No.

IN THE SUPREME COURT OF THE UNITED STATES

ARTAK OVSEPIAN AND
KENNETH WAYNE JOHNSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

DEVIN BURSTEIN
WARREN & BURSTEIN
501 West Broadway, Suite 240
San Diego, California 92101
Telephone (619) 234-4433
db@wabulaw.com

Counsel for Kenneth Wayne Johnson

BENJAMIN L. COLEMAN
Counsel of Record
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Artak Ovsepian

QUESTIONS PRESENTED

In *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012), the Court held "that the rule of *Apprendi* applies to the imposition of criminal fines." That holding was based largely on how criminal fines were treated historically, under common law. *See id.* at 353-56. Despite the fact that the historical records with respect to requiring jury findings to support criminal fines and criminal restitution are the same, and that restitution is part of a criminal sentence, the circuit courts have all declined to apply the rule of *Apprendi* (and *Southern Union*) to criminal restitution. The first question presented is: should the rule of *Apprendi* apply to the imposition of criminal restitution?

The lower courts have taken different approaches in applying the double-counting rule set forth in the commentary to U.S.S.G. § 2B1.6, which governs aggravated identity theft convictions under 18 U.S.C. § 1028A. The second question presented is: when does the commentary to § 2B1.6 apply so as to prohibit application of both an increase under the Sentencing Guidelines and a two-year consecutive sentence under § 1028A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

MISCELLANEOUS

OPINIONS BELOW

The Ninth Circuit's decisions in petitioners' first appeal affirming in part and reversing in part can be found at *United States v. Ovsepian*, 674 Fed. Appx. 712 (9th Cir. Jan. 9, 2017) and *United States v. Johnson*, 695 Fed. Appx. 304 (9th Cir. Aug. 15, 2017). The Ninth Circuit's decision in petitioners' second appeal affirming after resentencing can be found at *United States v. Ovsepian*, 739 Fed. Appx. 448 (9th Cir. Oct. 5, 2018).

JURISDICTION

The court of appeals filed its decision on October 5, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment states: "In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S.S.G. § 2B1.6 states:

> (a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapter Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction. . . .
>
> *Application Notes* . . . .
>
> 2. *Inapplicability of Chapter Two Enhancement*.– If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7). . . .

STATEMENT OF THE CASE

In 2011, a federal grand jury in the Central District of California returned an indictment charging petitioners, Artak Ovsepian and Kenneth Wayne Johnson, and numerous codefendants with several offenses, including conspiracy to commit health care fraud, conspiracy to possess and possession of identification documents and authentication features, aggravated identity theft, conspiracy to misbrand prescription drugs, and false statement to a federal officer.[1] The charges were based on the petitioners' involvement with Manor Medical Imaging, Inc. ("Manor"), a business located in Glendale, California.

The indictment generally alleged that Manor functioned as a "prescription mill" for expensive medications that patients did not need and that Medicare and Medi-Cal paid millions of dollars for the fraudulent prescriptions. The defendants recruited beneficiaries of those programs, who would be given cash or other inducements to go to Manor to receive the fraudulent prescriptions. The prescriptions were signed by petitioner Johnson, a medical doctor, but he

---

[1] Relevant to this petition, the aggravated identity theft charge under 18 U.S.C. § 1028A alleged: "Beginning on a date unknown, and continuing through on or about October 27, 2011 . . . defendants . . . knowingly transferred, possessed, and used . . . without lawful authority, a means of identification of another person, that is, the names and unique government-issued public health care identification numbers of H.T., A.V., M.V., R.E., R.R., Q.T., E.P., S.M., E.R., T.D., and J.H., during and in relation to a felony violation of Title 18, United States Code, Section 1349, Conspiracy to Commit Health Care Fraud . . . ."

would not properly examine the patients and instead allowed other codefendants to examine the beneficiaries and to issue them prescriptions under his name. In total, the indictment stated that Medicare and Medi-Cal paid $7,291,419 for the prescriptions. That money was sent to pharmacies, owned by other codefendants, who then laundered those funds. The indictment alleged that petitioner Ovsepian's role was to drive the beneficiaries from Manor to the pharmacies to fill the fraudulent prescriptions, and he would collect the medications from the beneficiaries and deliver them back to Manor.

Petitioners proceeded to a jury trial, and the jury convicted them. The jury, however, did not return a finding as to the amount of loss attributable to petitioners' alleged fraud or the amount of restitution for which they were liable. At sentencing, the district court imposed restitution in the amount of $9,146,137.71, although the indictment alleged that Medicare and Medi-Cal paid $7,291,419 for the prescriptions processed by Manor, nearly $2 million less.

