No. _____

In The
Supreme Court of the United States

LETANTIA BUSSELL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether a conviction for making, or conspiring to make, a false statement violates due process when based on a response that is truthful under a reasonable interpretation of an ambiguous government question.

2. Whether the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, authorizes an order of restitution against a criminal defendant for losses caused by acts of which the defendant has not been convicted, including conduct of which the defendant was acquitted.

3. Whether an increase in a sentence of imprisonment based on consideration of acquitted conduct violates the Fifth and Sixth Amendments.

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PETITION FOR A WRIT OF *CERTIORARI*

Letantia Bussell respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming petitioner's conviction (App., *infra*, 30a-55a) is reported at 414 F.3d 1048. The opinion of that court affirming petitioner's sentence on appeal after remand (*id.* at 1a-29a) is reported at 504 F.3d 956. The relevant district court orders (*id.* at 56a-116a) are not published.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on September 27, 2007. Petitioner's petition for rehearing *en banc* was denied on December 5, 2007. On February 22, 2008, Justice Kennedy granted an extension of time within which to file a petition for a writ of *certiorari* to and including April 3, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the United States Constitution, U.S. Const. amend. V, provides that

"[n]o person shall *** be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution, U.S. Const. amend VI, provides, in pertinent part, that "[i]n 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 *** and to be informed of the nature and cause of the accusation."

The relevant provisions of the Victim and Witness Protection Act (1994)("VWPA") are set forth at App., *infra*, 121a-128a.

INTRODUCTION

The courts of appeals are in conflict regarding the constitutionality of a conviction for making a false statement where the statement responds to an ambiguous government question and is truthful under one reasonable interpretation of the question, but false under another. The circuits are in conflict as well on the use of acquitted conduct to impose restitution under the VWPA. The use of acquitted conduct also has created great confusion with regard to increasing a term of imprisonment. This Court's review is necessary to resolve these conflicts that result in different rules for federal criminal prosecutions in different jurisdictions across the country.

STATEMENT OF THE CASE

A. Factual Background

Petitioner was indicted, along with her husband, on charges related to their alleged concealment of assets and alleged false statements in connection with filing for bankruptcy. App., *infra*, 32a. Petitioner was acquitted of certain charges and convicted of others. *Id.* at 33a. The district court sentenced her to serve 36 months in prison and to pay approximately $2.3 million in restitution. *Id.* at 33a-34a.

1. The allegations against petitioner, a practicing dermatologist, and her husband, formerly a cardiac anesthesiologist, generally derived from financial determinations made a few years before the couple declared bankruptcy. The couple received an IRS deficiency notice in 1991. Pet. C.A. No. 02-50495 Brief, at 6 (Nov. 6, 2003)(hereinafter "Pet. Br."). They received advice from attorneys Jeffrey Sherman and Robert Beaudry, and undertook to reorganize their business affairs according to that advice. Unbeknownst to petitioner and her husband, attorneys Sherman and Beaudry, and Sherman's law and accounting firm, the "Tax Consulting Group" (TCG), routinely advised clients to structure their finances in illegal ways in order to minimize costs and avoid tax liability. *Id.* at 3-4.

Attorneys Sherman and Beaudry recommended a three-tier structure for petitioner's dermatology practice that separated the business aspects of the enterprise from the medical aspects. App., *infra*, at

3a. This structure addressed petitioner's desire that the practice be able to continue uninterrupted in the event of her incapacity from her then recently diagnosed insulin dependent diabetes. Pet. Br. at 6, 8. The lawyers formed two new medical management corporations—BBL Medical Management, Inc. and Beverly Hills Dermatology Medical Corp.—and one medical corporation—L.B. Bussell, Inc. BBL Medical Management was structured to accept the gross receipts, pay the overhead expenses, and retain 80 to 90 percent of the practice's profits. App., *infra*, 3a. Beverly Hills Dermatology received the remainder of the profits and employed petitioner through L.B. Bussell, Inc., a professional corporation with respect to which petitioner was the sole shareholder and officer. *Ibid.* The stock of BBL Medical Management and Beverly Hills Dermatology was held by, or in the name of, other, third-party doctors and medical management professionals; neither petitioner nor her husband was a shareholder or officer of those entities. *Ibid.*

Attorneys Sherman and Beaudry established another corporation that received disability insurance payments for petitioner's husband and that held a security interest in a condominium in Park City, Utah. *Id.* at 3a-4a.

2. On March 7, 1995, petitioner and her husband filed a joint petition for Chapter 7 bankruptcy relief, which their attorney Sherman signed and submitted. *Id.* at 4a. The petition asserted certain asset values and debt totals and included the standard bankruptcy form as an attachment. The

form included a Schedule of Personal Property that asked, in Question 12, for a listing of the debtors' "[s]tocks and interests in incorporated and unincorporated businesses." *Id.* at 133a. It also included a Statement of Financial Affairs that asked, in Question 16, for disclosure of any business in which the debtors served as an "officer, director, partner, or managing executive." *Id.* at 139a. Neither BBL Medical Management nor Beverly Hills Dermatology was listed in response to these questions. *Id.* at 43a.

The petition declared that petitioner and her husband had assets valued at slightly more than $1.78 million and debts of approximately $4.67 million. *Id.* at 4a. The total debt scheduled to be discharged was $3.05 million. *Ibid.* Due to a pending adversary proceeding with respect to one claimed liability, however, the bankruptcy court ultimately discharged $2.29 million of debt. *Ibid.*

