No. 17-9082

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA JOHN HESTER AND MARCO MANUEL LUIS, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Amendment requires that facts affecting the amount of restitution ordered under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-25) is not published in the Federal Reporter but is reprinted at 708 Fed. Appx. 441. A prior opinion of the court of appeals in petitioner Luis's case (Pet. App. 6-12) is reported at 765 F.3d 1061. A prior opinion of the court of appeals in petitioner Hester's case (Pet. App. 13-14) is not published in the Federal Reporter but is reprinted at 584 Fed. Appx. 805.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2018. A petition for rehearing was denied on February 27, 2018 (Pet. App. 30). The petition for a writ of certiorari was filed

on May 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Southern District of California, petitioners were convicted on two counts of conspiracy to commit money-laundering, in violation of 18 U.S.C. 1956(h) and 1957(a). Hester Judgment 1; Luis Judgment 1. Petitioner Hester also pleaded guilty to six drug-related counts. Hester Judgment 1. Petitioner Luis was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Luis Judgment 2-3. Petitioner Hester was sentenced to 100 months of imprisonment, to be followed by five years of supervised release. Hester Judgment 2-3. The district court ordered petitioners, jointly and severally, to pay restitution. See Pet. 5-6. Petitioners appealed only the restitution award. Pet. 7-8, 9. The court of appeals affirmed in part and vacated and remanded in part. Pet. App. 6-12, 13-14. This Court denied certiorari. 135 S. Ct. 1873; 135 S. Ct. 1572. On remand, the district court entered a revised restitution order for the amount of $329,767. Pet. App. 24. The court of appeals affirmed. Id. at 24-25.

1. In the mid-2000s, petitioners, who were "long-time friends, began investing in real property together." Pet. App. 8. "As a real estate agent, Luis had the know-how. As a career marijuana dealer, Hester had the cash." Ibid.

Using straw buyers and falsified paperwork, petitioners purchased two California properties, one in Rancho Santa Fe for $2,050,000 in 2006 and one in Palomar for $560,000 in 2007. Pet. App. 8-9. To finance the Palomar purchase, CitiGroup issued two interest-only loans: a first mortgage for $448,000 and a second mortgage for $112,000. Id. at 9. In December 2008, the Palomar property went into default. Ibid. The fraudulent nature of the loans was discovered during an investigation of Hester's marijuana operation. Ibid. In April 2010, CitiGroup sold the property's first mortgage, with $447,977 outstanding, for $230,068, and wrote off its second mortgage balance of $111,858. Ibid.

2. A federal grand jury indicted petitioners on, inter alia, two counts of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957. Indictment 7-8. Petitioners pleaded guilty to those counts, Hester Judgment 1, Luis Judgment 1, and Hester also pleaded guilty to six drug-related counts, Hester Judgment 1. Following petitioners' guilty pleas, the district court held a two-day hearing on restitution as to Luis, after which the court ordered $615,935 in restitution on the Rancho Santa Fe property and $329,767 on the Palomar property. Pet. App. 9. Only the latter is at issue here.

At the hearing, which included testimony from a CitiGroup representative, the initial loan amounts and the outstanding balances were undisputed. 10/26/12 Tr. (No. 10-cr-2967) 18 (initial loan amounts), id. at 24-25 (outstanding balances); see

id. at 30-48 (cross-examination not addressing these figures). There also was not "any dispute as to what [the first mortgage] was sold for." 10/30/12 Tr. 15. Rather, the parties disputed only whether the loan sale price, which was part of a bulk package and not based on an individualized assessment of the Palomar property, was a fair market value for the property. See, e.g., id. at 34-37. The district court resolved that dispute by adding the unpaid principal balances and subtracting the amount CitiGroup had received from selling the Palomar property ($447,977 + $111,858 - $230,068), resulting in a restitution amount of $329,767 on the Palomar property. Ibid. The court subsequently adopted the same findings as to Hester and imposed joint and several liability for the restitution. Pet. App. 4-5.

3. Petitioners separately appealed the restitution orders, which the court of appeals affirmed in part and vacated and remanded in part. The court addressed Luis's case first, in a published opinion, Pet. App. 6-12, and then adopted the same reasoning in an unpublished memorandum opinion in Hester's case, Id. at 13-14.

The court of appeals first rejected petitioners' argument that conspiracy to commit money laundering is not an "offense against property" under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, and affirmed the district court's restitution award to CitiGroup. Pet. App. 10-11. The court of appeals also rejected, in reliance on circuit precedent,

petitioners' argument that the Sixth Amendment requires facts supporting a restitution award to be found by a jury or admitted by the defendant. See id. at 11-12 n.4 (citing United States v. Green, 722 F.3d 1146 (9th Cir.), cert. denied, 571 U.S. 1025 (2013)); id. at 13-14 n.2 (same). The court concluded, however, that the district court had erred in its restitution calculations regarding the Rancho Santa Fe loans. See id. at 11.