The district court also imposed custodial sentences of 180 months (15 years) for petitioner Ovsepian and 108 months (9 years) for petitioner Johnson. In doing so, the district court imposed 2-year consecutive sentences on petitioners for their aggravated identity theft convictions under § 1028A and assessed a 2-level increase under U.S.S.G. § 2B1.1(b)(11) for use of an authentication feature or

means of identification. The § 2B1.1(b)(11) increase was based on reasoning in the Presentence Report ("PSR") that the "co-conspirators unlawfully used authentication features and identification documents of the recruited beneficiaries."

In a first appeal, the Ninth Circuit rejected petitioner Ovsepian's claim that the restitution order failed to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). It reasoned that it had already held that *Apprendi* does not apply to restitution in cases like *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013) and that "[r]ecent Supreme Court authority" did not sufficiently "undercut the rationales" of its prior precedent. "On the whole, there is not enough support to conclude that intervening authority has sufficiently undercut *Green*'s rationales to be 'clearly irreconcilable' for this panel to overrule circuit precedent."

Petitioners also contended on appeal that, under U.S.S.G. § 2B1.6, they improperly received both a two-year consecutive sentence for using a means of identification under § 1028A and a 2-level increase for similar conduct under U.S.S.G. § 2B1.1(b)(11). The Ninth Circuit reversed petitioners' sentences and ordered the district court to explain why it imposed the § 2B1.1(b)(11) enhancement and to address whether the enhancement constituted impermissible double counting with the consecutive sentence imposed on petitioners for

aggravated identity theft.

On remand, the district court imposed the same sentences on petitioners. The district court again imposed both the § 2B1.1(b)(11) increase and the 2-year consecutive sentence for aggravated identity theft and explained:

> I recognize that it's an intricate, complex issue, but the record that I would make in reference to the double-counting is the defendant's conviction for the aggravated identity theft, that was Count Five, as pointed out by the Government, related to a specific victim. That victim testified in this Court, and that victim has been identified as H.T. The Court did not apply the 2-level enhancement because of the conduct related to Count Five or H.T.
>
> Again, as pointed out by counsel for the Government, a 2-level enhancement was justified because of 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. And so the conspirators used authentication features for purposes of hiding their scheme to defraud, keeping their scheme from the Medi-Cal or the Medicare auditors, which allowed them to perpetrate the fraudulent scheme over a long period of time. And they submitted various falsified documents to perpetuate the scheme, and the Court applied the enhancement to address that conduct.

On petitioners' second appeal, the Ninth Circuit affirmed the application of both the § 2B1.1(b)(11) increase and the 2-year consecutive sentence. The Ninth Circuit simply stated: "[U]nder the facts in this case, Application Note 2 to section 2B1.6 did not bar the two-level authentication-feature enhancement under U.S.S.G. § 2B1.1(b)(11)(A)(ii)."

ARGUMENT

I. This Court should grant review to consider whether *Apprendi* applies to restitution.

In *Southern Union*, the Court held "that the rule of *Apprendi* applies to the imposition of criminal fines." 567 U.S. at 360. The Court's reasoning in *Southern Union*, including its reliance on the historical record, applies equally to criminal restitution. But the Ninth Circuit – and seven other circuits that have addressed the issue – has concluded that *Southern Union* does not provide sufficient justification to overrule prior, uniform circuit precedent holding that *Apprendi* does not apply to criminal restitution. Petitioners request that the Court grant their petition because this error is entrenched across all the circuits and relates to an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

Apprendi 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." 530 U.S. at 490. "[T]he '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). "In other words, the relevant 'statutory maximum' . . . is not the

maximum sentence a judge may impose after finding additional facts, but the maximum [she] may impose *without* any additional findings." *Id.*

Apprendi's rule is "rooted in longstanding common-law practice." *Cunningham v. California*, 549 U.S. 270, 281 (2007); *see also Alleyne v. United States*, 570 U.S. 99, 109-10 (2013). It's core concern is to the ensure that the jury determines "facts that warrant punishment for a specific statutory offense." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). But it also serves an important notice function, because its requirement that "a fact that increas[es] punishment must be charged in the indictment" 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).

In *Southern Union*, the Court applied the *Apprendi* rule to criminal fines, because "[c]riminal fines, like . . . other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses." 567 U.S. at 349. The Court noted that "[i]n stating *Apprendi*'s rule, [it had] never distinguished one form of punishment from another. Instead, [the Court's] decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment [s]'—terms that each undeniably embrace fines." *Id.* at 350 (citations omitted).

