No._____

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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PETITION FOR A 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 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." The Court later held in Southern Union Co. v. United States, 567 U.S. 343, 360 (2012), that "the rule of Apprendi applies to the imposition of criminal fines." That holding resulted largely from how courts historically, under the common law, treated criminal fines. See id. at 353-56.

But notwithstanding that historical records requiring jury findings to support criminal fines and criminal restitution are the same, and that restitution is part of a criminal sentence, the federal courts of appeals have declined to apply Apprendi's and Southern Union Co.'s rule to criminal restitution.

The question presented is as follows:

Should Apprendi's rule apply to the imposition of criminal restitution?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Petitioner Elza Budagova respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on January 17, 2019.

OPINION BELOW

A three-judge panel of the Ninth Circuit issued an unpublished memorandum disposition and entered judgment on January 17, 2019, affirming Petitioner's conviction and sentence. The disposition can be found at United States v. Budagova, No. 15-50387, 748 Fed. Appx. 152 (9th Cir. Jan. 17, 2019). App. 1-4.

JURISDICTION

The Ninth Circuit entered judgment in this case on January 17, 2019. App. 1-4. The Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3. The district court had jurisdiction under 18 U.S.C. § 3231, and the Ninth Circuit had appellate jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

STATEMENT OF THE CASE

Although Petitioner continues to dispute her conviction, she will – as the Court specified in Jackson v. Virginia, 443 U.S. 307 (1979) – present the facts pertinent to her petition in the light most favorable to the government.

A. Evidence Presented During the Government's Case-in-Chief

1. In a nutshell, the clinic where Petitioner performed medical-type services between 2008 and 2010 at three different locations in Los Angeles County (see, e.g., App. 134-39, 177-79, 185, 213-15, 231-36, 239, 244, 297-300, 304-05, 549, 592) – the Lake Medical Group – had dichotomous business operations. On the one hand, Lake Medical Group employed properly-licensed physicians and physician assistants. Those professionals evaluated and treated legitimate patients who had genuine medical needs, some of which warranted pharmaceutical prescriptions. See, e.g., App. 217-21, 223, 236-38, 240-48, 265, 278-93, 312-17, 326-29, 490-92, 528-30, 568-69.

Among the services that the doctors and their assistants performed were evaluating patients – many of whom did not have private insurance and, because they were indigent, therefore qualified for Medi-Cal – who complained of severe pain. See, e.g., App. 275-76, 296, 301, 305-06. The professionals also occasionally conducted legitimate tests on those patients, for which the practice properly sought Medi-Cal payments. See, e.g., App. 275-76, 301-03, 307.

On the other hand, however, Lake Medical Group operated as a front for a "pill mill" scheme for Michael Mikaelian and Anjelika Sanamian, neither of whom was a physician. See, e.g., App. 141-42, 248-50, 489-90, 559, 565-67, 569-71.

Mikaelian and Sanamian employed persons known variously as "cappers" or "marketers" to recruit patients in the Los Angeles area. See, e.g., App. 139-40, 187-88, 223-26, 251, 318, 437-40, 475-76, 479-82, 551-61, 573, 583-85, 591, 609. Those patients, though, often did not have medical conditions that warranted the clinic's services. But the clinic would nevertheless perform unnecessary tests on them and improperly then seek Medi-Cal or Medicare payments.[1] See, e.g., App. 187-93, 206-07, 250, 310, 483-87, 489, 495-501, 503-08, 513-16, 539, 562-63, 586-87, 589.

Additionally, clinic doctors would sign blank prescription forms for other patients that persons working there would then complete. Commonly, the prescriptions were for 90-tablet bottles of an opioid called OxyContin, a Schedule II controlled substance. Each tablet contained 80 milligrams of the drug. Persons called "runners" would then either take the patient to a pharmacy in Los Angeles County to obtain the OxyContin or, alternatively, pick up the narcotics themselves after having submitted an authorization form that the patient purportedly signed.[2]

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[1] Mikaelian, Sanamian, and others sometimes stole or borrowed persons' identities, and then used them to obtain Medi-Cal fees fraudulently for services that the clinic never performed. See, e.g., App. 211, 256-58, 275, 300, 308-09, 320-24, 474-78, 500-02.

