NO:

IN THE
SUPREME COURT OF THE UNITED STATES

KERRI KALEY,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court 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." Subsequently, 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." The Court based this holding, in large part, because under the common law criminal fines were pegged to facts charged in an indictment and proven to a jury. *See id*. at 353-56. Despite the fact that the historical record 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 question presented is: should the rule of *Apprendi* apply to the imposition of criminal restitution?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Kerri Kaley respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case numbers 16-17543-GG and 17-11061-GG in that court on January 8, 2019, *United States v. Kerri Kaley*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 8, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

More than ten years ago, a grand jury indicted Kerri Kaley ("Kerri"), her husband Brian Kaley ("Brian") (collectively "the Kaleys"), and others with a conspiracy to transport stolen prescription medical devices (PMDs), in violation of 18 U.S.C. § 371; five substantive counts of transportation of stolen PMDs, in violation of 18 U.S.C. § 2314; and one substantive count of witness tampering, in violation of 18 U.S.C. § 1512(b)(3).

At her first trial, the jury found Kerri guilty of the witness tampering count but failed to reach a verdict on the other counts. The government decided to re-try Kerri. At her retrial, the jury convicted Kerri of the remaining counts.

The district court sentenced Kerri to 36 months' imprisonment and deferred the restitution determination. At the subsequent restitution hearing, the district court, despite no findings having been made by the jury, ordered that Kerri pay $841,420.

Kerri timely appealed her conviction and sentence, as well as the order of restitution.

Kerri, Jenny Gruenstrass ("Jenny"), Alan Schmidt ("Alan"), Frank Tarsia ("Frank"), and Roni Keskiyan ("Roni") were sales representatives for Ethicon Endosurgery, Inc. or Ethicon, Inc., (collectively "Ethicon") both subsidiaries of Johnson & Johnson. Kerri later obtained the position of Division Manager and supervised a group of sales representatives. Brian operated two companies: BKB Construction Corporation and Window Pro, Inc., and did not work for Ethicon.

Ethicon manufactured various PMDs, including suture material, and the sales representatives promoted and marketed these products to hospitals in the New York City area. During their employment at Ethicon, Kerri, Jenny, Alan, Frank, and Roni obtained PMDs and sold them to John Danks, a former Ethicon employee, for resale in the "gray" market.

Ethicon assigned each sales representative six to twelve hospitals depending on sales volume. The sales representatives worked on a typical salary plus commission basis. Ethicon expected each sales representative to sell various product lines to each hospital, and to service those hospitals. To accomplish both these goals, the sales representatives first would try to convince the surgeons to use Ethicon products, and then convince hospital administration to purchase the products.

Under company policy, sales representatives were not permitted to sell Ethicon products to unauthorized distributors. They also were not allowed to have another job.

Ethicon upgraded and improved their products "all the time." As indicated above, the sales representatives would pitch the surgeons as to the newer product because they drove the purchasing. When the surgeon wanted to use a new product, the previously used product became "obsolete."

As a general matter, Ethicon did not want to take "obsolete" product back; it actively discouraged returns of sold product and created a number of obstacles for

customers to return product. Ethicon would deny 90% of requests to return "obsolete" product.

John Danks ("John") previously worked for Ethicon as a sales representative. While employed by Ethicon, hospitals gave him excess medical products. John legitimately obtained these medical products, and he believed other sales representatives did the same.

When John left Ethicon, he resold about $60,000 worth of product that he had legitimately obtained. Ethicon never attempted to collect this product from him. John even offered to return the product, but Ethicon showed no interest. In this sense, Ethicon created a secondary or "gray" market for excess PMDs.

Sales representatives, like John and Kerri, accumulated excess product in a variety of ways. First, as with any "for-profit" company, Ethicon always introduced "new and improved" products, and sales representative were expected to market and sell the new product. When hospitals bought the new product that superseded a prior version, which was no longer needed, sale representatives were given the prior version by the hospital staff.