Petitioners filed petitions for a writ of certiorari seeking review of their Sixth Amendment claims. See Pet. 8. This Court denied certiorari. 135 S. Ct. 1873; 135 S. Ct. 1572.

4. On remand, the district court declined to impose restitution for the Rancho Santa Fe loans, set a payment schedule for the restitution due to CitiGroup, and otherwise left the original judgments unchanged. See Pet. App. 24-25.

Petitioners appealed again, this time in a joint appeal, and the court of appeals affirmed in an unpublished decision. Pet. App. 24-25. The court did not re-address petitioners' Sixth Amendment claim.

ARGUMENT

Petitioners contend (Pet. 9-17) that Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held that, "[o]ther 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," applies to the calculation of restitution. Petitioners argue (Pet. 14-16) that

this Court's decisions in Southern Union Co. v. United States, 567 U.S. 343 (2012), which held that facts increasing a criminal fine above the statutory maximum should be found by a jury, and Alleyne v. United States, 133 S. Ct. 2151 (2013), which held that facts increasing a mandatory minimum sentence should be found by a jury, show that Apprendi applies to restitution. Petitioners are incorrect. Every court of appeals to consider the question has concluded that the imposition of restitution does not implicate Apprendi. This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review of that issue -- including petitioners' earlier petitions in these cases. See 135 S. Ct. 1873; 135 S. Ct. 1572.[1] The same result is warranted here.[2]

1. a. The court of appeals has correctly held that Apprendi does not apply to restitution. Pet. App. 11-12 n.4; id.

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[1] See also, e.g., Fontana v. United States, 138 S. Ct. 1022 (2018) (No. 17-7300); Alvarez v. United States, 137 S. Ct. 1389 (2017) (No. 16-8060); Patel v. United States, 137 S. Ct. 184 (2016) (No. 16-5129); Santos v. United States, 136 S. Ct. 1689 (2016) (No. 15-8471); Roemmele v. United States, 136 S. Ct. 255 (2015) (No. 15-5507); Gomes v. United States, 136 S. Ct. 115 (2015) (No. 14-10204); Printz v. United States, 136 S. Ct. 91 (2015) (No. 14-10068); Johnson v. United States, 135 S. Ct. 2857 (2015) (No. 14-1006); Basile v. United States, 135 S. Ct. 1529 (2015) (No. 14-6980); Ligon v. United States, 135 S. Ct. 1468 (2015) (No. 14-7989); Holmich v. United States, 135 S. Ct. 1155 (2015) (No. 14-337); Roscoe v. United States, 134 S. Ct. 2717 (2014) (No. 13-1334); Green v. United States, 571 U.S. 1025 (2013) (No. 13-472); Wolfe v. United States, 569 U.S. 1029 (2013) (No. 12-1065); Read v. United States, 569 U.S. 1031 (2013) (No. 12-8572).

[2] The same question is presented in Petras v. United States, No. 17-8462 (filed Apr. 9, 2018).

at 13-14 n.2; see United States v. Green, 722 F.3d 1146 (9th Cir.), cert. denied, 571 U.S. 1025 (2013). In Apprendi, this Court held that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved beyond a reasonable doubt and found by a jury. 530 U.S. at 490; see also United States v. Cotton, 535 U.S. 625, 627 (2002) (making clear that, in a federal prosecution, "such facts must also be charged in the indictment"). The "'statutory maximum' for Apprendi purposes 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) (citation and emphasis omitted).

The district court ordered petitioners to pay restitution pursuant to the MVRA. The MVRA provides that, "when sentencing a defendant convicted of an offense described in subsection (c)," which includes fraud offenses, "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1); see also 18 U.S.C. 3663A(c)(1)(A)(ii). The MVRA requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C. 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); see also 18 U.S.C. 3663A(b)(1) (restitution order shall require return of property or

payment of an amount equal to the value of lost or destroyed property).

By requiring restitution of a specific sum -- "the full amount of each victim's losses" -- rather than prescribing a maximum amount that may be ordered, the MVRA establishes an indeterminate framework. 18 U.S.C. 3664(f)(1)(A); see, e.g., United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012) ("Critically, * * * there 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.") (emphasis omitted), cert. denied, 569 U.S. 959 (2013); United States v. Reifler, 446 F.3d 65, 118-120 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). Thus, when a sentencing court determines the amount of the victim's loss, it "is merely giving definite shape to the restitution penalty [that is] born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts." United States v. Leahy, 438 F.3d 328, 337 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, Pasquantino v. United States, 544 U.S. 349, 365 (2005), "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." Leahy, 438 F.3d at 338. "The purpose of restitution under the MVRA * * *

is * * * to make the victim[ ] whole again by restoring to him or her the value of the losses suffered as a result of the defendant's crime." United States v. Hunter, 618 F.3d 1062, 1064 (9th Cir. 2010) (citation and internal quotation marks omitted; brackets in original). In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." Leahy, 438 F.3d at 338.