[2] Much like the Medi-Cal scheme, Mikaelian, Sanamian, and others sometimes used stolen identities to obtain – via fraudulent documents – 90-pill

See App. 132-33, 160-77, 194-210, 212, 227-30, 255-57, 266-77, 294-95, 319, 321-22, 325, 360, 438-47, 509-10, 586-88. Further, clinic employees such as Julia Shishalovsky (a material cooperating witness in this case) sometimes had their own fraudulent "patients," whom they used to obtain OxyContin fraudulently and then sell it to Mikaelian and other dealers. See, e.g., App. 533-42, 545-47, 549, 572.

After obtaining the OxyContin bottles from either the patients or the runners, Mikaelian then diverted the narcotic to street-level dealers. Mikaelian sold the bottles to the dealers at marked-up prices, and then divided the illicit proceeds with Sanamian. App. 143-49, 514-15. The dealers then fueled the Los Angeles area's exploding opioid-related epidemic by selling the tablets to persons who could not lawfully obtain a prescription for the controlled substance. App. 133, 538.

2. Petitioner Elza Budagova was born in the Republic of Armenia, then a constituent part of the Soviet Union, in 1941. App. 71-73. After completing her required medical education and training, Petitioner obtained a license to practice medicine in the Soviet Union. She did so until she emigrated

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bottles of OxyContin from pharmacies in Los Angeles County. See, e.g., App. 150-59, 175, 257-64, 470-73.

with her family to the United States. App. 72, 512.

3. Following her family's arriving in Los Angeles, Petitioner was eager to continue working in the medical field and, apparently, earn some limited income from so doing. She then worked sporadically at different medical-related jobs in the Los Angeles area between 2001 and 2007. App. 72. Later, after learning about the Lake Medical Group through contacts, Petitioner commenced working there as a volunteer sometime during the Fall of 2008. App. 128, 221-22. Originally, the clinic maintained its offices on 8th Street in downtown Los Angeles. See, e.g., App. 213-16.

4. According to Julie Shishalovsky, who worked as somewhat of a hybrid receptionist, medical assistant, and office manager at Lake Medical Clinic while Petitioner was there, Petitioner – whom the State of California had not licensed to practice medicine or work as a physician's assistant – represented herself to patients as a medical doctor. App. 489-90, 492-94, 531-32, 543-44, 548. While doing so, Petitioner examined the patients, wrote notations in their charts about supposed courses of treatment (including tests conducted on the clinic's premises), and wrote out prescriptions (most commonly for 90-tablet bottles of 80 milligrams of OxyContin) on pads that licensed physicians at the clinic had pre-signed. App. 328, 511-13, 516-17. Dr. Eleanor Santiago, a licensed medical

doctor who worked part-time at the clinic, testified similarly regarding Petitioner's role, and specified that she had never directed Petitioner to do anything medically-related. App. 143, 251-54, 311.

5. Experts testifying during the government's case-in-chief essentially opined that none of the clinic's testing-and-prescribed practices for actual patients was medically appropriate. More particularly, Dr. John Fullerton, a practicing internal-medicine specialist, testified that Lake Medical Group commonly performed tests that were conventional medical practices rarely administer. See, e.g., App. 574-82. Further, Dr. Donald Sullivan, a clinical pharmacy professor at Ohio State University College of Pharmacy, testified that the clinic's prescription practices for OxyContin did not reflect how responsible physicians typically used that Schedule II controlled substance for their patients' pain-management needs. See, e.g., App. 448-69. A pain specialist, Dr. Francis Ferrante, also so testified. See, e.g., App. 330-437.

6. Moreover, Shishalovsky testified at trial that Petitioner often wrote notations in files for fraudulent patients – in other words, persons who had never even visited the clinic to receive medical services. Some of what Petitioner wrote was supposed – but ultimately false – documentation that the patients had tests administered on them (such as sophisticated nerve-conductivity and

pulmonary-related tests), for which the clinic then later sought payment from Medi-Cal or Medicare. See, e.g., App. 509. Shishalovsky was one of two witnesses who identified Petitioner's handwriting in the clinic's patient records. See, e.g., App. 511.

