No. 18-7262

IN THE SUPREME COURT OF THE UNITED STATES

ARTAK OVSEPIAN AND KENNETH WAYNE JOHNSON, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ANDREW W. LAING
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court plainly erred in ordering restitution under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, based on the court's finding of the amount of the victims' loss by a preponderance of the evidence.

2. Whether the district court correctly determined that petitioners' possession or use of an "authentication feature" warranted a two-level enhancement under Sentencing Guidelines § 2B1.1(b)(10) (2010).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Johnson et al., No. 11-cr-1075 (Jan. 6, 2016; Jan. 22, 2018)

United States v. Ovsepian, No. 11-cr-1075 (July 20, 2015; June 19, 2017)

United States Court of Appeals (9th Cir.):

United States v. Ovsepian, No. 15-50338 (Jan. 9, 2017)

United States v. Johnson, No. 16-50028 (Aug. 15, 2017)

United States v. Ovsepian, No. 17-50231 (Oct. 5, 2018)

United States v. Johnson, No. 18-50026 (Oct. 5, 2018)

United States v. Lianna Ovsepian, No. 14-50399 (June 10, 2016) (appeal of codefendant)

United States v. Tamazyan, No. 14-50037 (Feb. 3, 2015) (appeal of codefendant)

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OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-3, 4-5, 6-7) are not published in the Federal Reporter but are reprinted at 674 Fed. Appx. 712; 695 Fed. Appx. 304; and 739 Fed. Appx. 448.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2018. The petition for a writ of certiorari was filed on

[1] The appendix to the petition for a writ of certiorari is not sequentially paginated. This brief treated the appendix as if it were sequentially paginated, with the first page following the cover page to the appendix as page 1.

January 3, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; conspiracy to possess at least five identification documents having authentication features with intent to use them unlawfully, in violation of 18 U.S.C. 1028(f); aggravated identity theft, in violation of 18 U.S.C. 1028A; and conspiracy to engage in the misbranding of prescription drugs, in violation of 18 U.S.C. 371 and 21 U.S.C. 331(k). D. Ct. Doc. 1021, at 1 (July 20, 2015) (Ovsepian First Judgment); D. Ct. Doc. 1084, at 1 (Jan. 6, 2016) (Johnson First Judgment);[2] see Johnson Presentence Investigation Report (PSR) ¶ 3. In addition, Ovsepian was convicted of making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). Ovsepian First Judgment 1. The district court sentenced Johnson to 108 months of imprisonment, to be followed by three years of supervised release, and it sentenced Ovsepian to 180 months of imprisonment, to be followed by three years of supervised release. Johnson First Judgment 2; Ovsepian First Judgment 2. The court also ordered both petitioners and other co-

[2] Johnson's first judgment erroneously indicated that he was convicted following a guilty plea; in fact, he and Ovsepian were convicted together following a jury trial. See Pet. App. 4.

defendants, jointly and severally, to pay restitution in the amount of $9,146,137.71. Johnson First Judgment 1-2; Ovsepian First Judgment 1-2. The court of appeals vacated both petitioners' sentences and remanded for resentencing. Pet. App. 1-3, 4-5. On remand, the district court imposed the same sentences. D. Ct. Doc. 1189, at 1-2 (June 19, 2017) (Ovsepian Second Judgment); D. Ct. Doc. 1211, at 1-2 (Jan. 22, 2018) (Johnson Second Judgment). The court of appeals affirmed. Pet. App. 6-7.

1. Ovsepian and others operated Manor Medical Imaging, Inc. (Manor) in Glendale, California. Johnson PSR ¶ 15. Manor was a prescription mill that generated thousands of prescriptions for expensive anti-psychotic medications that its patients did not need. Ibid. The prescriptions purported to have been issued by Johnson, a physician, when in fact Johnson allowed other Manor employees to pose as physicians and to use his name and billing information to issue prescriptions. Id. ¶ 16.

The prescription mill employed patient recruiters, who identified beneficiaries of Medicare and Medi-Cal (a publicly funded health care benefit program in California) and brought them to Manor. Johnson PSR ¶¶ 14, 17. There, beneficiaries presented their health care program identification cards in exchange for cash or other inducements, and Manor staff issued them prescriptions. Id. ¶ 18. Drivers employed by Manor then took the beneficiaries to pharmacies to have those prescriptions filled and returned the medications to Manor, where they were repackaged and

diverted to the black market. Id. ¶¶ 19-21. In addition to the recruits who were paid cash, the beneficiaries also included 26 elderly Vietnamese individuals who were brought to Manor under false pretenses and believed they would receive genuine medical services there. Id. ¶¶ 22(b), 23. Those victims' health care benefits were used to obtain prescriptions without their knowledge or consent, and they were not compensated. Id. ¶ 22(b). Medicare and Medi-Cal paid the pharmacies approximately $9,146,137 in reimbursement for 14,705 fraudulent claims over the course of the scheme. Id. ¶ 24.