B. Procedural History

1. District court proceedings

Petitioner, her husband, and attorney Sherman were subsequently indicted on charges of conspiracy to conceal assets, concealment of assets to avoid paying creditors (including the IRS), and making false statements related to a bankruptcy filing. App., *infra*, 4a. A 17-count superseding indictment was

handed down against the three defendants. *Id.* at 140a-175a.[1] Petitioner was named in 9 of the 17 counts. *Id.* at 4a-5a. Count One charged the three defendants with engaging in a conspiracy, the object of which was to conceal specified property in contemplation of bankruptcy, to make false statements in the bankruptcy filing, and to conceal specified assets. *Id.* at 140a, 148a-149a. Counts Two through Four charged the three defendants with fraudulent concealment from the bankruptcy trustee and creditors of the estate's beneficial ownership interests in BBL Medical Management and Beverly Hills Dermatology, and the estate's equity interest in the Utah condominium, in violation of 18 U.S.C. §§ 152(1), 2. *Id.* at 166a-167a. Counts Five and Six alleged that the three defendants knowingly and fraudulently made false declarations and statements in the bankruptcy filing, in violation of 18 U.S.C. §§ 152(3), 2. *Id.* at 167a-170a. Count Eleven charged petitioner with making a false oath and account by testifying in a civil proceeding that she was not actively involved in any corporation other than L.B. Bussell Inc., in violation of 18 U.S.C. § 152(2). *Id.* at 170a-172a. Counts Twelve and Seventeen alleged that the three defendants attempted, aided, and abetted evasion of taxes by falsely stating in their

[1] Attorney Beaudry pleaded guilty to a separate information alleging tax fraud, and testified as the government's key witness. Pet. Br. at 3, 21. Attorney Sherman entered into a plea agreement following the superseding indictment. App., *infra*, 5a.

returns the taxable income and the amount of tax due, in violation of 26 U.S.C. § 7201. *Id.* at 172a-175a.

Petitioner and her husband moved to dismiss the false-statement counts on the ground that their conviction on those charges would violate due process because the relevant questions on the bankruptcy form were ambiguous. The district court denied the motion. *Id.* at 43a.

Petitioner and her husband were then tried jointly before a jury. They introduced evidence to demonstrate that they had relied upon the advice of their lawyers in structuring their financial affairs and in completing the bankruptcy forms. *Id.* at 33a.

After the jury began its deliberations, petitioner's husband fell to his death from a hotel balcony. *Id.* at 33a. Pursuant to a supplemental instruction from the court stating that the case against petitioner's husband "had been disposed of," *id.* at 34a, the jury continued to deliberate with respect to the charges against petitioner alone.

On February 6, 2002, the jury returned its verdict and found petitioner not guilty of concealing her equity interest in the Utah condominium from the bankruptcy estate (Count Four). The jury also found her not guilty of making a false oath or account when she testified in a civil proceeding that the only corporation with which she was actively involved was L.B. Bussell Inc. (Count Eleven). And the jury found her not guilty of attempted tax evasion for 1996 (Count Seventeen). *Id.* at 5a. The jury convicted

petitioner of conspiracy (Count One), concealment of beneficial ownership interests in BBL Medical Management and Beverly Hills Dermatology (Counts Two and Three), making a false statement in relation to a bankruptcy case (Counts Five and Six), and tax evasion (Count Twelve). *Id.* at 4a-5a. Each of the counts of which petitioner was convicted was based, in whole or in part, on answers to ambiguous bankruptcy form questions.

At sentencing, the district court concluded that, for purposes of then-applicable Sentencing Guideline §2F1.1, the intended loss was the entire amount of debt scheduled to be discharged in the bankruptcies—$3.05 million.[2] *Id.* at 97a, 102a. That total included the equity interest in the Utah condominium, even though petitioner had been acquitted of the alleged concealment of that interest. Petitioner objected to, *inter alia*, the length of her imprisonment being based in part on acquitted conduct. *See id.* at 101a-103a. The court rejected all of petitioner's objections to the loss calculation which, if accepted, would have resulted in a 6-level increase rather than a 13-level increase above the base offense level. *Id.* at 97a. The court sentenced petitioner to 36 months in prison and three years of supervised release. *Id.* at 71a, 58a.

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[2] The courts below applied U.S.S.G. § 2F1.1, as it appeared in the 1994 Sentencing Guidelines manual, to avoid *ex post facto* issues. App., *infra*, 7a.

The court ordered that petitioner make criminal restitution payments in the amount of $2.3 million, which reflected the court's intended loss figure minus a settled debt. *Id.* at 53a, 111a-112a. Petitioner objected to the restitution and asserted that restitution under the VWPA should be limited to actual loss directly related to the conduct of which she had been convicted. *Id.* at 112a.

2. The court of appeals' first opinion

The Ninth Circuit affirmed in part, vacated in part, and remanded. The court rejected petitioner's argument that she could not be convicted for making false statements because of the ambiguity of the questions on the bankruptcy form. App., *infra*, at 42a-47a. The court explained that, although "[t]he answer to a 'fundamentally ambiguous' question 'may not, as a matter of law, form the basis of a prosecution for perjury or false statement'[,]" "we do not invalidate a conviction 'simply because the questioner and respondent might have different interpretations' of the relevant questions." *Id.* at 44a (quoting *United States v. Culliton*, 328 F.3d 1074, 1078-1079 (9th Cir. 2003)). The court determined that the context demonstrated that petitioner had knowingly and intentionally supplied false answers in light of her understanding of the questions. *Id.* at 45a-46a.

The court of appeals deferred consideration of substantive challenges to petitioner's imprisonment

term and remanded the case for the district court to determine whether it would have imposed a materially different sentence had it known that the guidelines were advisory. *Id.* at 53a (citing *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005)(en banc)).

On restitution, the court of appeals noted that, under the VWPA, the amount of restitution is "limited by the victim's *actual* losses." *Id.* at 54a (quoting *United States v. Woodley*, 9 F.3d 774, 780 (9th Cir. 1993))(emphasis in original). The court vacated the restitution order, because it had been erroneously based on intended loss, and remanded the case for the district court "to determine the actual losses caused by [petitioner's] fraudulent conduct—that is, to compare 'what actually happened with what would have happened if [she] had acted lawfully.'" *Id.* at 54a-55a (quoting *United States v. Feldman*, 338 F.3d 212, 220-221 (3d Cir. 2003)).

3. The district court's ruling on remand

The district court declined to reopen the sentencing proceedings or recalculate petitioner's guideline range on remand because the court would not have imposed a materially different sentence under an advisory guideline system. App., *infra*, 86a-88a.

The district court reaffirmed its restitution order (less approximately $9,000 that Sherman had paid). *Id.* at 88a. The court stated that the $2.3 million figure "represents the actual losses defendant

inflicted on victims" "as a result of her conspiracy conviction in Count One." *Id.* at 88a, 89a.