As it had done in every case in the *Apprendi* line, the Court in *Southern Union* based its holding largely on its "examin[ation of] the historical record, because 'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.'" *Southern Union*, 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170). In that regard, the Court noted that "the salient question . . . is what role the jury played in prosecutions for offenses that [fixed] the amount of a fine to the determination of specified facts – often, the value of damaged or stolen property." *Southern Union*, 567 U.S. at 353-56. The Court concluded from its "review of state and federal decisions . . . that the predominant practice was for such facts to be alleged in the indictment and proved to the jury." *Id.* at 354. The historical record is the same with respect to criminal restitution.

Prior to 1529, there was no method for awarding criminal restitution, and anything seized from a criminal defendant became property of the Crown. In that year, "King Henry VIII and Parliament authorized a writ of restitution in successful larceny indictments," which allowed a victim to recover stolen property. James Barta, *Guarding the Rights of the Accused and Accuser: the Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473 (Spring 2014) (citing Matthew Hale, 1 *Historia Placitorum Coronae: the History of the Pleas of the Crown*, at 541-43 (1736), and

Theodore F. T. Plucknett, *A Concise History of the Common Law*, at 451-52 (1929)). That recovery was limited to "goods listed in the indictment and found in the felon's possession." Barta, *supra*, at 473 (citing Hale, 1 *Pleas of the Crown*, at 541-43, and Edward Hyde East, 2 *A Treatise of the Pleas of the Crown* §171, at 787-89 (1806)). This practice became standard over time:

> Such was the influence of the 1529 statute that, by the eighteenth century, courts no longer required a writ of restitution. Instead, courts awarded restitution in successful prosecutions as a matter of common law in both England and America. After a larceny conviction, William Blackstone says that courts would "order, (without any writ), immediate restitution of such goods as are brought into court . . . ." Where the goods were no longer in the culprit's possession, a court would sometimes allow victims to recover the monetary value of the goods. Likewise, the American treatise-writer Joel Prentiss Bishop reports that American courts in the nineteenth-century would award restitution in the manner that Blackstone described.

Barta, *supra*, at 473 (citing several common law treatises). "[T]he relative consistency [of the historical record] is striking. Courts imposed restitution primarily for property crimes. Courts and legislatures often tied the amount of restitution owed to the loss the victim had sustained. And courts generally required the stolen property to be described in the indictment or valued in a special verdict." *Id.* at 476.

The district court imposed restitution in this case under the

Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §3663A, which deviates substantially from the historical practice discussed above. Under the MVRA, 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 18 U.S.C. §3664. *See* 18 U.S.C. §3663A(d). Section 3664(e) places on the government the burden of proving that an entity or person is a victim, and, if so, the appropriate amount of restitution to award. Evidence on this matter is first presented to the district court post-conviction, through allegations made by the government and in the presentence report. The district court may then "require additional documentation or hear testimony," or it may order restitution based on the papers submitted. 18 U.S.C. §3663A(d)(4). Of course, these procedures come up far short of what is required by *Apprendi*.

Prior to this Court's decision in *Southern Union*, nearly every circuit considered whether the principles set out in *Apprendi* apply to criminal restitution, and all concluded the answer is no.[2] Since *Southern Union* was decided, eight

[2] *See, e.g., United States v. Milkiewicz*, 470 F.3d 390, 391 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 104 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2007) (*en banc*); *United States v. Nichols*, 149 Fed. App'x 149, 153 (4th Cir. 2005) (unpublished opinion); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 453 (6th Cir. 2005); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005); *United States v. Williams*, 445 F.3d

circuit courts have assessed that opinion's impact on those prior holdings, and each has held that the prior, uniform circuit precedent has not been undermined. Courts have given two reasons for that conclusion.

The Seventh and Eighth Circuits noted that they had previously concluded that *Apprendi* principles do not apply to criminal restitution because it is civil in nature, rather than criminal punishment, and both courts found that *Southern Union* did not undermine that conclusion. *See United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012).

