No. 17-9082

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA JOHN HESTER and MARCO MANUEL LUIS,

Petitioners,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The question presented for review is "should the rule of *Apprendi* apply to the imposition of criminal restitution?" In opposing issuance of the writ, the government focuses on the merits, but also asserts this case is not a good vehicle for resolving the question presented. Petitioners reply below.

REPLY TO GOVERNMENT'S RESPONSE ON THE MERITS

I. Introduction

The circuit courts have given two reasons for holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply to federal criminal restitution: (1) there is no statutory maximum for restitution, thus a district court's increasing a sentence by ordering restitution does not exceed a maximum sentence; and (2) restitution is not "criminal punishment." The government relies on both reasons to argue that *Apprendi* does not apply to restitution. Petitioners address the government's treatment of those reasons below, but first discuss an important point the government ignores.

II. The Government Ignores The "Historical Record," A Key Driver Of The Court's *Apprendi* Holdings

This Court has emphasized that "'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.'" *Southern Union Co. v. United States*, 567 U.S. 343, 353 (2012) (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)); *see also Cunningham v. California*, 549 U.S. 270, 281 (2007) (stating that *Apprendi* is "rooted in longstanding common-law practice"). At common law, courts consistently limited restitution to property described in an indictment or valued in a special verdict. *See* Petition (Pet.) at 11-12. This strongly supports that *Apprendi* applies to criminal restitution.

The government acknowledges, passingly, that an analysis of the question presented requires considering how restitution was handled at common law. *See* Brief in Opposition (Brief in Opp.)

at 11. But the government says nothing about that historical record, nor does it dispute what is set out in the petition in this regard. That silence is telling.

III. The "No Statutory Maximum" Argument Is Contrary To *Blakely*, *Southern Union*, And *Alleyne*

The government's primary argument is that *Apprendi* does not apply because there is no statutory maximum for restitution. Thus, the government asserts, when a "court fixes the amount of restitution based on [a] victim's losses, it is not increasing the punishment beyond that authorized by the conviction," it is "merely giving shape to the restitution penalty born out of the conviction." Brief in Opp. at 8-10 (quoting *United States v. Leahy*, 438 F.3d 328, 337 (3rd Cir. 2006) (*en banc*)). This argument was refuted in the petition (at pages 15-17), but a few points bear making here.

The government's argument imagines a framework in which (1) the indictment identifies a victim (or victims) to whom an undefined sum of restitution is due, and (2) post-conviction the district court "merely" "fixes the amount of restitution" based on the harm the victim suffered. That is not the statutory regime involved here. Under the Mandatory Victims Restitution Act, a district court is tasked with identifying victims who have "suffered a physical injury or pecuniary loss" as a result of the defendant's offense conduct. 18 U.S.C. §3663A(c)(1)(B). The procedures for making that determination are set out in §3664, which indicates that restitution allegations are first made post-conviction, in a presentence report. *See* 18 U.S.C. §3664(d). A defendant may dispute those allegations, and the court may "require additional documentation or hear testimony," or it may rule based solely on the papers submitted. 18 U.S.C. §3664(d)(4). The government bears the burden of proving that an entity or person is a victim, and, if so, the appropriate amount of restitution. *See* 18 U.S.C. §3663(e).

The government is therefore incorrect when it asserts that a conviction authorizes a limitless sum of restitution to an identified victim, and the only thing left for the district court to do is "fix the amount." That is glaringly evident when one considers what happened in this case with respect to JP Morgan Chase (Chase): (1) Chase was not named as a victim in the indictment, nor did the indictment mention restitution; (2) post-conviction, and after a contested evidentiary hearing, the district court found Chase was a victim and ordered Petitioners to pay Chase $615,935 restitution; but (3) after a reversal and remand from the Ninth Circuit, and several more evidentiary hearings (including expert testimony), the district court found that Chase was not a victim and was due no restitution.[1] *See, e.g.*, 12/30/15 D. Ct. Order (Docket #1019 in S.D. Cal. Case No. 10-cr-2967).

In sum, following a conviction, but before imposing a restitution portion of a sentence, a district court must make fact findings beyond what was found by the jury or admitted by the defendant during his guilty plea. As this Court has explained, "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," "*without* any additional findings" by the court. *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Accordingly, when a district court makes additional findings necessary to impose the restitution portion of the sentence, it violates *Apprendi*'s rule. It is exactly that reasoning that drove the dissents in *United States v. Leahy*, 438 F.3d 328, 343-44 (3rd Cir. 2007) (*en banc*) (McKee, J., dissenting), and *United States v. Carruth*, 418 F.3d 900, 905 (8th Cir. 2005) (Bye, J., dissenting).

[1] The circumstances were much the same with respect to CitiGroup, except that the restitution ordered was affirmed during the first appeal. *See United States v. Luis*, 765 F.3d 1061, 1067-68 (9th Cir. 2014).