4. The court of appeals' second opinion

The court of appeals affirmed. App., *infra*, 1a-29a. The court upheld the sentence of 36 months in prison, which was based on a loss calculation to which petitioner objected because it included acquitted conduct. *Id.* at 11a-13a; *see also id.* at 101a-102a. The Ninth Circuit cited the Sentencing Guideline on relevant conduct and merely stated that, "[i]n determining relevant conduct for sentencing purposes in a fraud case, a district court may consider fraudulent conduct by the defendant other than that for which evidence was offered at trial." *Id.* at 12a n.8 (quoting *United States v. Munoz*, 233 F.3d 1117, 1126 (9th Cir. 2000)).

The court of appeals rejected petitioner's claim that the restitution order was improper because it included the value of all assets that had been allegedly concealed, even though she had been acquitted of concealing certain of those assets and had not been charged with concealing some of the other assets on which the restitution amount was based. *Id.* at 21a-23a. The court of appeals disagreed with petitioner's reliance on *Hughey v. United States*, 495 U.S. 411 (1990), which had held that restitution may be awarded under the VWPA "only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 21a (quoting *Hughey*, 495

U.S. at 420). The Ninth Circuit concluded that *Hughey* "is of no avail to [petitioner] because Congress amended the VWPA by expanding the definition of 'victim,' in part to overrule that decision." *Ibid.* The court reasoned that, under the amended statute, "when someone is convicted of a crime that includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, the court can order restitution for losses resulting from any conduct that was part of the scheme, conspiracy, or pattern of criminal activity." *Id.* at 22a (quoting *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir.), *cert. denied,* 519 U.S. 882 (1996))(emphasis omitted). Because petitioner was "convicted of a crime that included a conspiracy 'as an element of the offense,'" *ibid.*, the Ninth Circuit concluded that the district court properly considered as part of the restitution order all of the assets allegedly concealed as a result of the conspiracy, even the equity in the Utah condominium, which petitioner was acquitted of concealing, *id.* at 22a-23a.

The court of appeals denied a petition for panel rehearing and rehearing *en banc*. *Id.* at 119a-120a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS REQUIRED TO RESOLVE A CIRCUIT CONFLICT OVER THE CONSTITUTIONALITY OF A CONVICTION FOR MAKING A FALSE STATEMENT, WHERE THE STATEMENT IS NOT FALSE UNDER A REASONABLE INTERPRETATION OF AN AMBIGUOUS GOVERNMENT QUESTION

The courts of appeals generally acknowledge that a defendant may not be convicted for making a false statement in response to a government query if the government's question is impermissibly ambiguous, but they have different views of what level of ambiguity is impermissible. *See United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003), *cert. denied,* 540 U.S. 1111 (2004); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980). The courts of appeals apply different legal standards to evaluate such ambiguity and ultimately come to different conclusions regarding when a false statement conviction based on a response to an unclear question must be vacated. This Court should grant a writ of *certiorari* to address this divergence of opinions, which affects false statement prosecutions under a variety of federal statutes.

A. The Ninth Circuit And Other Circuits Are In Conflict With The Fourth Circuit On The Constitutionality Of False Statement Convictions Where The Statement Is Made In Response To An Ambiguous Government Question

1. The Ninth Circuit upheld petitioner's conviction for false statements in response to questions from the government even though the questions were ambiguous. The court ruled that the evidence sufficiently indicated that petitioner subjectively understood the questions in a manner that rendered her responses false.

The Ninth Circuit requires reversal of a false statement conviction on due process grounds only when the government question is "fundamentally" ambiguous. Under that view, which is shared by several other circuits, a question is "fundamentally" ambiguous only when persons "of ordinary intelligence cannot arrive at a mutual understanding of [the question's] meaning." *United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004)(quoting *Culliton*, 328 F.3d at 1078), *cert. denied,* 546 U.S. 827 (2005); *see also United States v. Damrah*, 412 F.3d 618, 627 (6th Cir. 2005); *United States v. Farmer*, 137 F.3d 1265, 1268-1269 (10th Cir. 1998); *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir.), *cert. denied,* 510 U.S. 948 (1993); *United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991); *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987); *United States v.*

Lighte, 782 F.2d 367, 375 (2d Cir. 1986); *United States v. Martellano*, 675 F.2d 940, 942 (7th Cir. 1982).

A finding of "fundamental" ambiguity is a rare exception under that approach. *See Damrah*, 412 F.3d at 627. Generally, in those courts, the government's question is found merely to contain "some ambiguity," and those courts will not set aside the indictment or conviction as a matter of law. *Camper*, 384 F.3d at 1076; *Ryan*, 828 F.2d at 1015. Rather, they allow such cases to go to a jury, and they require that the jury "decide[ ] which of the plausible interpretations of an ambiguous question the defendant apprehended and responded to." *Camper*, 384 F.3d at 1076; *see also Farmer*, 137 F.3d at 1269. Those courts reject a challenge to a criminal conviction so long as the evidence was sufficient to enable a reasonable jury to conclude that "the response given was false as the defendant understood the question." *Lighte*, 782 F.2d at 375 (quoting *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977)).

2. The Fourth Circuit "takes a very different approach," as the Ninth Circuit previously has recognized. *Camper*, 384 F.3d at 1077.