Petitioners and other Manor operators worked to perpetuate and conceal their fraud by maintaining physical patient files at Manor for the beneficiaries whose insurance benefits they appropriated; those files included falsified medical charts as well as copies of each patient's driver's license and health insurance card. D. Ct. Doc. 1176, at 11 (May 30, 2017) (Gov't Br. Regarding Ovsepian Resentencing) (summarizing evidence at trial). Those falsified files were presented to a Medi-Cal auditor to create the impression that Manor provided legitimate services to patients. Id. at 11-12.

2. A federal grand jury charged petitioners with conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; conspiracy to possess at least five identification documents having authentication features with intent to use them unlawfully, in violation of 18 U.S.C. 1028(f); aggravated identity theft, in

violation of 18 U.S.C. 1028A; and conspiracy to engage in the misbranding of prescription drugs, in violation of 18 U.S.C. 371 and 21 U.S.C. 331(k). Indictment 8-16, 19-21. Additionally, Ovsepian was charged with one count of making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). Indictment 34.

A jury found petitioners guilty on all counts. Ovsepian First Judgment 1; Johnson First Judgment 1; see Johnson PSR ¶ 3. The district court sentenced Johnson to 108 months of imprisonment, to be followed by three years of supervised release, and it sentenced Ovsepian to 180 months of imprisonment, to be followed by three years of supervised release. Ovsepian First Judgment 2; Johnson First Judgment 2. The court also ordered that both petitioners, along with other co-defendants, jointly and severally, pay restitution in the amount of $9,146,137.71. Johnson First Judgment 1-2; Ovsepian First Judgment 1-2. Neither petitioner raised any constitutional objection to the court's restitution order.

When calculating petitioners' recommended sentencing ranges under the Sentencing Guidelines, the district court adopted the Probation Office's recommendation to include a two-level increase under Sentencing Guidelines § 2B1.1(b)(10) (2010) in light of petitioners' unlawful use of authentication features -- namely, the health care program identification cards maintained by petitioners to conceal their scheme from authorities. D. Ct. Doc. 1066, at 32 (Dec. 4, 2015) (Ovsepian Sentencing Tr.); Ovsepian PSR

¶ 45; D. Ct. Doc. 1116, at 23 (May 13, 2016) (Johnson Sentencing Tr.); Johnson PSR ¶ 40.[3] Neither petitioner objected to that enhancement. See Ovsepian Sentencing Tr. 32; Johnson Sentencing Tr. 19.

3. Each petitioner appealed. Each argued, as relevant here, that the district court should not have applied the authentication-features enhancement because they each had also received a two-year consecutive sentence under 18 U.S.C. 1028A. Petitioners cited Application Note 2 to Guidelines Section 2B1.6 (2010), which states that a sentencing court should not "apply any specific offense characteristic for the transfer, possession, or use of a means of identification" with respect to an offense underlying an aggravated identify theft crime. 15-50338 Ovsepian C.A. Br. 10-11 (citation omitted); 16-50028 Johnson C.A. Br. 49 (citation and emphasis omitted). In addition, Ovsepian (but not Johnson) argued that the district court had erred under Apprendi v. New Jersey, 530 U.S. 466 (2000), in ordering restitution without a finding by the jury. Pet. App. 3. Ovsepian acknowledged, however, that he had not raised that claim in the district court. See 15-50338 Ovsepian C.A. Br. 25.

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[3] Johnson's presentence report mistakenly cited Guidelines § 2B1.1(b)(11) for the authentication-features enhancement, as opposed to Guidelines § 2B1.1(b)(10), where it was located in the 2010 version of the Guidelines that applied in Johnson's case. Johnson PSR ¶ 29. Amendments to the Guidelines between Johnson's crime and sentencing had relocated the enhancement to § 2B1.1(b)(11) without any substantive change. See 15-50338 Gov't C.A. Br. 15 n.3.

