No. 18-8938

IN THE SUPREME COURT OF THE UNITED STATES

ELZA BUDAGOVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit

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

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 1620
San Diego, California 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

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INTRODUCTION

The question that Petitioner Elza Budagova presented here for review is "should the rule of Apprendi apply to the imposition of criminal restitution?" In opposing the writ's issuance, the government not only focuses on the merits, but also asserts that this case is not a good vehicle for resulting the question. Petitioner replies below.

I. REPLY TO THE GOVERNMENT'S RESPONSE ON THE MERITS.

A. Introduction

The federal courts of appeals have given two principal reasons for holding that Apprendi v. New Jersey, 530 U.S. 466 (2000) does not apply to criminal restitution: (1) there is no statutory maximum for restitution, thus a district court's increasing a sentence by ordering it does not exceed a maximum sentence; and (2) restitution is not "criminal punishment."

Petitioner addresses the government's discussion of those reasons below, but she initially discusses an important point which the government focuses on superficially – and, indeed, insufficiently and unpersuasively.

B. The Government Mostly Overlooks the "Historical Record," a Key Rationale for the Court's *Apprendi*-Related Holdings

This Court has emphasized that "'the scope of the constitutional jury right

must be informed by the historical role of the jury at common law.'" Southern Union Co. v. United States, 567 U.S. 343, 353 (2012) (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)); see also Cunningham v. California, 549 U.S. 270, 281 (2007) (holding that Apprendi is "rooted in longstanding common-law practice). Indeed, throughout that practice, courts consistently limited restitution to property described in an indictment or valued in a special verdict. See Petition (Pet.) at 18-20. And this strongly supports Apprendi's extending into the criminal restitution realm.

As it must, the government acknowledges – briefly – that analyzing the question presented requires considering how jurists handled restitution at common law. See Brief in Opposition (Brief in Opp.) at 11-12. But the government does not say anything appreciable about that historical record.

Indeed, without discussing any of the American state court jurisprudence that Petitioner addressed via Southern Union Co. (see Pet. at 24), the government engages only two authorities that Petitioner cited regarding English common law practices, arguing that only the "crown" – not the victims – received the "stolen property." Brief in Opp. at 11-12. But as the government itself noted in a parenthetical quotation (id. at 12), that practice applied only to "'[a]ny goods omitted from the indictment . . . .'" 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). Instead, as Petitioner noted (see Pet. at 19-20), if anything, that English and American jurisprudence typically required property for which restitution applied to be charged specifically in an indictment only strengthens the historical record here.

C. The "No Statutory Maximum" Argument is Contrary to *Blakely*, *Southern Union Co.*, and *Alleyne*

1. The government's primary merits-based argument is that Apprendi does not apply because there is no statutory maximum for restitution. Brief in Opp. at 6-9. Thus, the government asserts, when a "'court fixes the amount of restitution based on [a] victim's losses, it is not increasing the punishment beyond that authorized by the conviction,'" but is "'merely giving definite shape to the restitution penalty that is born out of the conviction.'" Brief in Opp. at 7 (quoting United States v. Leahy, 438 F.3d 328, 337 (3d Cir. 2006) (en banc)). Petitioner already refuted this argument in her petition (at 22-27), but she expands below upon her earlier points.

Interestingly enough, the government's argument imagines a framework in which (1) the indictment identifies a victim (or victims) to whom an undefined sum of restitution is due; and (2) the district court post-conviction "merely" "fixes

the amount of restitution" based on the harm the victim sustained. Brief in Opp. at 7-8. But that is not the statutory regime at issue here.

Under the Mandatory Victims Restitution Act, a district court must identify victims who have "suffered a physical injury or pecuniary loss" because of the defendant's offense-related conduct. 18 U.S.C. § 3663A(c)(1)(B). In § 3664, the statute sets forth the procedures for making that conclusion, indicating that restitution allegations occur initially post-conviction in a presentence report. See 18 U.S.C. § 3664(d)(4). The government has the burden of proving that an entity or person is the victim and, if so, the appropriate restitution amount. See 18 U.S.C. § 3663(e). Consequently, the government is incorrect when it asserts that a conviction authorizes a limitless restitution amount to an identified victim, and all that a district court must do is "fix the amount."