The Fourth Circuit holds that a prosecution for making a false statement in response to an ambiguous government question cannot be sustained if "the defendant's statement *** accords with a reasonable construction" of the question. *Race*, 632 F.2d at 1120. The Fourth Circuit requires that the defendant's answer be objectively false under all

reasonable interpretations of the question in order to support a conviction for making a false statement. *Ibid.* Due process requires that the government "negative any reasonable interpretation that would make the defendant's statement factually correct." *Ibid.* (quoting *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978)). The Fourth Circuit emphasizes that its approach is required because "one cannot be found guilty of a false statement *** beyond a reasonable doubt when his statement is within a reasonable construction of the [question]." *Ibid.*

The Fourth Circuit does not view the matter to be one for a jury to resolve as a question of proof regarding the defendant's subjective interpretation of the question, as the Ninth Circuit below did. Instead, the Fourth Circuit evaluates falsity of a statement as an objective matter. Only if the statement is objectively false under all reasonable interpretations of the question to which the statement responded, is evidence of the defendant's subjective understanding relevant to determine whether the defendant knew that the statement was false when made. *See ibid.*

The Ninth Circuit reads the Fourth Circuit precedent as a "per se rule against [a] perjury conviction for an ambiguous statement." *Id.* at 1078. But the Ninth Circuit describes its own precedent to hold that, "even when a question has two plausible meanings, where the evidence proves that the defendant understood one such meaning and

answered falsely to it, a jury can convict for false statement." *Ibid.*

B. The Fourth Circuit Is In Accord With This Court's Precedent And Due Process

The Fourth Circuit is correct to hold that a conviction for false statement in response to a government question cannot stand unless the government question is unambiguous or, if ambiguous, the statement is false under all reasonable interpretations of the question. *See United States v. Hairston*, 46 F.3d 361, 375-376 (4th Cir.), *cert. denied,* 516 U.S. 840 (1995).

The Fourth Circuit's approach is required by this Court's precedent. More than 30 years ago, this Court made clear in the context of a perjury prosecution that "the burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Bronston v. United States*, 409 U.S. 352, 360 (1973).

The Fourth Circuit's requirement follows from the well-established due process principles of definiteness and fair notice in a criminal prosecution. The government must provide to "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" before criminal sanctions can be imposed. *United States v. Harriss*, 347 U.S. 612, 617 (1954); *see also Rogers v. Tennessee*, 532 U.S. 451, 457 (2001)("criminal statute must give fair warning of the conduct that it makes a crime" (quoting *Bouie v. City*

of Columbia, 378 U.S. 347, 350 (1964)); *Marks v. United States*, 430 U.S. 188, 191 (1977)("[T]he notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty."). "[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)(*per curiam*)(quoting *Harriss*, 347 U.S. at 617).

The rule of lenity in criminal law is rooted in these principles. For the same reasons that a criminal statute must be strictly construed with any ambiguities resolved in favor of an accused, *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 408 (2003)(quoting *United States v. Enmons*, 410 U.S. 396, 411 (1973)), an ambiguous question posed by the government must be strictly construed in favor of one who is being prosecuted for a false response to that question. Questions asked by the government that establish the boundaries for criminal liability cannot, consistent with due process, invite more than one reasonable construction and then allow prosecution for a false response to whichever construction a particular prosecutor selects. Otherwise, an individual who states the truth in response to one such construction will not have sufficient notice that the government intended the question to mean something else and that the individual will be subject to criminal liability for responding falsely under that other interpretation of the question.

This Court has also made clear that a jury in a perjury prosecution may not speculate whether a defendant's answer "was intended to mislead or divert the examiner," but must acquit so long as the defendant's answer was literally true. *Bronston*, 409 U.S. at 359. Similarly, the Fourth Circuit's approach rightly recognizes that, where the government's own imprecision creates more than one reasonable interpretation of its question, the defendant cannot be convicted for an answer that is truthful under the more beneficial construction. *See Hairston*, 46 F.3d at 375-376 (witness cannot be convicted of perjury even if evasive and misleading so long as answers are literally true).

C. This Conflict Is Longstanding, Affects Several Federal Criminal Statutes, And Can Be Appropriately Resolved In This Case

1. The conflict among the courts of appeals on this due process question has deep roots and is unlikely to be reconciled without intervention by this Court. The reasoning of the Ninth Circuit below, that government questions with "some" ambiguity may support a criminal conviction based on a subjective analysis, had its genesis in 1955. *See United States v. Lattimore*, 127 F. Supp. 405, 409 (D.D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955). The Fourth Circuit's contrary rule has been in place for nearly three decades. *See Race*, 632 F.2d at 1114 (decided in 1980).

2. The circuit conflict affects prosecutions under several federal statutes. The current case involves a conviction for false declarations or statements in relation to a bankruptcy case in violation of 18 U.S.C. § 152(3). Other cases have addressed the issue in the context of 18 U.S.C. § 1001, which proscribes making false statements to the federal government in wide-ranging circumstances. *See, e.g., Race*, 632 F.2d at 1115; *Culliton*, 328 F.3d at 1076; *Camper*, 384 F.3d at 1074. Additional cases have involved 18 U.S.C. § 1014, which make it a crime to make a false statement on certain loan or credit applications submitted to any one of a number of federal entities. *Ryan*, 828 F.2d at 1012. Still other cases have involved 18 U.S.C. §§ 1621 and/or 1623, which impose criminal sanctions for false statements made under penalty of perjury, and for false declarations before a grand jury or court, respectively. *See Hairston*, 46 F.3d at 375 (§ 1623); *United States v. McKenna*, 327 F.3d 830, 834 (9th Cir.)(§ 1621), *cert. denied,* 540 U.S. 941 (2003); *Lighte*, 782 F.2d at 369 (§ 1623); *Farmer*, 137 F.3d at 1266 (§ 1623).

3. This case is an appropriate vehicle to resolve the circuit conflict because the questions on the bankruptcy schedules in this case were ambiguous, and petitioner did not provide false responses under reasonable interpretations of those questions.

Question 12 on Schedule B asks the debtor to list "[s]tock and interests in incorporated and unincorporated businesses." App., *infra*, 133a. That question is ambiguous because the term "interests" is

not defined in the form (nor is there a definition in the Bankruptcy Code, the Bankruptcy Rules, or in relevant case law), and it is susceptible to more than one reasonable interpretation. "Interests" could reasonably be construed to refer only to *legal* interests (*i.e.*, "legal title"). *See* Black's Law Dictionary 829 (8th ed. 2004). "Interests" might also include beneficial interests (*i.e.*, a "right or expectancy [other than] legal title"). *Id.* at 828. Furthermore, although the government forms elsewhere asked broad questions that called for a listing of specified types of interests, *see, e.g.,* App., *infra,* 138a (Statement of Financial Affairs Question 11, requiring listing of accounts either in debtor's name or held for debtor's benefit), it did not provide any such listing in Question 12, *id.* at 133a.