The government claims *Blakely*'s reasoning does not apply because in that case the Court did not deal with restitution, it dealt with a "sentence of incarceration beyond the statutory maximum on the basis of facts found by the judge." Brief in Opp. at 14. That misses the point, which is that without making additional fact findings the district court could not have imposed *any* restitution on Petitioners, therefore the rule of *Apprendi* is implicated.

Notably, in making its "no statutory maximum" argument the government mostly ignores three points made on pages 15-16 of the petition. First, "*Southern Union* relied on common law cases in which there was no explicit maximum fine, and instead the fine was based on the victim's loss." Pet. at 15 (citing *Southern Union*, 567 U.S. at 353-56). Despite that, the courts in those cases applied the *Apprendi* rule. Second, there is, in fact, a statutory maximum for criminal restitution – the amount of a victim's loss.[2] *See* Pet. at 15. Finally, the no-statutory-maximum argument is akin to the argument that *Apprendi* should not apply to findings necessary to support a mandatory minimum sentence, because those findings do not alter the maximum penalty. The Court rejected that argument in *Alleyne v. United States*, 570 U.S. 99 (2013), stating that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of the new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact." *Id.* at 115.

The government ignores the first two points mentioned in the preceding paragraph. As for the third, the government says *Alleyne* does not apply because there is no statutory minimum amount for federal restitution. *See* Brief in Opp. at 13-14. That argument, like the government's treatment

[2] There is a statutory maximum for restitution in much the same way there is for the fine at issue in *Southern Union*, in that the maximum fine is determined by finding the number of days that the defendant violated the statute. *See* Brief in Opp. at 12.

of *Blakely*, misses the point, which is that if an increase in the restitution portion of a sentence relies on a fact finding, that finding must be made by a jury (or admitted by the defendant).

IV. The "Restitution Is Not Punishment" Argument Is Contrary To *Pasquantino*, *Southern Union*, And *Paroline*

The government also argues that *Apprendi* does not apply because restitution is not criminal punishment, it is a "restorative remedy" meant to make a victim "whole again." Brief in Opp. at 8-9 (quoting *Leahy*, 438 F.3d at 338). This argument was addressed in the petition (at pages 14-15), but a few points bear making here.

As an initial matter, the government ignores the Courts' statement in *Pasquantino v. United States*, 544 U.S. 349, 365 (2005), that "[t]he purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for [the defendant's criminal] conduct."

Furthermore, in making this argument the government attempts to distinguish *Southern Union* by stating that the Court "considered only criminal fines [in that case], 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*." Brief in Opp. at 11. The portion of *Southern Union* quoted sparingly by the government says, "In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]' – terms that each undeniably embrace fines." *Southern Union*, 567 U.S. at 350 (citations omitted). Thus, the Court in *Southern Union* made clear that *Apprendi* applies to fact findings that increase a defendant's "sentence," and criminal restitution is undeniably part of a criminal sentence. *See* 18 U.S.C. §3663A(a)(1). This point was made in the petition (at pages 10, 14-15), but ignored in the government's opposition brief.

The petition also points out the importance of the fact that restitution is imposed at the behest of the government, *see* 18 U.S.C. §3664(d)(1), and "[t]he victim has no control over the amount of restitution awarded or over the decision to award restitution." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). *See* Pet. 14. In *Southern Union*, the Court relied on similar considerations to hold that *Apprendi* applies to fines. 567 U.S. at 349 (stating that fines are "inflicted by the sovereign for the commission of offenses"). The Court relied on those same considerations to analogize restitution and fines in *Paroline v. United States*, 572 U.S. 434 (2014), stating that "despite the differences between restitution and a traditional fine, restitution still implicates the prosecutorial powers of government," and "serves punitive purposes," and thus may be within the purview of the Constitution's Excessive Fines Clause. *Id.* at 456 (quotation and citation omitted).

That the government wields restitution as part of its "prosecutorial powers," and for "punitive purposes," is starkly illustrated by the facts in this case. The defaulted CitiGroup loans underlying the restitution portion of the sentence were taken by Jay Hansen. Mr. Hansen took those loans to buy a home in which he and Mr. Hester planned to grow marijuana. Mr. Luis was the mortgage broker for the loans. Mr. Hansen entered into a plea agreement and agreed to cooperate with the government. Mr. Luis, on the other hand, pleaded guilty without a plea agreement, and did not enter into a cooperation agreement because there was nothing he could do to assist the government. When it came time for Mr. Hansen's sentencing, the government did not seek any restitution from him, nor did the district court impose restitution. *See* 5/14/12 Hansen Sent. Tr. (Docket #630 in S.D. Cal. Case No. 10-cr-2967); 7/14/11 Hansen Plea Agr. (Docket #372). Later, the government successfully sought restitution from Messrs. Luis and Hester, for the loans that Mr. Hansen fraudulently obtained. This disparate treatment did not advance the purpose of making the victim whole, but certainly rewarded Mr. Hansen and further punished Petitioners.