At bottom, following a conviction but before imposing a sentence's restitution-related portion, a district court must make findings of fact beyond what the jury found or the defendant admitted during her guilty plea. As the Court has explained, "the 'statutory' maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts relected in the jury verdict or admitted by the defendant," "*without* any additional findings" by the trial court. Blakely v. Washington, 542 U.S. 296, 303 (2004) (original emphasis).

Consequently, when a district court makes additional findings that are necessary to impose restitution, it violates Apprendi's rule. And it is precisely that reasoning that drove the dissents in Leahy, 438 F.3d at 343-44 (McKee, J., dissenting), and United States v. Carruth, 418 F.3d 900, 905 (8th Cir. 2005) (Bye, J., dissenting).

2. The government suggests that Blakely's reasoning does not apply because there, the Court did not address restitution; rather, in the government's view, it only considered "'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" Brief in Opp. at 6 (quoting Blakely, 542 U.S. at 303) (emphasis added). But that misses the point. Simply put, without making additional findings of fact, the district court could not have imposed any restitution on Petitioner, therefore implicating Apprendi's rule.

Notably, in making its "no statutory maximum" argument, the government mostly overlooks three points Petitioner made on pages 24 to 26 of the petition. First, "Southern Union Co. relied on common law cases in which there was no explicit maximum fine, basing it instead on the victim's loss." Pet. at 24 (citing Southern Union Co., 567 U.S. at 353-56). Despite that, the courts in those cases applied Apprendi's rule. Second, there is indeed a statutory maximum for criminal

restitution – the victim's loss amount.[*] See Pet. at 24-25.

Finally, the no-statutory-maximum argument is akin to one that Apprendi should not apply to findings necessary to support a mandatory-minimum sentence because those do not alter the maximum penalty. The Court rejected that argument in Alleyne v. United States, 570 U.S. 99 (2013), holding that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of the new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact." Id. at 115.

Unfortunately, the government overlooks the first two points above. And for the third, the government contends that Alleyne does not apply because there is no statutory minimum amount for federal restitution. See Brief in Opp. at 13. But that argument – like the government's reading of Blakely – misses the point: if an increase in a sentence's restitution portion relies on findings of fact, a jury must do that, not a federal district judge.

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[*] Indeed, there is a statutory maximum for restitution, much like the fine at issue in Southern Union Co., because a jury determines the maximum fine by finding the number of days that the defendant violated the statute. See Brief in Opp. at 8-9.

D. The "Restitution is Not Punishment" Argument is Contrary to *Pasquantino*, *Southern Union Co.*, and *Paroline*

Additionally, the government further argues that Apprendi does not apply because restitution is not a criminal punishment but, rather, a "restorative remedy intended to make a victim "whole again." Brief in Opp. at 7 (quoting Leahy, 438 F.3d at 338). Petitioner already addressed this argument in the petition (at pages 23-24), but she expands further below on her earlier points.

As a threshold concern, the government overlooks the Court's stating in Pasquantino v. United States, 544 U.S. 349, 365 (2005), that "[t]he purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for [the defendant's criminal] conduct."

Further, in making this argument, the government attempts to distinguish Southern Union Co., stating that the Court there "considered only criminal fines [in that case], which are 'undeniably' imposed as criminal penalties in order to punish illegal conduct, 567 U.S. at 350, and it held only that such fines are subject to Apprendi." Brief in Opp. at 10. But the portion of Southern Union Co. that the government quoted sparingly reasoned as follows: "In stating Apprendi's rule, we have never distinguished one form of punishment from another. Instead, or decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' penalties,' or 'punishment[s]' – terms that each undeniably embrace

fines." Southern Union Co., 567 U.S. at 350 (internal citations omitted).

Thus, the Court in Southern Union Co. made plain that Apprendi applies to findings of fact that increase a defendant's "sentence." And criminal restitution is a part of a federal criminal sentence. See 18 U.S.C. § 3663A(a)(1).

