No. 18-8938

IN THE SUPREME COURT OF THE UNITED STATES

ELZA BUDAGOVA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Budagova, No. 2:11-cr-922 (Aug. 20, 2015)

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

United States v. Budagova, No. 15-50387 (Jan. 17, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 748 Fed. Appx. 152.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2019. The petition for a writ of certiorari was filed on April 17, 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, petitioner was convicted on one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 841(b)(1)(C) and 846; and one count of conspiracy to commit health-care fraud, in violation of 18 U.S.C. 1347 and 1349. Judgment 1. The district court sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. Ibid. The court also ordered petitioner and nine co-defendants, jointly and severally, to pay restitution in the amount of $1,236,988. Judgment 2. The court of appeals affirmed. Pet. App. 1-4.

1. From approximately December 2008 to August 2010, petitioner worked as an unlicensed physician's assistant at a purported medical clinic in the Los Angeles area. Presentence Investigation Report (PSR) ¶¶ 27, 47. In reality, the clinic "functioned as a 'prescription mill'" that generated unnecessary prescriptions and fraudulent insurance claims. PSR ¶ 28. The clinic used cash or other inducements to recruit beneficiaries of Medicare and Medi-Cal (a publicly funded healthcare benefit program in California), ordered unnecessary medical tests for the recruited patients, and issued unneeded prescriptions for OxyContin. PSR ¶¶ 29-32. The clinic then used falsified paperwork to bill Medicare and Medi-Cal for the unnecessary medical tests, some of which were never performed. PSR ¶¶ 19, 31-32. Clinic

employees also took the recruited patients, or simply the prescriptions, to pharmacies to fill the prescriptions, and returned the OxyContin to the clinic's administrator for eventual sale on the street. PSR ¶ 33. During the clinic's operation, it fraudulently billed Medicare and Medi-Cal for approximately $6 million in medical services, and diverted more than 1.1 million OxyContin pills. PSR ¶¶ 36-37.

Petitioner held herself out to the recruited patients as a doctor at the clinic, frequently fabricating notes and prescriptions in patient files and ordering unjustified medical tests to support the clinic's operations. PSR ¶¶ 47, 63-71; see Gov't C.A. Br. 10-13. Investigating agents reported that petitioner's distinctive handwriting appeared in "practically all" of the 2000 fraudulent patient files they reviewed, and "[v]irtually all of them" included a prescription for 90 maximum-strength OxyContin pills. Gov't C.A. Br. 10-11 (citations omitted).

A federal grand jury charged petitioner with one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 841(b)(1)(C) and 846; and one count of conspiracy to commit health-care fraud, in violation of 18 U.S.C. 1347 and 1349. Pet. App. 22-39. Petitioner proceeded to trial and was convicted on both counts. Judgment 1. The district court sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. Ibid. And it ordered petitioner and

her co-defendants, jointly and severally, to pay restitution in the amount of $1,236,988. Judgment 2; see PSR ¶ 140 (listing losses to Medicare and Medi-Cal). Petitioner did not raise any constitutional objection to the restitution order.

2. The court of appeals affirmed. Pet. App. 1-4. As relevant here, petitioner argued for the first time on appeal that Apprendi v. New Jersey, 530 U.S. 466 (2000), prohibits the imposition of restitution without a finding by the jury of the amount of the victims' loss. Pet. C.A. Br. 56. She acknowledged, however, that her argument was foreclosed by circuit precedent. Ibid. (citing United States v. Green, 722 F.3d 1146, 1151 (9th Cir.), cert. denied, 571 U.S. 1025 (2013)). The court agreed. Pet. App. 4 (citing Green, 722 F.3d at 1148-1149).

ARGUMENT

Petitioner contends (Pet. 14-28) that Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," applies to the calculation of restitution. The court of appeals correctly rejected that contention. As petitioner acknowledges (Pet. 21-23 & n.7), 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 petitioner

forfeited her Sixth Amendment argument by failing to raise it in the district court, 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.* The same result is warranted here.

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 also United States v. Cotton, 535 U.S. 625, 627 (2002) (making clear

* 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); Read v. United States, 569 U.S. 1031 (2013) (No. 12-8572); Wolfe v. United States, 569 U.S. 1029 (2013) (No. 12-1065). The issue is also presented in the petition for a writ of certiorari in Ovsepian v. United States, No. 18-7262 (filed Jan. 3, 2019).

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 petitioner 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 petitioner's argument (Pet. 16-28), 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).

Petitioner contends (Pet. 18-20) 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 petitioner's 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., United States v. Ovsepian, 674 F. Appx. 712, 714 (9th Cir. 2017); 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).

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

In any event, this case would be an unsuitable vehicle for considering the question presented because petitioner did not raise the issue in the district court. Petitioner's Sixth Amendment argument is therefore reviewable on appeal only for plain error. See Fed. R. Crim. P. 52(b); see also Puckett v. United States, 556 U.S. 129, 135 (2009). On plain-error review, petitioner would be entitled to relief only if she could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [her] 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 her Sixth Amendment argument, petitioner cannot demonstrate error that is "clear or obvious, rather than subject to reasonable dispute." Marcus, 560 U.S. at 262 (citation omitted). Nor can petitioner demonstrate that any error affected her substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Indeed,

petitioner has never argued that submitting the restitution issue to the jury would have resulted in a lower calculation of the amount of restitution she jointly and severally owes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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