Indeed, the extent of ambiguity in the term "interests" in Question 12 required the government to introduce expert testimony at petitioner's trial to explain the term. And even the government's own expert could not provide a definition of "interests"; he acknowledged that the term does not have a commonly understood meaning. He testified that most individual debtors would seek the advice of counsel to define "interests in incorporated and unincorporated businesses." The government's expert agreed that even bankruptcy lawyers could reach different conclusions about the term's meaning. The indictment in this very case did not utilize only the ambiguous term "interest"; the prosecution inserted the phrase "beneficial ownership" to modify "interest"

in the indictment, likely to avoid ambiguity. *Id.* at 167a.

Petitioner did not respond falsely to Question 12 under a construction of the question that equates "interests" with legal interests. Petitioner responded that she owned "100% of stock in L.B. Bussell Medical Corporation." *Id.* at 133a. She disclosed no "interest" in either BBL Medical Management or Beverly Hills Dermatology, *ibid.*, entities in which she held no stock or other legal title.

The response to Question 12 permeated the indictment. *See, e.g.*, App., *infra*, at 155a, 167a, 168a. The failure to disclose petitioner's "interests" in BBL Medical Management and Beverly Hills Dermatology is alleged in, or incorporated into, every count of which petitioner was convicted and served as the centerpiece of the prosecution's case. Accordingly, because the term "interests" was impermissibly ambiguous, petitioner is entitled to vacatur of her conviction on every count.

Question 16(a) on the Statement of Financial Affairs suffers from similar infirmity; it asks the debtor to list all businesses in which he or she was an "officer, director, partner, or managing executive." *Id.* at 139a. Petitioner was not an officer, director, or partner of BBL Medical Management or Beverly Hills Dermatology. Nevertheless, petitioner was charged with failing to disclose that she was a "managing executive" of those businesses. The term "managing executive" is susceptible to various reasonable

interpretations and is not defined in the bankruptcy petition, nor in any statute, rule, or case law. The plain meaning of the term "executive" is "[a] corporate officer at the upper levels of management." Black's Law Dictionary, *supra*, 610. Thus, "managing executive" could reasonably be construed to pertain only to a corporation's executive officers and other similarly situated corporate personnel. Petitioner's response, therefore, was truthful under a reasonable construction of "managing executive." Indeed, the jury acquitted petitioner on Count 11, which charged her with testifying falsely that the only corporation with which she was actively involved was L.B. Bussell, Inc.

Despite the ambiguities of these government questions, the Ninth Circuit refused to set aside petitioner's convictions for false statements because the court concluded that the terms "interests" and "managing executive" were not "fundamentally" ambiguous. The court declared that, given "the context of the question and answers, as well as other extrinsic evidence," petitioner answered falsely as she understood the terms. App., *infra*, 44a-46a.[3]

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[3] The government presented no evidence at trial regarding petitioner's actual understanding of the terms. The Ninth Circuit purported to determine petitioner's "understanding" primarily from the context of the questions, concluding that petitioner understood "interests" as the prosecution charged because petitioner answered other questions correctly that contained the same word. App., *infra*, 45a. But petitioner's answers to those other questions, like her answer to Question 12, were consistent with an interpretation of "interests" to mean

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By contrast, if petitioner had been prosecuted in the Fourth Circuit, her conviction would have been reversed as a violation of due process because petitioner did not answer falsely under a reasonable construction of the government's questions. *See Race*, 632 F.2d at 1120 ("[O]ne cannot be found guilty of a false statement *** when his statement is within a reasonable construction of the [question].").

II. THE NINTH CIRCUIT'S AFFIRMANCE OF RESTITUTION BASED ON ACQUITTED CONDUCT MERITS REVIEW BECAUSE IT CONFLICTS WITH OTHER CIRCUITS AND IS CONTRARY TO THE PLAIN MEANING OF A FEDERAL STATUTE

This Court has read "the language and structure" of the VWPA, to "make plain Congress' intent to authorize an award of restitution only for the loss caused by *the specific conduct that is the basis of the*

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legal interests. Moreover, the Ninth Circuit mistakenly opined that if petitioner thought "interests" referred only to legal interests, she should have listed beneficial interests in Question 33, *ibid.*, which asked for "[o]ther personal property of any kind not already listed," *id.* at 136a. The first 32 questions on Schedule B, however, enumerated myriad types of personal property, such as interests in pension plans, interests in businesses, intellectual property, and even boats and aircraft. *Id.* at 133a-135a. Question 33 was a catchall question, asking for any other *property*, not any other *interests*; importantly, petitioner was not charged with making a false response to Question 33.

offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990)(interpreting 18 U.S.C. §§ 3579, 3580(a)(1982))(emphasis added).

The Seventh Circuit and some other circuits adhere to *Hughey* and hold that a district court lacks authority to order restitution for conduct of which a defendant has been acquitted. *See United States v. Kane*, 944 F.2d 1406, 1415 (7th Cir. 1991). But the Ninth Circuit applies a different rule, relying on a statutory amendment that it reads to overrule *Hughey* in cases involving conduct related to a conspiracy or scheme. That interpretation cannot be reconciled with the statutory text.

A. The Circuits Disagree On Whether Restitution May Be Imposed For Acquitted Conduct Under The VWPA

1. The VWPA provides that a district court may order restitution by "a defendant *convicted of an offense*" under the federal criminal code to "any victim *of such offense.*" App., *infra*, 121a (18 U.S.C. § 3663(a)(1)(1994)(emphasis added)).[4] In *Hughey v.*

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[4] The VWPA (Pub. L. No. 97-291, 96 Stat. 1248 (1982)) was first codified at 18 U.S.C. §§ 3579 and 3580, and recodified at 18 U.S.C. §§ 3663, 3664, effective November 1987. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. In 1996, Congress enacted the Mandatory Victims Restitution Act ("MVRA"), which was codified at 18 U.S.C. § 3663A. At present, 18 U.S.C. § 3663(a)(1)-(3) contains the re-codified VWPA and addresses *discretionary* restitution, while the MVRA's

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United States, this Court read that plain language to mean that restitution must "be tied to the loss caused by the offense of conviction." 495 U.S. at 418. There the indictment had charged the defendant with using 21 stolen credit cards, thereby causing more than $90,000 in losses, but the defendant pleaded guilty to the use of only *one* card that resulted in a $10,000 loss. *Id.* at 414. The *Hughey* Court ruled that restitution was limited to that lesser amount and that the district court had erred when it imposed a restitution order for the amount related to the entire alleged scheme. *Id.* at 414-415.