Moreover, the petition also notes that a district court does not impose restitution without the government's initiative, see 18 U.S.C. § 3664(d)(1), and "[t]he victim has no control over the decision to award restitution." Kelly v. Robinson, 479 U.S. 36, 52 (1986). See Pet. at 23-24. In Southern Union Co., the Court relied on similar considerations to hold that Apprendi applies to fines. 567 U.S. at 349 (stating that fines are "inflicted by the sovereign for the commission of offenses."). The Court also relied on those same factors to analogize restitution and fines in Paroline v. United States, 572 U.S. 434 (2014), noting that "despite the differences between restitution and a traditional fine, restitution still implicates the prosecutorial powers of government," and "serves punitive purposes," thus potentially placing it within the Eighth Amendment's Excessive Fines Clause's purview. Id. at 456 (internal quotation marks and citation omitted).

II. THIS CASE IS SUITABLE FOR RESOLVING THE QUESTION PRESENTED.

Overlooking entirely the petition's discussion of Justice Gorsuch's dissent from the denial of certiorari (joined by Justice Sotomayor) earlier this year in Hester v. United States, No. 17-9082, slip op.at 1-4 (U.S. Jan. 7, 2019) (Pet. at 13, 28-30), the government principally sets forth two rationales for why this case is not a suitable vehicle to review the question presented.

1. First, the government contends that no conflict exists regarding this question among the federal courts of appeals that have addressed it. See Brief in Opp. at 4, 8, 12-13. Petitioner acknowledges this reality, but she observes that under Sup. Ct. R. 10(c) certiorari still would be appropriate, particularly considering that Petitioner's principal theory is that all of the federal appellate decisions on point conflict with Southern Union Co.'s application of Apprendi's rule. Indeed, that is implicit in Justice Gorsuch's dissent's reasoning.

Thus, a circuit split's absence does not present an insuperable obstacle for review here. And simply because this Court has already denied certiorari in multiple cases presenting similar questions (Brief in Opp. at 5) should not preclude it from categorically eschewing review altogether, particularly given the compelling rationales that Justice Gorsuch articulated in his Hester dissent.

2. Second, the government argues that because the Court would review

Petitioner's question presented for plain error, this case specifically is not a suitable vehicle. Brief in Opp. at 14-15. Once again, as she must, Petitioner acknowledges that the standard of review here would indeed be plain error. But the government's presuming that Petitioner necessarily would lose on the merits following a grant of certiorari – which Petitioner disputes because the Court's opinions in United States v. Marcus, 560 U.S 258, 262 (2010), and United States v. Cotton, 535 U.S. 625, 631-32 (2002), do not definitively foreclose a defendant from prevailing under Apprendi's rule on plain-error-review – essentially places a cart containing a presumed outcome before the certiorari horse.

That is, the government ostensibly argues that the Court grant petitions only in situations when petitioners likely would prevail under a newly announced or extended rule that favors criminal defendants. Indeed, Cotton itself involved a certiorari grant, followed by the Court's holding on the merits on plain-error review in the government's favor (535 U.S. at 631-34) – plainly not a result preordained during the certiorari-related stages.

Consequently, notwithstanding whether the Court prefers a case presenting a similar question on de novo review, Petitioner submits that her petition submits a pure legal issue that the Court readily can address, regardless of the precise standard of review that applies. The Court should therefore grant her petition.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Dated: August 1, 2019

Respectfully submitted,

s/David A. Schlesinger

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on August 1, 2019, as required by Supreme Court Rule 29, I served Petitioner Elza Budagova's Reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari on counsel for Respondent by depositing an envelope containing the reply in the United States mail (Priority, first-class), properly addressed to him, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Noel J. Francisco, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the reply to my client, Petitioner Elza Budagova, by depositing an envelope containing the documents in the United States mail, postage prepaid, and sending it to the following address:

Elza Budagova
c/o Armen Shahbyza
1257 Normandy Avenue, Apt. 7
Los Angeles, CA 90029

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 2019

s/David A. Schlesinger
_____
DAVID A. SCHLESINGER
Declarant