The Second, Fourth, Fifth, and Sixth Circuits distinguished *Southern Union* by pointing out that the fines in that case were capped by an explicit statutory maximum, whereas restitution under the MVRA has no statutory cap, thus a court's imposition of restitution cannot exceed a statutory maximum. *See United States v. Bengis*, 783 F.3d 407, 412-13 (2d Cir. 2015) (holding that because MVRA does not state a maximum restitution amount, it "does not implicate a defendant's Sixth Amendment rights"); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (relying on prior Fifth Circuit precedent to reject challenge to restitution based on *Southern Union*, "because no statutory maximum applies to

---

1302, 1310 (11th Cir. 2006).

restitution"); *United States v. Jarjis*, 551 Fed. Appx. 261 (6th Cir. 2014) (same with respect to Sixth Circuit precedent) (unpublished opinion); *United States v. Day*, 700 F.3d 713, 731 (4th Cir. 2012) ("Critically, however, 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").

The Ninth and Tenth Circuits have relied on both the not-punishment and no-maximum rationales to conclude that *Southern Union* does not apply to imposition of restitution under the MVRA. *See United States v. Burns*, 800 F.3d 1258, 1261 (10th Cir. 2015) (relying on conclusion that "there is no statutory maximum" for restitution); *United States v. Keifer*, 596 Fed. App'x 653, 664 (10th Cir. 2014) (relying on conclusion that "Tenth Circuit precedent is clear that restitution is a civil remedy designed to compensate victims – not a criminal penalty"); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (relying on both reasons). Both reasons are lacking, as addressed below.

First, however, it is useful to point out a major flaw in both lines of cases: they ignore the historical requirement that any claimed criminal restitution had to be charged in the indictment, and the facts supporting that restitution had to be found by a jury. Yet attention to historical practice has driven the Court's

Apprendi line of cases. In *Southern Union* this Court emphasized that the "Court of Appeals [in that case] was correct to examine the historical record, because 'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.'" 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170).

Turning to the rationale that restitution does not amount to "criminal punishment," that is an extremely weak basis for declining to apply *Apprendi* to imposition of restitution under the MVRA. This Court has explicitly stated that "[t]he purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for [the defendant's criminal] conduct." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). Moreover, restitution is imposed as part of the criminal "sentence," at the behest of the government. *See* 18 U.S.C. §3663A (a)(1). "The 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). For exactly those reasons, this Court has analogized restitution to criminal fines and said that there is strong reason to believe that the Excessive Fines Clause of the Eighth Amendment applies to criminal restitution. *See Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014).

Equally wrong is the reasoning that *Apprendi* does not apply to the MVRA because there is no statutory maximum for restitution. There are several

flaws with that assertion.

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. 567 U.S. at 353-56. For example, *Southern Union* relied on *Commonwealth v. Smith*, 1 Mass. 245, 247 (1804), a larceny case in which the court was authorized to order a fine of three times the amount of money stolen, which the court declined to do with respect to property that was not listed or valued in the indictment. There was no statutory maximum applicable to that fine. The same holds true for the other historical cases relied on in *Southern Union*, which all dealt with offenses for which the available fine was determined by the value of property stolen or damaged. 567 U.S. at 354-55.

Second, "[t]he MVRA does, in fact, prescribe a statutory maximum" penalty – the amount of the victim's loss. Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?*, 64 Ala. L. Rev. 803, 828 (2013); *see United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012) ("award of restitution greater than a victim's actual loss exceeds the MVRA's statutory maximum"); *United States v. Bussell*, 414 F.3d 1048, 1061 (9th Cir. 2005) ("amount of restitution is limited by the victim's actual losses"); *United States v.*

Broughton-Jones, 71 F.3d 1143, 1147 (4th Cir. 1995) (excessive restitution "is no less illegal than a sentence of imprisonment that exceeds the statutory maximum").

Third, the no-statutory-maximum distinction is akin to that rejected in *Alleyne*. There the government argued that *Apprendi* should not be applied to facts that support imposing a mandatory minimum sentence because those facts do not alter the maximum penalty, which in that case permitted life imprisonment. The Court rejected that argument, 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." *Alleyne*, 570 U.S. at 115. Here, the circumstances even more strongly favor application of the *Apprendi* rule, because without the district court's fact finding *no* restitution could have been imposed under the MVRA.