Congress amended the VWPA that same year to expand the definition of "victim" by adding the following language to 18 U.S.C. § 3663(a)(2):

> For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4863.

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provisions, 18 U.S.C. § 3663A, concern *mandatory* restitution. Courts have relied upon cases that implicate either statute when addressing the question presented here. The VWPA applies here because the alleged conduct took place prior to 1996.

2. The Ninth Circuit has read that statutory expansion of the category of victims who can be compensated through restitution to somehow expand the scope of conduct that can support restitution. The Ninth Circuit thus declared that the amendment to the VWPA "overruled" *Hughey* as applied in cases where the defendant is convicted of participating in a conspiracy or scheme. *United States v. DeSalvo*, 41 F.3d 505, 515 (9th Cir. 1994); *accord United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999); *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997); *Reed*, 80 F.3d at 1423. The Ninth Circuit has held that, if the crime of conviction "includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense," *Reed*, 80 F.3d at 1423 (emphasis omitted), "the court can order restitution for losses resulting from *any* conduct that was part of the scheme," even conduct of which the defendant has not been convicted. *Ibid.* (emphasis added).[5]

The Ninth Circuit has gone so far as to affirm an order that required a defendant to pay restitution for all the purported losses resulting from an alleged credit card and wire fraud scheme that was set forth in a 113-count indictment, even though the defendant was convicted of only two counts related to that scheme. *See United States v. Johnson*, 132 F.3d 1279,

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[5] The Ninth Circuit continues to apply *Hughey* where the crime of conviction does *not* include, as an element, a conspiracy or scheme. *Lawrence*, 189 F.3d at 846; *see, e.g.*, *Reed*, 80 F.3d at 1421, 1423.

1287 (9th Cir. 1997); *see also United States v. Grice*, 319 F.3d 1174, 1179 (9th Cir.)(for mail-fraud convictions, affirming restitution order for acts occurring several years before scheme was alleged to have begun in indictment), *cert. denied,* 539 U.S. 950 (2003).

The Ninth Circuit's broad view of the scope of restitution under the VWPA has led it to allow restitution for losses that resulted from *acquitted* conduct, so long as the government alleges that such acts are part of a conspiracy or scheme. For example, in *United States v. Booth*, 309 F.3d 566 (9th Cir. 2002), two co-defendants were convicted of committing various acts of wire fraud and money laundering in connection with an alleged investment scheme, but the jury acquitted the defendants of certain fraud charges—including the conspiracy charge. *Id.* at 571. Nevertheless, the Ninth Circuit reasoned that, because the specific crimes of which the defendants were convicted required the government to prove participation in a scheme, such crimes "qualify as ones for which restitution may be ordered for all persons directly harmed by the entire scheme." *Id.* at 576. The Ninth Circuit declared that "[r]estitution is *** not confined to harm caused by the particular offenses of which [the defendant] was convicted," *ibid.*, and affirmed a restitution order for "the entire amount of loss caused to victims of the scheme," *id.* at 575.

The Second, Fifth, and Eleventh Circuits have similarly concluded that the VWPA authorizes a

district court to impose restitution for acquitted acts. *See, e.g.*, *United States v. Foley*, 508 F.3d 627, 635-636 (11th Cir. 2007)(rejecting challenge to restitution calculation under MVRA based partly on acquitted conduct); *United States v. Boyd*, 222 F.3d 47, 51 (2d Cir. 2000)("[T]he VWPA confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts ***."); *United States v. Chaney*, 964 F.2d 437, 452 (5th Cir. 1992)(rejecting argument that "'[r]estitution under the [VWPA] is forbidden for losses that may be attributed to conduct that is the basis of charges for which the defendant is acquitted.'"). *See also, e.g.*, *United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996)(under VWPA, court may order restitution in cases involving a conspiracy or scheme "without regard to whether *the particular criminal conduct* of the defendant which directly harmed the victim was alleged in a count to which the defendant pled guilty, or was even charged in the indictment." (emphasis in original)).

3. The Seventh Circuit and other circuits interpret *Hughey* and the VWPA differently.

The Seventh Circuit maintains that "[a]fter *Hughey*, the appropriate focus is on the *conduct* that forms the basis for the offense." *United States v. Bennett*, 943 F.2d 738, 740 (7th Cir. 1991)(emphasis added), *cert. denied,* 504 U.S. 987 (1992). Thus, even in cases in which the offense of conviction is a conspiracy or scheme, the Seventh Circuit continues to follow *Hughey*'s mandate that restitution be awarded only for "the specific conduct" that the

defendant committed in furtherance of the alleged scheme. *Hughey*, 495 U.S. at 413; *see, e.g., United States v. George*, 403 F.3d 470, 474 (7th Cir.)(under *Hughey*, restitution is appropriate only for losses caused by acts that were part of the specific conspiracy of which the defendant was convicted), *cert. denied,* 546 U.S. 1008 (2005).

The Seventh Circuit does not treat a conspiracy conviction as necessarily allowing a restitution order in regard to every aspect of a broadly alleged scheme. Rather, it reads the VWPA to require a link between the specific acts that underlie the conviction and the order for restitution. *See United States v. Frith*, 461 F.3d 914, 921 (7th Cir. 2006)(a restitution order must be "tied to the specific conduct of conviction").

Thus, the Seventh Circuit refuses to interpret the VWPA as a blank check that allows a district court to order any restitution amount requested by the government whenever there is a conspiracy conviction. *See, e.g., United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003)("[U]nder *Hughey*, both the amount of the restitution award and the persons to whom such award may be directed are limited by the circumstances of the offense for which the defendant has been convicted.")(emphasis omitted). And the Seventh Circuit requires that the conspiracy allegations be specific enough to enable the identification and assessment of the particular acts that comprise the scheme and the losses caused by those acts. *See Bennett*, 943 F.2d at 741 (because "[t]he scheme concept is by nature an amorphous one," an award of

restitution is authorized only when a scheme "is defined with specificity").