Common sense indicates this dynamic is not rare – it undoubtedly occurs frequently. *See also United States v. Williams*, 612 F.3d 500, 505, 509, 512 (6th Cir. 2010). This supports the Court's statement in *Pasquantino* that restitution functions as punishment, and its statement in *Paroline* that the government wields restitution for "punitive purposes," as part of its "prosecutorial powers." At any rate, restitution is undeniably a part of the criminal sentence, thus *Southern Union* makes clear that the rule of *Apprendi* applies.

THIS CASE IS IDEAL FOR RESOLVING THE QUESTION PRESENTED

The government argues that this case "presents a poor vehicle" for resolving the question presented because "[e]ven if *Apprendi* applie[s] to restitution, any error here was harmless." Brief in Opp. at 15. The government claims, essentially, that a *petit* jury would come to the same conclusion with respect to restitution as did the district court.

As an initial matter, the government ignores that Petitioners' claim is based in part on *Apprendi*'s requirement that facts necessary to support an increase in a defendant's sentence must be charged in the indictment. *See United States v. Cotton*, 535 U.S. 625 (2002); *Apprendi*, 530 U.S. at 476. In addition to being required by the Fifth Amendment's grand jury clause, this serves an important notice function because it allows a defendant to "predict with certainty the judgment from the face of the felony indictment . . . ." *Alleyne*, 570 U.S. at 109-10 (quoting *Apprendi*, 530 U.S. at 478). The indictment in this case did not allege anything with respect to restitution. Nor did Petitioners have any reason to believe they would be subject to restitution, considering that Mr. Hansen entered his guilty plea and proceeded to sentencing first, and the government did not seek restitution from him. Furthermore, and as discussed in the petition, the government's theory as to why Mr. Luis was subject to paying restitution was novel and not foreseeable to Mr. Luis. *See* Pet.

at 2-3. All of these reasons support an independent basis for relief. *See, e.g., United States v. Carll*, 105 U.S. 611, 612 (1881); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 111-16 (2007) (Scalia, J., dissenting).

The government ignores this and focuses only on the Sixth Amendment aspect of *Apprendi*. To support its harmlessness argument in that regard the government asserts that the only facts "that mattered for calculating the restitution" were "the outstanding principal balances on the loans and the amount the bank recouped when it sold the loans," and those amounts were uncontested. Brief in Opp. at 15. As discussed in more detail in the petition (at pages 4-6), the relevant facts in this regard are as follows: (1) rather than foreclosing on the Palomar Mountain Property, CitiGroup delayed, then sold the rights to the first loan without any consideration of the property's value; and (2) had CitiGroup instead proceeded with foreclosure and sold the property, its loss would have been much less, as much as $140,000 less. Based on this, Petitioners argued that any restitution figure should be reduced because their conduct did not "directly and proximately" cause a substantial portion of CitiGroup's loss on the first loan. *See* 18 U.S.C. §3663A(a)(2). The district court (and Ninth Circuit) rejected that argument, and based restitution on the amount owed to CitiGroup on the first loan, minus the amount CitiGroup received when it sold the rights to the loan. *See Luis*, 765 F.3d at 1067-68.

In a subsequent opinion in *United States v. Robers*, 134 S. Ct. 1854 (2014), the Court addressed restitution in mortgage fraud cases and said that "an offender is [not] responsible for everything that reduces the amount of money a victim receives for collateral." *Id.* at 1859. While the Court indicated that a defendant will usually be liable for loss due to fluctuations in the market value of the collateral property that secured the loan, the Court also said that "[m]arket fluctuations are normally unlike, say, an unexpected natural disaster that destroys collateral or a victim's donation

of collateral or its sale to a friend for a nominal sum – any of which, as the Government concedes – could break the causal chain" between the defendant's conduct and the loss involved. *Id.* The government also conceded that "if the collateral loses value after the victim chooses to hold it, then that 'part of the victim's net los[s]' is 'attributable to' the victim's 'independent decisions.'" *Id.* at 1860 (Sotomayor, J., concurring); *id.* at 1859 (majority opinion cite to same concession). Here, CitiGroup not only "held" the property for an extended time – or at least sat on its right to foreclose and sell the property – it then sold its right to the first loan without any consideration for the property's value. Thus, it made an independent decision that substantially increased its loss, and Petitioners were nonetheless ordered to pay for that increased loss.

The government says these facts are irrelevant because "market fluctuations in property values are common," thus "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." Brief in Opp. at 16 (quoting *Robers*, 134 S. Ct. at 1859). This argument does not make sense because CitiGroup did not sell the collateral, which was the Palomar Mountain Property. It sold the rights to the loan, in a bulk loan sale, without any consideration for the value of the collateral property. Thus, a substantial portion of CitiGroup's loss on the loan had nothing to do with market fluctuation, or with Petitioners' conduct. Had CitiGroup instead proceeded as envisioned in *Robers*, with a foreclosure sale of the Palomar Mountain Property, its losses on the first loan would have been much less – up to $140,000 off of the $217,909 restitution imposed with respect to that loan. A jury surely could have found that, and the *Apprendi* rule indicates that the issue should have been submitted to a jury.

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CONCLUSION

Petitioners request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

/s/ Todd W. Burns

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