7. Further, Shishalovsky contended that Petitioner was well-aware that the tests she ordered for actual patients and the pre-signed prescriptions she filled out were neither medically appropriate nor proper. App. 512-13. Further, Shishalovsky testified that Petitioner knowingly participated in Mikaelian's pill-mill diversionary tactics by personally going to a pharmacy with Shishalovsky to receive a 90-pill bottle of OxyContin that a clinic doctor had supposedly prescribed for Petitioner – but was instead handed over to Mikaelian so he could sell the pills to street dealers. App. 520-24, 553-54.

8. Finally, Shishalovsky also testified that Petitioner told her that Petitioner – if questioned by law enforcement authorities investigating the clinic's practices – would tell them that she was working there solely as a "volunteer." App. 518-19. In actuality, Shishalovsky contended, Petitioner periodically received off-the-books cash payments for the services she rendered to the clinic.

App. 550; see also App. 183-84.[3]

9. After Mikaelian and Sanamian eventually decided to relocate Lake Medical Clinic from downtown Los Angeles to Santa Monica, Petitioner accompanied her colleagues to the new offices there. App. 177-79, 185, 231-33, 525, 564. Unfortunately for Petitioner, however, she was working on September 10, 2010, when agents from California's Department of Justice raided the offices in Van Nuys and executed a search warrant. App. 180-82, 186, 526-27, 590.

Special Agent Chou Tran later scheduled an appointment to interview Petitioner at Petitioner's residence in Los Angeles on July 19, 2011. App. 131. Among other things, Petitioner told Special Agent Tran at the clinic's premises she was merely a clinic volunteer, wrote in patients' charts while doctors supervised her, and did not treat any patients. See, e.g., App. 129-30.

Substantively speaking, Petitioner once again claimed during the follow-up

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[3] On direct appeal to the Ninth Circuit, Petitioner noted – as that court had already discussed in a published opinion involving one of Petitioner's colleagues at the medical clinic, see United States v. Garrison, 888 F.3d 1057, 1061-63 (9th Cir. 2018) – that the government had committed pervasive Brady and Giglio violations, many of which involved untimely disclosures to the defense of evidence concerning Shishalovsky's and Dr. Santiago's admitted fraud and deceit. The Ninth Circuit, however, rejected Petitioner's arguments that the district court had erred by neither dismissing the two counts against her nor ordering a new trial, reasoning among other things that Garrison controlled under the law of the case doctrine. See App. 2-3.

interview in July 2011 that she was only a volunteer at Lake Medical Group, and consequently did not receive any compensation for her services. She also denied knowing Mikaelian and Sanamian. And although Petitioner acknowledged that handwriting appearing in some of the patient charts and prescriptions for OxyContin was indeed hers, Petitioner contended that she wrote only as doctors at the clinic, such as Dr. Santiago, had directed her to do. She described her role as merely translating for patients who spoke Russian and Armenian, and she acknowledged that she was a medical doctor in Russia. See, e.g., App. 129-30, 593-608.[4]

B. The Indictment

After governmental agencies had apparently completed their investigation of Lake Medical Group's operations, a grand jury empaneled in the Central District of California indicted Petitioner and fourteen other defendants on September 28, 2011. App. 11. Essentially, the indictment charged Petitioner with two conspiracy counts: conspiring to (1) distribute a controlled substance (OxyContin), therefore violating 21 U.S.C. § 846; and (2) defraud federally-

[4] Petitioner contended on direct appeal to the Ninth Circuit that the district court had abused its discretion by deciding, without holding an evidentiary hearing, Petitioner's motion to suppress statements the government derived from the interview. The Ninth Circuit, however, rejected that argument. App. 3-4.

funded Medicare and Medi-Cal programs, thus violating 18 U.S.C. § 1349. App. 22-24, 30-34, 36-37.

