2d Cir. 2006); *Leahy*, 438 F.3d at 337-38; *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam); *United States v. Sosebee*, 419 F.3d 451, 460-62 (6th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *Carruth*, 418 F.3d at 903-04; *Green*, 722 F.3d at 1148-51; *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005); *United States v. Williams*, 445 F.3d 1302, 1310-11 (11th Cir. 2006).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA Plaintiff, v. DAVID A. KATZ Defendant.	JUDGMENT IN A CRIMINAL CASE Case No.: 3:21-CR-00455-IM-1 USM Number: 78855-509 Aaron Katz, Defendant's Attorney Andrew T. Ho, Assistant U.S. Attorney

THE DEFENDANT:
☒ was found guilty on count(s) 1, 2, 3, 4, and 5 of the Superseding Indictment after a plea of not guilty.
The defendant is adjudicated guilty of the following offense(s):

Title, Section & Nature of Offense	**Date Offense Concluded**	**Count Number**
18:371 Conspiracy to Defraud the United States	Beginning on or about 1/1/2014 and continuing until 12/29/2017	1s
31:5324(a)(2) and 31:5324(d)(2) Filing False Currency Transaction Reports	1/3/2017	2s-5s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) and is discharged as to such count(s).

☒ Underlying Indictment is dismissed on the motion of the United States.

☒ The defendant shall pay a special assessment in the amount of $100.00 for each of Count(s) 1, 2, 3, 4, and 5 for a total of $500.00 payable to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

February 03, 2025
Date of Imposition of Sentence

s/ Karin J. Immergut
Signature of Judicial Officer

Karin J. Immergut, U.S. District Judge
Name and Title of Judicial Officer

February 03, 2025
Date

* * *

DEFENDANT: DAVID A. KATZ
CASE NUMBER: 3:21-CR-00455-IM-1

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

	TOTALS
Assessment (as noted on Sheet 1)	$500.00
Restitution	$44,877,254.21
Fine	
AVAA Assessment[1]	
JVTA Assessment[2]	
TOTAL	$44,877,754.21

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☒ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

---

[1] Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

[2] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

Name of Payee	**Amount of Restitution Ordered**
IRS – RACS Attn: Mail Stop 6261, Restitution 333 W. Pershing Avenue Kansas City, MO 64108	$44,877,254.21
TOTALS	$44,877,254.21

☐ If applicable, restitution amount ordered pursuant to plea agreement: $_____.

☐ The defendant must pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that

☐ The interest is waived for the ☐ fine and/or ☐ restitution.

☐ The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

Any payment shall be divided proportionately among the payees named unless otherwise specified.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAVID A. KATZ, Defendant.	Case No. 3:21-cr-00455-IM February 3, 2025 Portland, Oregon

SENTENCING
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KARIN J. IMMERGUT
UNITED STATES DISTRICT COURT JUDGE

* * *

[47]

THE COURT: I think everybody has argued what they need to argue on that. So let me go through. I do think that there was sufficient evidence that was presented at trial on the tax loss amount and that it is a conservative estimate that the three main sham companies cashed around

25 $177 million, and the -- I did find persuasive the agent's

[48]

1 testimony concerning how they calculated the tax loss, and I
2 think -- and then, obviously, there were some
3 representatives or witnesses who gave an indication about
4 the purpose for constructing the scheme the way it was
5 constructed.
6 So I do find that the tax loss is properly at the 44 --
7 or at least the Government has presented by a preponderance
8 of the evidence that the tax loss amount is properly
9 $44,000,877 -- 877,254.21.

* * *

[86]

14 So I am going to impose a prison sentence of 48 months
15 with the Bureau of Prisons, and I'll follow it with three

years of supervised release.

I'm going to impose -- I'm not going to impose a fine because I am going to impose the restitution amount, which -- I am going to impose the 44,877,254 joint and several with co-defendants because I -- it doesn't seem to me that there is a way, really, to apportion it.

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED AUG 10 2026
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	No. 25-981
Plaintiff-Appellee,	D.C. No. 3:21-cr-00455-IM-1 District of Oregon, Portland
v.	
DAVID A. KATZ,	ORDER
Defendant-Appellant.	

Before: CHRISTEN, HURWITZ, and BADE, Circuit Judges.

Judges Christen and Bade have voted to deny the petition for rehearing en banc, and Judge Hurwitz so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petition for rehearing en banc, Dkt. 51, is DENIED.

APPENDIX E

Wayne Mackeson
714 Main Street, Suite 201
Oregon City, OR 97045
(503) 656-8300
Wayne@WayneMackeson.com

Aaron M. Katz (pro hac vice)
Aaron Katz Law LLC
399 Boylston Street, 6th Floor
Boston, MA 02116
(617) 915-6305
akatz@aaronkatzlaw.com

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES 3:21-cr-00455

v.

DAVID KATZ,
Defendant.

DAVID KATZ'S SENTENCING MEMORANDUM

* * *

[41]

VII. THE RESTITUTION ISSUE

We wish to briefly address the issue of restitution. If the Court believes it needs more detailed briefing on the restitution issue, we are happy to provide it.

First, the points we made above regarding the Guidelines tax loss issue are applicable to the restitution issue as well. The conspiracy that the government proved against David did not involve any tax loss for purposes of 18 U.S.C. § 3663A, because the proven conspiracy did not include the real construction companies and their employees who were the actual tax cheaters.[21] Moreover, because the government failed to introduce at trial any of the tax returns for the real construction companies or their employees—which is the information that would need to be examined to determine, as opposed to speculate, the amount of tax loss suffered by the United States—it has no valid argument that the trial evidence established a $44 million tax loss (or any tax loss) for purposes of David's sentencing. The government has not informed the Court or the defense that it intends to introduce such evidence at David's sentencing hearing. In any event, turning the sentencing proceeding into a trial on tax loss evidence that the government failed to submit at trial would unduly complicate the sentencing process, thus allowing the Court to order that no restitution should be ordered. *See* 18 U.S.C. 3663A(c)(3).

[42]

Second, we wish to preserve for purposes of any appellate review (including a petition for certiorari) the argument that restitution is subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the jury must find the facts necessary to increase

---

[21] As stated earlier in this memorandum, the agreement between the actual tax cheaters and Miguel Lopez and his shell company confederates were separate conspiracies that the government did not prove David joined.

the defendant's punishment). The jury did not specially find any tax loss, and no tax loss is inherent in the jury's verdict.

* * *

APPENDIX F

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(4) Clarification.—In ordering restitution under this section, a court shall order the defendant to make restitution to a person who has assumed the

victim's rights under paragraph (2) to reimburse that person's necessary and reasonable—

(A) lost income, child care, transportation, and other expenses incurred during and directly related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(B) lost income, transportation, and other expenses incurred that are directly related to transporting the victim for necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; and

(C) lost income, transportation, and other expenses incurred that are directly related to transporting the victim to receive necessary physical and occupational therapy and rehabilitation.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;

(iv) an offense described in section 1365 (relating to tampering with consumer products); or

(v) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) or (iii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f) (1) (A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and

without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3) (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g) (1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j) (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide

that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m) (1) (A) (i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.