The court of appeals affirmed in part, but vacated petitioners' sentences and remanded for resentencing, on the ground that "the record [did] not show * * * why the district court applied a sentence enhancement for unlawful use or possession of an authentication feature." Pet. App. 2 (memorandum opinion in Ovsepian's appeal); id. at 4 (memorandum opinion in Johnson's appeal) (citation omitted).[4] The court rejected Ovsepian's Apprendi argument, relying on its prior opinion in United States v. Green, 722 F.3d 1146, 1151 (9th Cir.), cert. denied, 571 U.S. 1025 (2013), which determined that "Apprendi does not affect restitution." Pet. App. 3. The court additionally reasoned that restitution "does not implicate a statutory minimum like in Alleyne [v. United States, 570 U.S. 99 (2013)]." Pet. App. 3.

4. On remand, the district court imposed the same sentences it had originally imposed. Ovsepian Second Judgment 1-2; Johnson Second Judgment 1-2.

In advance of Ovsepian's resentencing hearing, the government explained that the "authentication features" enhancement was appropriate because the enhancement covered petitioners' unlawful use of authentication features in the identification cards that the conspirators maintained in Manor's patient files in order to

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[4] The court of appeals referred to the authentication-features enhancement as Guidelines § 2B1.1(b)(11), not § 2B1.1(b)(10), where it was located in the 2010 Guidelines that applied to petitioners' cases. As described in note 3, supra, the re-codification of the enhancement did not change its substance.

enhance the appearance that Manor provided legitimate medical services to bona fide patients. Gov't Br. Regarding Ovsepian Resentencing 13-14. The government also explained that those authentication features were distinct from the "means of identification" as to which Application Note 2 of Sentencing Guidelines § 2B1.6 (2010) would preclude an enhancement, because the "means of identification (names and insurance numbers) were necessary for the fraudulent billings, which were submitted electronically by pharmacies and included information such as the relevant identification numbers," whereas the "conspirators possessed and used authentication features for the purpose of concealment." Gov't Br. Regarding Ovsepian Resentencing 14; see D. Ct. Doc. 1191, at 10-11 (June 30, 2017) (Ovsepian Resentencing Tr.) (government counsel explaining the distinction between these "authentication features" and the "means of identification" of patients used to submit false claims to insurance providers).

The district court agreed with the government and referenced the government's arguments in explaining its decision to apply the authentication-features enhancement to each petitioner. See Ovsepian Resentencing Tr. 27 ("[A]s pointed out by counsel for the Government, a 2-level enhancement was justified because of [sic] the authentication features[ ] played, again, a distinct role in the defendant's scheme to defraud separate from the means of identification obtained from the beneficiaries[;] the conspirators used authentication features for purposes of hiding their scheme

to defraud, keeping their scheme from the Medi-Cal or Medicare auditors, which allowed them to perpetuate the fraudulent scheme over a long period of time."); D. Ct. Doc. 1215, at 7 (Apr. 19, 2018) (Johnson Resentencing Tr.) ("[T]he Court reaches the same conclusion in reference to Mr. Johnson as it did for Mr. Ovsepian in reference to the authentication feature enhancement.").

5. The court of appeals affirmed. Pet. App. 6-7. The court determined that, under the facts of this case, "Application Note 2 to section 2B1.6 did not bar the two-level authentication-feature enhancement," and that "the district court did not err in applying" the enhancement. Pet. App. 6.

ARGUMENT

Petitioners contend (Pet. 7-18) that Apprendi v. New Jersey, 530 U.S. 466 (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," id. at 490, applies to the calculation of restitution. The court of appeals correctly rejected that contention. As petitioners acknowledge (Pet. 18), every court of appeals to consider the question has determined that the imposition of restitution does not implicate Apprendi. And in any event, this case would be a poor vehicle for addressing the question presented, because petitioners each forfeited their Sixth Amendment argument by failing to raise it in the district court (and Johnson also failed to raise the argument on appeal),

and thus any appellate review would solely be for plain error. This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review of whether Apprendi applies to restitution, including in cases where the issue has been preserved.[5] The same result is warranted here.