C. The Government Proffers Evidence Regarding Losses that Medicare and Med-Cal Sustained Because of the Charged Conspiracies

During its case-in-chief, the government proffered evidence illustrating that Lake Medical Group received $690,437 from the Medicare program. Similarly, it also adduced proof that the clinic received approximately $546,000 from California's Medi-Cal program. App. 50. The government did not proffer evidence regarding the specific losses that it attributed to Petitioner's putative conduct.

D. The Jury's Verdict

Following the trial, which lasted parts of fifteen days, the jury convicted Petitioner of conspiring to distribute OxyContin and to defraud Medicare and Medi-Cal. The jury, however, did not make any special findings regarding the losses that those programs sustained because of Budagova's – or any other defendant's conduct, for that matter – actions.[5] App. 62-64.

[5] Petitioner apparently did not object to the verdict form before the district court submitted it to the jury.

E. After Making Factual Findings Regarding Losses that Petitioner Caused, the District Court Sentences Petitioner to a 36-Month Term, and Also Orders Her to Make Considerable Restitution to Government Programs

At a sentencing hearing on August 20, 2015, the district court adopted the Presentence Report's findings regarding loss attributable to Budagova's putative conduct – $1,236,988, jointly and severally with nine other defendants. It accordingly entered a restitution order, and also sentenced Budagova to a 36-month custodial term, followed by a three-year period of supervised release. App. 119-20.

F. The Decision Below by the Court of Appeals

Following Petitioner's direct appeal, a three-judge panel of the Ninth Circuit affirmed her conviction and sentence. In pertinent part, it rejected Petitioner's Sixth Amendment argument, citing to its opinion in United States v. Green, 722 F.3d 1146, 1148-49 (9th Cir. 2013), for the proposition that Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny do not apply to restitution-related findings. App. 1-4.

ARGUMENT

In Southern Union Co. v. United States, 567 U.S. 343 (2012), the Court held that "the rule of Apprendi applies to the imposition of criminal fines." Id. at 360.

Quite simply, the Court's reasoning in Southern Union Co., including its relying on the historical record, applies equally to criminal restitution. But the Ninth Circuit – and seven of its sister federal courts of appeals that have addressed this precise issue – has concluded that Southern Union Co. does not furnish sufficient reasoning to justify its overruling earlier circuit precedents holding that Apprendi does not apply in this context.

Here, Petitioner requests that the Court grant her petition because this error is entrenched throughout the federal courts of appeals 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). Indeed, just a few months ago, two of the Court's justices so recognized, therefore illustrating this issue's constitutional resonance. Hester v. United States, No. 17-9082, slip op. at 1-4 (U.S. Jan. 7, 2019) (Gorsuch, J., dissenting from denial of certiorari, joined by Sotomayor, J.).

I. APPRENDI AND ITS PROGENY DURING THE PAST TWO DECADES HAVE REPEATEDLY OVERRULED LONGSTANDING PRECEDENTS THAT PERMITTED A JUDGE TO MAKE FACTUAL FINDINGS THAT ENHANCED A DEFENDANT'S SENTENCING EXPOSURE, INCLUDING FINES.

A. Beginning with Apprendi in 2000, this Court diametrically changed its approach toward how a trial court must handle sentencing-pertinent facts for Sixth Amendment purposes. Indeed, in the more-than eighteen years since Apprendi issued, the Court has repeatedly reaffirmed that a sentencing judge is not authorized under the Sixth Amendment to impose a term lengthier than the maximum supported by a general verdict without the jury's making specific factual findings beyond a reasonable doubt concerning enhancements.[6]

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[6] See, e.g., Apprendi, 530 U.S. at 490 ("Other 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.") (emphasis added)); Ring v. Arizona, 536 U.S. 584, 588 (2002) (describing Apprendi as precluding a defendant from being "exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.") (alteration in original, original emphasis, internal quotation marks omitted)); Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – not matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.") (emphasis added)); Blakely v. Washington, 542 U.S. 296, 303 (2004) ("Our precedents make clear . . . 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*.") (original emphasis)); Cunningham v. California, 549 U.S. 270, 274-75 (2007) ("As this Court's decisions instruct, the Federal Constitution's jury-trial