Second, representatives also would trade particular items for other items between hospitals. Ethicon approved this practice. Either the operating room materials manager or the department head would give the product to the sales representative for the trade or exchange. Third, sales representatives would accumulate product when a hospital "converted" from one manufacturer to another. In the PMD trade, the two main suppliers were Ethicon and U.S. Surgical. If, for

example, a hospital converted from U.S. Surgical to Ethicon, then the hospital would remove U.S. Surgical's products from inventory and often give that product to the sales representative. Fourth, when a representative left Ethicon, other representatives would acquire that representative's excess product.

Knowing that sales representatives legitimately obtained excess PMDs, John sensed a business opportunity and started a company called F&S Medical ("F&S"). F&S purchased and resold sterile and packaged end-date PMDs. John specialized in PMDs from three companies: Ethicon, U.S. Surgical, and Davis & Geck. He had, in turn, three primary sources for these goods: sales representatives, auction houses, and eBay.

John met Kerri through a supplier. While operating F&S, John told Kerri that he would buy certain medical products, including suture, from her. (John did not believe that Kerri sold him stolen property. Because of his experience, he knew that Ethicon's business practices created a secondary market with "a lot" of excess product. John would have a list of products wanted by his buyers that he would provide, via facsimile, to his sellers. John paid 25% of the dealer price.

Through the years, John bought over $2 million of product from Kerri, including suture material, trocars, and linear staplers. He would pay by check and keep a copy of the check. The checks that John wrote for Kerri's benefit were to MP Doodles, McCarty, Inc., BKB, and WP, Inc. He also wrote checks to Brian and Brandon Kaley, Kerri's husband and son respectively. Despite their business relationship, he rarely spoke to Kerri and never had any personal contact with her.

Ethicon sales representatives provided him PMDs from a number of New York area hospitals. One sales representative who provided PMDs for resale was Jenny Gruenstass ("Jenny"). Jenny started working at Ethicon in 1990. She met Kerri at Ethicon; they were both on the same team. Jenny never stole any medical product, and never saw Kerri steal any PMDs.

At some point, Kerri mentioned to Jenny that there was a distributor in Florida who would buy excess product. Through Kerri, Jenny sold the excess product that she accumulated to John. Kerri never asked her for a specific product.

Jenny believed the hospital had the authority to give the product to the sale representative. "More times than not," hospital personnel assisted her or Kerri with physically taking the product out of the hospital. In any event, a sales representative could not remove a significant amount of PMDs from a hospital without staff noticing.

Frank Tarsia ("Frank"), another Ethicon sales representative, also cooperated with the government. During the latter part of 2003, Frank gave Kerri product. Frank received about $350,000 for the product he gave Kerri. Kerri had asked Frank to find specific product and paid him by check.

Frank testified under oath before the grand jury that he acquired product that the hospitals no longer wanted. Yet, at Kerri's second trial, however, Frank testified that he "walked" the product out of the hospitals without permission and that he inflated orders from his hospitals to make more product available.

The PMDs that the sales representatives sold to John were purportedly obtained from a number of hospitals.

New York Methodist ("NYM") bought PMDs from Ethicon during this time period. The Ethicon sales representative would check the hospital's inventory and recommend a reorder. On occasion, when Ethicon delivered the product, the sales representative would store the PMDs.

From 2003-2005, Frank was Ethicon's sale representative to NYM. In 2006, Michael Sharp, a NYM employee, heard that a neighboring hospital, which had the same Ethicon sales representative, had an issue with loss. As a result, Sharp asked Ethicon for a purchase accounting for 2003-2005. NYM then "matched" that information with information obtained through the distributor. Sharp found the results alarming because the PMD purchases did not correspond with the surgeries during those years.

The government sought to introduce a letter Sharp sent to the Food and Drug Administration that included the purported number of bariatric surgeries performed by NYM during the time period and attached the NYM purchasing history sheet provided by Ethicon. The government never provided the defense with the underlying records with regard to the number of surgeries or the Ethicon purchases. Sharp testified that at the time of trial he could not verify whether the numbers were accurate through the underlying documents.