Petitioners also contend (Pet. 19-24) that this Court should resolve "confusion" regarding Application Note 2 to Sentencing Guidelines Section 2B1.6, which prohibits double-counting at sentencing in the form of imposing both a two-year consecutive sentence for the use of a means of identification under 18 U.S.C. 1028A and applying an offense-level increase for the same conduct. That contention relates solely to the interpretation and application of the advisory Sentencing Guidelines and therefore

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[5] See, e.g., Hester v. United States, 139 S. Ct. 509 (2019) (No. 17-9082); Petras v. United States, 139 S. Ct. 373 (2018) (No. 17-8462); 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, 572 U.S. 1151 (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). The issue is also presented in the petition for a writ of certiorari in Budagova v. United States, No. 18-8938 (filed Apr. 17, 2019).

does not warrant review. In any event, no double-counting occurred here, because petitioners' two-year consecutive sentence was imposed based on their unlawful use of a means of identification (names and insurance numbers), whereas petitioners' sentencing enhancement was imposed based on their unlawful use of authentication features (health care program identification cards), which are legally and factually distinct.

1. a. The court of appeals correctly determined that Apprendi does not apply to restitution. Pet. App. 4; 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 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) (emphasis omitted).

The district court ordered petitioners to pay restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A. 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 determined 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; 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; 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; 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 reasoning 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 Co. v. United States, 567 U.S. 343 (2012), that "the rule of Apprendi applies to

the imposition of criminal fines," id. 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 petitioners' argument (Pet. 18), Southern Union does not require applying Apprendi to restitution. Southern Union 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).

Petitioners contend (Pet. 9-10) that the historical record supports extending Apprendi to restitution, asserting that, at common law, a victim could recover restitution for certain property crimes only if the stolen property was listed in the indictment. But petitioners' argument provides no sound basis for extending Apprendi to grant additional rights to defendants themselves in the context of restitution. Unlike facts that determined the amount of a criminal fine, the historical consequence of omitting facts from the indictment relevant only to restitution was not that the indictment was defective or that the defendant was permitted to retain the stolen property. Rather, the stolen property was simply "forfeit[ed], and confiscate[d] to the king," instead of to the victim. 1 Matthew Hale, The History of the Pleas of the Crown 538 (1736); see id. at 545; James Barta, Note, Guarding the Rights of the Accused and Accuser, 51 Am. Crim. L. Rev. 463, 473 ("Any goods omitted from the indictment were forfeited to the crown.").

Since Southern Union, at least seven courts of appeals have considered in published opinions whether to overrule their prior precedents declining to extend the Apprendi rule to restitution. Each determined, 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.) (reasoning 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; 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.) (explaining that 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 v. United States, 570 U.S. 99 (2013), 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," id. at 108, 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. Accordingly, since Alleyne, every court of appeals to consider whether the decision in Alleyne requires that the Apprendi rule extend to restitution has determined that it does not. See, e.g., Pet. App. 3; Kieffer, 596 Fed. Appx. at 664; 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; United States v. Holmich, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 135 S. Ct. 1155 (2015).

Petitioners' reliance (Pet. 16-18) 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 a prescribed 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.

d. Petitioners acknowledge (Pet. 18) that the courts of appeals are not divided on the question presented. Although those courts employ somewhat different reasoning, they all agree that

Apprendi does not apply to restitution. This Court's review is therefore not warranted.

In any event, this case would be an unsuitable vehicle for considering the question presented. Neither petitioner raised the issue in the district court, and Johnson did not raise it even in the court of appeals. Petitioners' Sixth Amendment argument is therefore reviewable on appeal only for plain error. See Fed. R. Crim. P. 52(b); see Puckett v. United States, 556 U.S. 129, 135 (2009); see also 15-50338 Gov't C.A. Br. 67-68. On plain-error review, petitioners would be entitled to relief only if they could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [their] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted); see Cotton, 535 U.S. at 631-632 (applying plain-error review to a claim of an Apprendi error). In light of the courts of appeals' unanimous rejection of their Sixth Amendment argument, petitioners cannot demonstrate error that is "clear or obvious, rather than subject to reasonable dispute." Marcus, 560 U.S. at 262 (citation omitted). Nor can petitioners demonstrate that any error affected their substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Petitioners have never argued that submitting the restitution issue to the jury would have

resulted in a lower calculation of the amount of restitution they jointly and severally owe.

2. Petitioners separately contend (Pet. 19-24) that this Court should grant review to "resolve the confusion" regarding Application Note 2 to Sentencing Guidelines § 2B1.6. Such review is not warranted.

First, petitioners' contention relates solely to the interpretation and application of the advisory Sentencing Guidelines. This Court typically leaves issues of Guidelines application to the Sentencing Commission, which is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Because the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it."). Petitioners identify no reason for this Court to depart from that longstanding practice here.