The Seventh Circuit holds—in direct conflict with the Ninth Circuit below—that a restitution order cannot be based on allegations of which the defendant was acquitted merely because the defendant has been convicted of participation in a conspiracy. *E.g.*, *George*, 403 F.3d at 474 ("*Hughey* requires the court to exclude injuries caused by offenses that are not part of the scheme of which [the defendant] has been convicted.").

In *United States v. Kane,* 944 F.2d 1046, 1414 (7th Cir. 1991), the Seventh Circuit vacated a restitution order that required payment for all losses allegedly caused by a scheme to defraud federally insured banks where the defendant had been acquitted of two (out of five) specific incidents of loan-application fraud that the government had charged in separate counts. The court reasoned that the defendant "was convicted of conspiracy, but the jury's verdicts, taken collectively, *narrow the scope of the conspiracy*," and "must be taken as a judgment that the conspiracy did not include the acts charged in th[e] counts" of which he was acquitted. *Ibid.* (emphasis added); *see also id.* at 1415 ("The jury apparently found that a conspiracy existed, but believed it to consist of three fraudulent loan applications and not five.").

The Ninth Circuit's attempt to distinguish *Kane* as being outdated, App., *infra*, 21a & n.12, is without merit. Prosecutors in the Seventh Circuit "concede

that restitution cannot be ordered that relates to conduct for which the defendant has been acquitted." *United States v. Polichemi*, 219 F.3d 698, 714 (7th Cir. 2000), *cert. denied,* 531 U.S. 1168 (2001).

The Third Circuit interprets the VWPA amendment in a manner similar to the Seventh Circuit, and precludes restitution based on acquitted conduct. *See United States v. Pedroni*, 45 Fed. Appx. 103, 111 (3d Cir.)(where defendant was convicted of conspiracy to defraud the United States and tax evasion, restitution not permitted for "loss associated with the charges for which [defendant] was acquitted"), *cert. denied,* 537 U.S. 1045 (2002); *United States v. Console*, 13 F.3d 641, 674 (3d Cir. 1993)(where defendant was convicted of 24 mail fraud counts but acquitted of 11 others, restitution award was proper because "it covered only the losses associated with offenses for which [defendant] has been convicted" (citing and relying upon *Hughey,* 495 U.S. at 420)), *cert. denied,* 511 U.S. 1076 (1994); *see also United States v. Akande*, 200 F.3d 136, 141 (3d Cir. 1999)("'[T]he offense of conviction,' as defined by *Hughey* [ ], remains the reference point for classifying conduct that determines liability for restitution.").

Although the Fifth Circuit earlier had ruled similarly to the Ninth Circuit, allowing restitution based on acquitted conduct in conspiracy cases, *see* page 29, *supra,* that court more recently has analyzed the issue in the context of guilty pleas in a manner that appears to call into question its earlier rationale. In *United States v. Adams*, 363 F.3d 363 (5th Cir.

2004), the court vacated a restitution order (under the parallel provision of the MVRA, *see*, *supra*, page 25 n.4), where the defendant had entered a plea to two substantive counts that alleged particular instances of mail fraud related to a broad conspiracy that was incorporated by reference into each of the substantive counts. The district court had accepted the plea based on a factual proffer that the two counts resulted in only $34,833 of harm but had ordered restitution of $170,312.31, based on the loss attributable to all of the counts of the conspiracy that named the defendant. *Id.* at 365. The Fifth Circuit vacated the order based on its conclusion that a defendant "is only responsible to pay restitution for the conduct underlying the offense for which he has been convicted," *id.* at 366, and the plea agreement, rather than the indictment, establishes the extent of the scheme of conviction, *id.* at 367.[6]

Like the Seventh Circuit, these other circuits look to the *conduct* of which the defendant is

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[6] The Fifth Circuit's attempted distinction between the entry of a guilty plea—where, in its view, "the scope of the underlying scheme [i]s defined by the parties themselves," *Adams*, 363 F.3d at 367—and a conviction by jury—where the extent of the scheme is defined by the allegations of the indictment notwithstanding the jury's verdict, *Chaney*, 964 F.2d at 452 n.48—is unpersuasive. That is especially so here, where the prosecution charged specific acts in separate counts of the indictment, and although the jury specifically returned a not guilty verdict on the count for concealment of equity in the Utah condominium, the district court included amounts related to that count in its restitution order.

convicted, not merely the existence of a conspiracy, to determine the extent of restitution that the district court is authorized to order under the VWPA. *Adams*, 363 F.3d at 366-367; *accord Akande*, 200 F.3d at 139 (the VWPA "'is not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant related to the scheme, conspiracy, or pattern'" (quoting *United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996))); *see also id.* at 142 (the government "bears the burden of including language sufficient to cover all acts for which it will seek restitution"); *United States v. Jeffery*, No. 93-6295, 1994 WL 468099, *9 (10th Cir. Aug. 25, 1994)(unpub.)(rejecting on *Hughey* grounds the government's argument that, in conspiracy cases involving an ongoing scheme to defraud, restitution may be ordered for all acts made pursuant to the scheme, even if not specifically charged in the indictment), *cert. denied,* 513 U.S. 1196 (1995).

Moreover, rather than defer to the government (or probation officer) about which acts fall within the realm of the conspiracy, such courts have held that judges have a duty to assess the actual extent of the scheme not only by examination of the allegations made in the indictment or at sentencing, but also by consideration of the jury verdict or plea proceedings. *See, e.g., Adams*, 363 F.3d at 366 ("Our review of the restitution order *** compels us to define the scope of the scheme underlying [the defendant's] fraud conviction."); *Akande*, 200 F.3d at 142 (examining "the question of what was the 'offense of conviction'"

in determining the permissible scope of restitution in a conspiracy case); *George*, 403 F.3d at 474 (same).

B. The Ninth Circuit's Ruling Cannot Be Squared With The Plain Text Of The Statute And Raises Constitutional Doubt

1. As noted above, the VWPA authorizes a district court to order restitution by "a defendant *convicted of an offense*" under the federal criminal code only "to any victim *of such offense*." App., *infra*, 121a (emphasis added). The statutory amendment did not change that text in any respect. The "amendment [merely] enlarged the group of victims who would be entitled to restitution, but the triggering event—the offense of conviction—remains the same." *Akande*, 200 F.3d at 141 (citing *United States v. Wesland*, 23 F.3d 205, 207 (8th Cir. 1994)).