Finally, the no-statutory-maximum distinction does not jibe with the definition of "statutory maximum sentence" set out in *Blakely*, which states that "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." 542 U.S. at 303. Without the district court making additional fact findings in petitioners' case, it could not have ordered any restitution under

the MVRA. As Judge Bye said in his dissent in *United States v. Carruth*, 418 F.3d 900 (8th Cir. 2005):

> Once we recognize restitution as being a "criminal penalty" the proverbial *Apprendi* dominoes begin to fall. While many in the pre-*Blakely* world understandably subscribed to the notion *Apprendi* does not apply to restitution because restitution statutes do not prescribe a maximum amount . . . this notion is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum. To this end, *Blakely*'s definition of "statutory maximum" bears repeating again, "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*, 124 S.Ct. at 2537 (emphasis added). Applying this definition to the present case, it dictates a conclusion that the district court's order imposing a $26,400 restitution amount violates the Sixth Amendment's jury guarantee because all but $8,000 of said amount was based upon facts not admitted to by Carruth or found by a jury beyond a reasonable doubt.

Carruth, 418 F.3d at 905 (Bye, J., dissenting). Judge McKee made the same point dissenting in *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (*en banc*):

> The majority's analysis requires that we accept the proposition that an order of restitution rests upon the jury's verdict alone, even though no restitution can be imposed until the judge determines the amount of loss. We must also accept that adding a set dollar amount of restitution to a sentence does not "enhance" the sentence beyond that authorized by the jury's verdict alone. I suspect that a defendant who is sentenced to a period of imprisonment and ordered to pay restitution in the

> amount of $1,000,000 would be surprised to learn that his/her sentence has not been enhanced by the additional penalty of $1,000,000 in restitution. "*Apprendi* held[ ] [that] every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313 (emphasis in original). Determining the amount of loss is "legally essential" to an order of restitution.

Leahy, 438 F.3d at 343-44 (McKee, J., dissenting)

The discussion above makes clear that the principles set out in *Apprendi* and *Southern Union* apply equally to criminal restitution. However, the circuit courts do not view *Southern Union* as a strong enough indicator of Constitutional law to overrule their contrary precedent. This is well illustrated in the controlling Ninth Circuit case, which stated:

> Our precedents are clear that *Apprendi* doesn't apply to restitution, but that doesn't mean our caselaw's well-harmonized with *Southern Union*. Had *Southern Union* come down before our cases, those cases might have come out differently. Nonetheless, our panel can't base its decision on what the law might have been. Such rewriting of doctrine is the sole province of the court sitting *en banc*. Faced with the question whether *Southern Union* has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable,' we can answer only: No.

Green, 722 F.3d at 1151. Given the circuit courts' uniform unwillingness to revisit the issue following *Southern Union*, this Court should resolve the issue.

II. This Court should grant review to resolve the confusion regarding application of 18 U.S.C. § 1028A and U.S.S.G. § 2B1.6.

Section 2B1.6 governs aggravated identity theft convictions and states: "If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by the statute." U.S.S.G. § 2B1.6. Application note 2 states: "If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply *any* specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction . . . ." U.S.S.G. § 2B1.6 comment. (n.2) (emphasis added). The use of the word "any" is expansive, *see Brogan v. United States*, 522 U.S. 398, 400-01 (1998); *United States v. Gonzales*, 520 U.S. 1, 5 (1997), and the lower courts are divided on the application of this commentary.

Applying the commentary to § 2B1.6, the Seventh, Eighth, and Eleventh Circuits have held that a defendant cannot receive both a guidelines increase for using a means of identification and a 2-year consecutive sentence pursuant to § 1028A under similar circumstances. *See United States v. Zheng*, 762 F.3d 605, 610 (7th Cir. 2014); *United States v. Charles*, 757 F.3d 1222, 1226-27 (11th Cir. 2014); *United States v. Doss*, 741 F.3d 763, 767-68 (7th Cir. 2013);

United States v. Lyons, 556 F.3d 703, 708 (8th Cir. 2009). The Ninth Circuit's unexplained decision in this case conflicts with this authority.

Similarly, the district court's limited analysis also conflicts with the commentary, as interpreted by this precedent, and was otherwise erroneous. The commentary does not state that a court can impose both the 2-level increase and the 2-year consecutive sentence if it can somehow draw a distinction between the precise conduct supporting both increases. Instead, the commentary is simple and direct – do not apply *any* specific offense characteristic for use of a means of identification when a 2-year consecutive sentence is imposed.

The Eighth Circuit's decision in *Lyons*, 556 F.3d at 708, supports this straightforward interpretation of the plain language in the commentary. In *Lyons*, the Eighth Circuit reversed a sentence based on application note 2 to § 2B1.6. In doing so, the Eighth Circuit rejected the government's argument that both the § 2B1.1(b)(11) increase and the 2-year consecutive sentence under § 1028A could apply because the conduct involved both a counterfeit driver's license and counterfeit credit cards. *Id.* at 708. Even though the court could theoretically justify both increases based on separate conduct, basing one on the driver's licence and the other on the credit card, the straightforward language in the commentary barred the 2-level increase.