In any event, petitioners' claim lacks merit. The district court correctly determined that petitioners were subject to an enhancement under Sentencing Guidelines § 2B1.1(b)(10) (2010), see Ovsepian Resentencing Tr. 26-27; Johnson Resentencing Tr. 7, and the court of appeals found no error "under the facts in this case," Pet. App. 6. That provision imposes a two-level enhancement on a defendant convicted of a fraud offense "[i]f the offense involved [ ] the possession or use of any * * * authentication feature." Sentencing Guidelines § 2B1.1(b)(10) (2010). Petitioners err in suggesting that the application of that enhancement was impermissible in their cases in light of Application Note 2 to Sentencing Guidelines § 2B1.6, which implements the aggravated identity theft statute, 18 U.S.C. 1028A.

Section 1028A prescribes a mandatory consecutive two-year term of imprisonment for any person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" during and in relation to specified offenses, including, as relevant here, conspiracy to commit health care fraud. 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(c)(5). The application note on which petitioners rely states that, if a defendant is sentenced for a violation of Section 1028A(a)(1) "in conjunction with a sentence for an underlying offense," the court should not enhance the recommended sentencing range for the underlying offense based on "the transfer, possession, or use of a means of identification" as that term is

defined in 18 U.S.C. 1028(d)(7). Sentencing Guidelines § 2B1.6, comment. (n.2) (2010).

Section 1028(d)(7), in turn, defines a "means of identification" as:

> any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any --
>
> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (C) unique electronic identification number, address, or routing code; or
>
> (D) telecommunication identifying information or access device (as defined in section 1029(e)).

18 U.S.C. 1028(d)(7).

An "authentication feature," by contrast, is separately defined in the Guidelines by reference to 18 U.S.C. 1028(d)(1). Sentencing Guidelines § 2B1.1, comment. (n.9(A)) (2010). Section 1028(d)(1) defines "authentication feature" as "any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified." 18 U.S.C. 1028(d)(1).

Thus, an authentication feature, while potentially intended to be used to authenticate a means of identification, is not itself a means of identification, and the placement of the definitions in separate subsections of Section 1028(d) makes that distinction plain. Application Note 2 to Guidelines § 2B1.6, which prohibits double-counting in the form of imposing both a consecutive two-year term of imprisonment and an increase to a defendant's offense level under the Guidelines in connection with a "means of identification," thus does not preclude an enhancement for an "authentication feature."

The cases that petitioners cite (Pet. 19-20) are not to the contrary. None of those cases involved authentication features, and each case's discussion of Application Note 2 in other contexts is inapposite. In United States v. Zheng, 762 F.3d 605 (2014), for example, the Seventh Circuit found that a defendant's use of a passport had been double-counted because the passport could constitute "both an 'identification document,'" the basis for the Guidelines enhancement, and "a 'means of identification,'" the basis for the Section 1028A conviction. Id. at 610. This case, by contrast, has no similar overlap: the means of identification that formed the basis for the Section 1028A convictions were the beneficiaries' identifying information transmitted to Medicare and Medi-Cal to trigger payment, whereas the authentication features that formed the basis for the Guidelines enhancements were those contained within the patient files at Manor to bolster the false

impression that Manor actually provided legitimate services to identifiable patients. See Ovsepian Resentencing Tr. 26-27 ("[A]s pointed out by counsel for the Government, a 2-level enhancement was justified because of [sic] the authentication features[ ] played, again, a distinct role in the defendant's scheme to defraud separate from the means of identification obtained from the beneficiaries[;] the conspirators used authentication features for purposes of hiding their scheme to defraud, keeping their scheme from the Medi-Cal or Medicare auditors, which allowed them to perpetuate the fraudulent scheme over a long period of time.").

The other cases that petitioners cite are even further afield. In each case, the court of appeals found that a Guidelines enhancement and a two-year consecutive term of imprisonment under Section 1028A constituted impermissible double-counting where the Guidelines enhancement was triggered by the use of an "access device," which is explicitly included in Section 1028(d)(7)'s definition of "means of identification." United States v. Charles, 757 F.3d 1222, 1226-1227 (11th Cir. 2014); United States v. Doss, 741 F.3d 763, 767-768 (7th Cir. 2013); United States v. Lyons, 556 F.3d 703, 708 (8th Cir. 2009). The definition of "means of identification" does not explicitly include "authentication features," so the reasoning of those cases is inapplicable here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ANDREW W. LAING
Attorney

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