A victim of the "offense" of which the defendant was "convicted" cannot, under the plain meaning of the statutory language, be provided restitution for any alleged losses tied to alleged conduct of which the defendant was acquitted. Likewise, where specific conduct was not charged in the indictment, the defendant could not have been "convicted" of that conduct for the purposes of ordering restitution under the statute.

Such is the case here, where the amount of restitution imposed—$2.3 million—could be derived only by including assets that the indictment did not

specifically charge petitioner with concealing, and assets that petitioner was acquitted of concealing. This Court's intervention is required to make plain that restitution may not be ordered for specific acts of which the defendant has not been convicted, whether because of acquittal or because the conduct was never charged in the indictment.

It is no answer that an acquittal by a jury might reflect only that the government did not bear its burden of proof. Under the plain language of the VWPA, restitution is authorized only when the defendant has been *convicted* of an offense, and no matter the reason, being acquitted of engaging in conduct is not a conviction of such conduct.

2. The Ninth Circuit's interpretation of the VWPA as authorizing restitution based on acquitted conduct raises doubts about that provision's constitutionality.

The majority of the courts of appeals have held that a restitution order under 18 U.S.C. § 3663 is a criminal sanction. *See United States v. Leahy*, 438 F.3d 328, 334-335 & n.9 (3d Cir.)(en banc)(collecting cases from the Fifth, Eighth, Ninth, and D.C. Circuits holding that restitution is a criminal penalty "when ordered in connection with a criminal conviction"), *cert. denied,* 127 S. Ct. 660 (2006).[7] This Court has

[7] Some circuits view restitution as a civil remedy. *See George*, 403 F.3d at 473; *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir.), *cert. denied,* 528 U.S. 934 (1999).

also indicated that it views a restitution order as one that "mete[s] out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). As such, a restitution order based on acquitted conduct would implicate the guarantee of a right to trial by jury in a criminal matter under the Fifth and Sixth Amendments. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *accord Blakely v. Washington*, 542 U.S. 296, 303-304 (2004).

C. This Court's Review Is Warranted To Eliminate Significant Sentencing Disparities Across The Country

The restitution order here would not have been allowed by the Seventh Circuit. That is precisely the kind of unwarranted disparity that prompted sentencing reform efforts more than 20 years ago. Such continued disparities in sentencing as a result of different judicial interpretations of the VWPA are a pressing problem that this Court should resolve.

The proper scope of a restitution order in a scheme or conspiracy prosecution is a substantial and recurring issue. It is raised in nearly every fraud case involving a conspiracy allegation. In 2006 alone, more than 9,500 defendants were convicted of fraud-related crimes in federal court, including mail or wire fraud or conspiracy to defraud the United States, *see* Sourcebook Of Criminal Justice Statistics Online, http://www.albany.edu/sourcebook/pdf/t5242006.pdf, and in each of these federal cases, a district court judge

faced the difficult determination of how to calculate the appropriate restitution amount. *See Randle,* 324 F.3d at 558 ("[C]alculating and providing for restitution can be difficult to sort out" and "[d]etermining who are victims and the amount of loss are often not easy tasks.").

This Court's last pronouncement on the subject occurred nearly 18 years ago, before the VWPA's definition of "victim" was amended and before the MVRA was enacted. Since then, nearly every federal court of appeals has interpreted 18 U.S.C. § 3663 in the context of a conviction for conspiracy, and the conflicting interpretations are well-established.

III. THIS COURT SHOULD GRANT REVIEW TO ELIMINATE UNCERTAINTY ABOUT WHETHER A TERM OF IMPRISONMENT MAY BE INCREASED BASED ON ACQUITTED CONDUCT, OR ALTERNATIVELY, HOLD THIS CASE FOR *OREGON V. ICE*, NO. 07-901

In *United States v. Watts*, 519 U.S. 148, 156 (1997), this Court held that reliance on acquitted conduct to determine the length of a defendant's prison sentence does not violate the Double Jeopardy clause. This Court's more recent pronouncements, however, reaffirm that the right to have a jury make factual determinations is critical to constitutionally permissible sentences. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 248-249 (2005); *Blakely*, 542 U.S. at 304; *Apprendi*, 530 U.S. at 489.

In the wake of *Booker*, criminal defendants have vigorously challenged the "relevant conduct" aspect of the Sentencing Guidelines, which authorizes the consideration of conduct proven only to the judge and only by a preponderance of the evidence—even conduct of which the defendant has been acquitted—for the purpose of calculating the term of imprisonment. Although the federal courts of appeals have thus far upheld reliance on acquitted conduct, widespread concern about the practice remains and judges around the country are struggling with this significant constitutional issue. *See, e.g., United States v. White,* No. 05-6596, 503 F.3d 487 (6th Cir. 2007)(panel opinion affirming sentence based on acquitted conduct vacated by grant of rehearing *en banc*).

This Court should decide the issue in this case. Petitioner was sentenced to 36 months of imprisonment based in part on a loss calculation under the guidelines that included amounts related to conduct of which she had been acquitted. Thus, this case provides an appropriate vehicle in which to address the constitutional issues related to the use of acquitted conduct at sentencing. This case is, in fact, superior to others raising the acquitted conduct matter because review in this case would also enable the Court to resolve the conflict over whether a district court is statutorily and constitutionally authorized to order restitution based on acquitted conduct. *See* Part II, *supra*.

If the Court does not grant a writ of *certiorari* in this case, it should at least hold the instant petition pending its disposition of *Oregon v. Ice*, No. 07-901. The Sixth Amendment question in that case—whether an increased sentence can be imposed based on facts found by a judge rather than a jury—is at issue in this case as well, only more so, because the judge in the instant case overrode the will of the jurors by sentencing petitioner on the basis of conduct on which the jury had returned a verdict of not guilty.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted or, in the alternative, the case should be held pending the Court's disposition of *Oregon v. Ice*, No. 07-901.

Respectfully submitted,

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