Every court of appeals to have considered the question has held that the rule of Apprendi does not apply to restitution, whether ordered under the MVRA or the other primary federal restitution statute, the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663. See, e.g., United States v. Churn, 800 F.3d 768, 782 (6th Cir. 2015); United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985, and 135 S. Ct. 989 (2015); Day, 700 F.3d at 732 (4th Cir.); United States v. Brock-Davis, 504 F.3d 991, 994 n.1 (9th Cir. 2007); United States v. Milkiewicz, 470 F.3d 390, 403-404 (1st Cir. 2006); Reifler, 446 F.3d at 114-120 (2d Cir.); United States v. Williams, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by United States v. Lewis, 492 F.3d 1219, 1221-1222 (11th Cir. 2007) (en banc); Leahy, 438 F.3d at 337-338 (3d Cir.); United States v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); United States v. Carruth, 418 F.3d 900,

902-904 (8th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005).

Those courts have relied primarily on the absence of a statutory maximum for restitution in determining that, when the court fixes the amount of restitution based on the victim's losses, it is not increasing the punishment beyond that authorized by the conviction. See, e.g., Leahy, 438 F.3d at 337 n.11 ("[T]he jury's verdict automatically triggers restitution in the 'full amount of each victim's losses.'") (quoting 18 U.S.C. 3664(f)(1)(A)). Some courts have additionally reasoned that "restitution is not a penalty for a crime for Apprendi purposes," or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures. United States v. LaGrou Distrib. Sys., Inc., 466 F.3d 585, 593 (7th Cir. 2006); see Visinaiz, 428 F.3d at 1316; Carruth, 418 F.3d at 904; see also Leahy, 438 F.3d at 337-338.

b. This Court's holding in Southern Union that "the rule of Apprendi applies to the imposition of criminal fines," 567 U.S. at 360, does not undermine the uniform line of precedent holding that restitution is not subject to Apprendi. In Southern Union, the Court found that a $6 million criminal fine imposed by the district court -- which was well above the $50,000 fine that the defendant argued was the maximum supported by the jury's verdict -- violated the Sixth Amendment. Id. at 347. The Court explained that criminal fines, like imprisonment or death, "are penalties

inflicted by the sovereign for the commission of offenses." Id. at 349. Observing that, "[i]n stating Apprendi's rule, [it] ha[d] never distinguished one form of punishment from another," id. at 350, the Court concluded that criminal fines implicate "Apprendi's 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" id. at 349 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." Id. at 353 (quoting Ice, 555 U.S. at 170). Finding that "English juries were required to find facts that determined the authorized pecuniary punishment," and that "the predominant practice" in early America was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying Apprendi to criminal fines." Id. at 353-354.

Contrary to petitioner's argument (Pet. 11-12), Southern Union does not require applying Apprendi to restitution. The Southern Union Court considered only criminal fines, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct, 567 U.S. at 350, and it held only that such fines are subject to Apprendi. Id. at 360. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant

to an indeterminate scheme that lacks a statutory maximum. Indeed, Southern Union supports distinguishing restitution under the MVRA from the type of sentences subject to Apprendi because, in acknowledging that many fines during the founding era were not subject to concrete caps, the Court reaffirmed that there cannot "be an Apprendi violation where no maximum is prescribed." Id. at 353. Unlike the statute in Southern Union, which prescribed a $50,000 maximum fine for each day of violation, the MVRA sets no maximum amount of restitution, but rather requires that restitution be ordered in the total amount of the victims' losses. 18 U.S.C. 3663A(b)(1) and (d), 3664(f)(1)(A); see Day, 700 F.3d at 732 (stating that, "in Southern Union itself, the Apprendi issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case," and distinguishing restitution on the ground that it is not subject to a "prescribed statutory maximum") (emphasis omitted).