The district court's attempt to justify the 2-year consecutive sentence under § 1028A based on one specific identity theft victim while basing the 2-level increase on other identity theft victims was similarly flawed. Not only did this analysis conflict with the plain language of the commentary and *Lyons*, but it also failed to recognize that petitioners received a 2-level increase based on the *number* of identity theft victims under § 2B1.1(b)(2). In other words, the guidelines contemplate that an offense may involve numerous identity theft victims and include a specific offense characteristic to address that conduct. Thus, even if so-called "double counting" were the only concern, the district court's analysis did not eliminate "double counting" because its multiple-victim rationale constituted "double counting" with § 2B1.1(b)(2).[3]

Similarly, the district court's efforts to distinguish between "authentication features," which it did not specifically describe, and "means of identification" also conflicts with the plain language of the guidelines because the relevant definition of an "authentication feature" incorporates the definition of a "means of identification."[4] The guidelines use the statutory definitions. *See*

---

[3] In any event, the § 1028A charge did not specify one victim, as maintained by the district court. Instead, that count alleged a continuing course of conduct involving 11 different victims.

[4] The district court did not rely on the PSR's assertion that the conspirators used "identification documents." For the reasons discussed in the text,

U.S.S.G. § 2B1.1 comment. (nn. 1 and 10); U.S.S.G. § 2B1.6 comment. (n.2). The relevant portion of the statutory definition of an "authentication feature" in this case is a "sequence of numbers or letters . . . that either individually or in combination with another feature is used by the issuing authority on . . . [a] *means of identification* to determine if the document is counterfeit, altered, or otherwise falsified . . . ." 18 U.S.C. § 1028(d)(1) (emphasis added).[5] As explained by the Seventh Circuit when finding that application note 2 to § 2B1.6 was applicable, the definitions in section 1028(d) "overlap," and thus an "authentication feature" can also be a "means of identification." *Zheng*, 762 F.3d at 610; *see Doss*, 741 F.3d at 767-68.

Indeed, the uses of "means of identification" underlying the § 1028A violation as alleged in the indictment were the uses of "names and unique government-issued public health care identification numbers . . . ." The district court did not explain any material difference, or any difference at all, between an "authentication feature" and "means of identification" for purposes of § 1028A and § 2B1.1(b)(11) in this case. This reasoning also conflicts with the Seventh

---

the result would be the same even if it did rely on an "identification document" theory.

[5] A "means of identification" is defined as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual . . . ." 18 U.S.C. § 1028(d)(7).

Circuit's opinions in *Zheng* and *Doss*, which demonstrate that a sentencing court cannot classify a "means of identification" as another term of art, such as an "authentication feature," "unauthorized access device," or an "identification document," to avoid application note 2. In *Doss*, for example, the Seventh Circuit rejected the government's attempt to define driver's licenses as access devices in order to avoid application note 2.

The district court's short and vague explanation mentioned that the conspirators used authentication features to hide the scheme from auditors so that they could perpetrate it over a long period of time. It is not clear what the district court meant by this rationale. The conspirators used the victims names and identification numbers to defraud Medicare and Medi-Cal. This same conduct supported both the 2-year consecutive sentence and the 2-level increase. Once again, the effort to dissect the conduct into different uses is inconsistent with the precedent of several circuits and the plain language in application note 2.

Furthermore, under the guidelines, the term "offense" means "the offense of conviction and all relevant conduct under § 1B1.3 . . . ." U.S.S.G. § 1B1.1 comment. (n.1). When application note 2 states not to add an identity theft specific offense characteristic to the underlying "offense," it means the relevant conduct for all of the counts of conviction. Indeed, application note 2 states that §

2B1.6 "accounts for this factor [use of a means of identification] for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." U.S.S.G. § 2B1.6 comment. (n.2).

In sum, the Ninth Circuit's decision below conflicts with opinions of the Seventh, Eighth, and Eleventh Circuits. This Court should grant review to resolve the conflict and confusion.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Dated: January 3, 2019

Respectfully submitted,

s/Benjamin L. Coleman

DEVIN BURSTEIN
WARREN & BURSTEIN
501 West Broadway, Suite 240
San Diego, California 92101
Telephone (619) 234-4433
db@wabulaw.com

Counsel for Kenneth Wayne Johnson

BENJAMIN L. COLEMAN
Counsel of Record
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Artak Ovsepian