Undeterred, the government asked Sharp if he or his staff reviewed the numbers in the Ethicon spreadsheet and whether they were accurate. Sharp said

yes. The district court then allowed, during Sharp's testimony, the prosecutor to make the chart referenced above with the same numbers in the excluded spreadsheet. The government highlighted this chart in closing argument to advance a theory that $1 million was stolen from the hospital: "Sharp came in from New York Methodist and he showed you that what Mr. Tarsia said was true. In 2003, they had 94 procedures . . . ."; "You know from the evidence that what Mr. Tarsia said was true because it was backed up by the evidence of Mr. Sharp and the numbers from the hospital so you know that things were stolen."

After Kerri's sentencing, the district court deferred her restitution hearing. When the parties reconvened, the government sought $1,011,699 due solely to NYM. In arriving at this sum, the government relied upon Frank Tarsia and Michael Sharp's testimony, as well as GX6 (the excluded spreadsheet). The defense responded by pointing out that Sharp's testimony and GX6 only demonstrated an "uptick" in ordering at NYM and not the amount of PMDs that were stolen. The defense asserted that no restitution order should be imposed because the government did not prove that the "uptick" equated to the loss.

Using GX6 and trial testimony, the district court set a restitution figure of $841,420. GX6 purports that NYM bought $973,000 worth of Endo-medical equipment in 2003, $2,155,690 in 2004, and $1,314,270 in 2005. The district court considered these numbers with Tarsia's testimony that he started providing PMDs to Kerri in late 2003 and stopped in 2004. The district court subtracted the 2005

number from the 2004 number reasoning that 2004's "uptick" was the amount of PMDs that were stolen by Tarsia.

REASONS FOR GRANTING THE WRIT

This Court held in *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court concluded that all of the historic evidence pointed to "a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id*. at 483 n.10. Based again upon an extensive historical analysis, the Court subsequently clarified 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." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Under *Apprendi*, and the cases that followed therefore, the proper understanding of the Sixth Amendment jury trial guarantee is that it does not permit "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id*. at 482-83 (emphasis in original).

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).

Before and after *Southern Union*, every circuit to consider whether *Apprendi*'s rule applies to criminal restitution, has held no.[1] After *Southern Union*, eight circuit courts have considered that opinion's impact on prior holdings, and each has held that precedent has not been undermined.

Courts have given two reasons for that conclusion. The Seventh and Eighth Circuits had found 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. The Second, Fourth, Fifth, and Sixth Circuits distinguished *Southern Union* by noting that the fines in *Southern Union* were capped by an explicit statutory maximum. Because restitution under the MVRA has no statutory cap, these courts reasoned, the 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

[1] *See, e.g., 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);*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).

applies to 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 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).

As for the rationale that restitution is not punishment, this Court has explicitly stated to the contrary: "[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). Indeed, restitution is imposed as part of the criminal "sentence," at the behest of the government. See 18 U.S.C. §3663A (a)(1).

The proposition that *Apprendi* does not apply to the MVRA because there is no statutory maximum for restitution is seriously flawed as well. First, *Southern*

Union relied on common law cases in which there was no explicit maximum fine; rather 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, the MVRA does delineate a statutory maximum penalty – the amount of the victim's loss. *See United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012) ("[a]n 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) ("the amount of restitution is limited by the victim's actual losses"); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (an unauthorized restitution order "is no less illegal than a sentence of imprisonment that exceeds the statutory maximum"). Third, the Court rejected an analogous argument in *Alleyne*. *See Alleyne v. United States*, 570 U.S. 99 (2013). There the government argued that *Apprendi*'s rule could not be applied to challenge a mandatory minimum sentence that did not alter the maximum. 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. Fourth, in *Blakely* the Court held 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 findings of fact at Ms. Kaley's sentencing, no restitution could be ordered.

This Court should resolve the issue.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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