Since Southern Union, at least seven courts of appeals have addressed in published opinions whether to overrule their prior precedents holding that the Apprendi rule does not apply to restitution. Each concluded, without dissent, that Southern Union did not call its preexisting analysis into question. See United States v. Sawyer, 825 F.3d 287, 297 (6th Cir.) (concluding that "Southern Union did nothing to call into question the key reasoning" of prior circuit precedent), cert. denied, 137 S. Ct. 386 (2016); United States v. Thunderhawk, 799 F.3d 1203, 1209 (8th

Cir. 2015) (finding "nothing in the Southern Union opinion leading us to conclude that our controlling precedent * * * was implicitly overruled."); United States v. Bengis, 783 F.3d 407, 412-413 (2d Cir. 2015) ("adher[ing]" to the court's prior precedent after concluding that "Southern Union is inapposite"); Green, 722 F.3d at 1148-1149 (9th Cir.); United States v. Read, 710 F.3d 219, 231 (5th Cir. 2012) (per curiam), cert. denied, 569 U.S. 1031 (2013); United States v. Wolfe, 701 F.3d 1206, 1216-1217 (7th Cir. 2012), cert. denied, 569 U.S. 1029 (2013); Day, 700 F.3d at 732 (4th Cir.) (the "logic of Southern Union actually reinforces the correctness of the uniform rule adopted in the federal courts" that Apprendi does not apply because restitution lacks a statutory maximum); see also United States v. Kieffer, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 135 S. Ct. 2825 (2015); United States v. Basile, 570 Fed. Appx. 252, 258 (3d Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015).

c. Similarly, this Court's holding in Alleyne that Apprendi also applies to facts that increase a mandatory minimum sentence, because such facts "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment," 133 S. Ct. at 2158, does not undermine the uniform line of precedent holding that restitution is not subject to Apprendi. Restitution under the MVRA does not set a mandatory minimum amount or even a "prescribed range" of amounts that a defendant may be ordered to pay. Rather, the amount -- if any --

is based on the loss caused to the victim by the defendant. Alleyne is thus inapplicable. Since Alleyne, every court of appeals to consider whether the decision in Alleyne requires that the Apprendi rule extend to restitution has concluded that it does not. See, e.g., Kieffer, 596 Fed. Appx. at 664 (10th Cir.); United States v. Roemmele, 589 Fed. Appx. 470, 470-471 (11th Cir. 2014) (per curiam) (rejecting Alleyne challenge to restitution), cert. denied, 136 S. Ct. 255 (2015); United States v. Agbebiyi, 575 Fed. Appx. 624, 632-633 (6th Cir. 2014); Basile, 570 Fed. Appx. at 258 (3d Cir.); United States v. Holmich, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 135 S. Ct. 1155 (2015).

d. Petitioner's reliance (Pet. 16-17) on this Court's decision in Blakely, supra, is similarly misplaced. The Court in Blakely held that a state sentencing scheme that authorized a trial court to increase a defendant's sentence of incarceration beyond the statutory maximum on the basis of facts found by the judge violated Apprendi. Blakely, 542 U.S. at 303. Because Blakely, like Apprendi, involved only a maximum sentence of incarceration, it does not conflict with the court of appeals' holding as to restitution.

3. Petitioner acknowledges (Pet. 13-14) that the courts of appeals are not divided on the question presented. Although those courts employ somewhat different reasoning, see ibid., they all agree that Apprendi does not apply to restitution. This Court's review is therefore not warranted.

Petitioners' cases additionally present poor vehicles for addressing the question presented because the legal rule that petitioners seek would not affect their cases. See Washington v. Recuenco, 548 U.S. 212, 222 (2006) (holding that a violation of Apprendi is "not structural error"). Even if Apprendi applied to restitution, any error here was harmless. In petitioners' cases, the facts that mattered for calculating the restitution that they owed were the outstanding principal balances on the loans and the amount the bank recouped when it sold the loans in an arms-length transaction. See Robers v. United States, 134 S. Ct. 1854, 1856 (2014) (for purposes of the MVRA, "no 'part of the [victim's] property' is 'returned' to the victim until the collateral is sold and the victim receives money from the sale"). Those facts were uncontested in petitioners' cases. See 10/26/18 Tr. 18 (initial loan amounts), id. at 24-25 (outstanding balances); see id. at 30-48 (cross-examination not addressing these figures); 10/30/18 Tr. 15 (noting that there was not "any dispute as to what [the first mortgage] was sold for"); 10-cr-2967 D. Ct. Doc. 883, at 2 (June 20, 2013) (Hester relying on Luis's substantive objections to proposed restitution); see also 13-50330 C.A. E.R. 290 (Hester admitting value of initial loans in plea agreement). Petitioners presented no evidence that the sale was not an arms-length transaction, and the question whether the property was worth more, especially at the moment CitiGroup acquired the legal right to sell it in foreclosure, than the pro-rata amount for which it sold,

was irrelevant. See Robers, 134 S. Ct. at 1856, 1858; see also id. at 1859 (holding that market "[f]luctuations in property values are common" and "losses in part incurred through a decline in the value of collateral sold are directly related to an offender's having obtained collateralized property through fraud").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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