B. Perhaps no case, though, better illustrates the sea change in how the Court approaches the interplay between sentencing and the Sixth Amendment's jury-trial guarantee than Alleyne v. United States, 570 U.S. 99 (2013). There, a jury convicted the petitioner of violating, among things, 18 U.S.C. § 924(c)(1)(A), and determined that he had "[u]sed or carried a firearm during and in relation to a crime of violence." Alleyne, 570 U.S. at 103 (quotation marks omitted, original alteration). But it "did not indicate a finding that the firearm was '[b]randished.'" Id. at 104 (original alteration). Determining that the mandatory-minimum term that would apply if it would make a finding regarding brandishing was only a "sentencing factor," the district court found accordingly under Harris v. United States, 536 U.S. 545 (2002), and sentenced the petitioner to such a term. The Fourth Circuit affirmed on direct appeal. Id.

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guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.") (emphasis added)); United States v. O'Brien, 560 U.S. 218, 224 (2010) ("In other words, while sentencing factors may guide or confine a judge's discretion in sentencing an offender within the range prescribed by statute, judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury.") (emphasis added, internal citations and quotation marks omitted)); Southern Union Co., 567 U.S. at 348 ("We have repeatedly reaffirmed this rule by applying it to a variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence.") (emphasis added)).

On certiorari, this Court reversed. Melding this Court's earlier sentencing-related case law with what has transpired post-Apprendi, it reasoned that "a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." Id. at 107-08. Further, "[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." Id. at 108. And "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Id. at 114-15. Consequently, the Court overruled Harris. Id. at 116.

Thus, Alleyene signaled that this Court is willing – particularly given Apprendi's enduring vitality – to overrule outmoded sentencing-related precedents that contravene Apprendi's core Sixth Amendment jury trial guarantee.

II. SOUTHERN UNION CO.'s EXTENDING APPRENDI TO CRIMINAL FINES SIMILARLY SHOULD APPLY TO THE CRIMINAL RESTITUTION CONTEXT.

A. In Southern Union Co., the Court held "that the rule of Apprendi applies to the imposition of criminal fines." 567 U.S. at 360. Simply put, the Court's reasoning in Southern Union Co., including its relying on the historical record as a rationale, applies equally to criminal restitution. But the Ninth Circuit –

and seven other federal courts of appeals that have addressed the issue – has concluded that Southern Union Co. does not sufficiently justify overruling earlier, uniform circuit precedent holding that Apprendi does not so apply.

Petitioner therefore requests that the Court grant her petition because this error permeates federal appellate jurisprudence, and also relates to an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

B. As the Court observed in Cunningham, Apprendi's rule "is rooted in longstanding common-law practice." 549 U.S. at 281. See also Alleyne, 570 U.S. 99 (2013). Its core concern is to 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 increase[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.

C. In Southern Union Co., 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 (internal citations omitted).

As it had done in every case in Apprendi's line, the Court in Southern Union Co. based its holding largely on its "examin[ing] 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 Co., 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 Co., 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.

Quite significantly, the historical record is the same for criminal restitution.

D. Before 1529, no method existed in England for awarding criminal restitution, and anything seized from a criminal defendant became the Crown's property. 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 Placitorium 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)).

Moreover, 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). Indeed, "the 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.

E. Here, the district court ostensibly imposed restitution under the Mandatory Victim Restitution Act ("MVRA") (App. 7), 18 U.S.C. § 3663A, which deviates substantially from the historical practice that Petitioner discussed above. Under the MVRA, a district court must identify 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). Next, 18 U.S.C. § 3664 sets forth the procedures for making that determination. See 18 U.S.C. § 3663A(d).

Under § 3664(e), the government has the burden of proving that an entity or person is a victim and, if so, the appropriate amount of restitution to award. The district court receives evidence from the government post-conviction, including via the presentence report. And 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). But of course, these procedures fall far short of what Apprendi requires.

F. Before the Court's opinion in Southern Union Co., nearly every federal court of appeals considered whether the principles that Apprendi sets forth apply to criminal restitution. Each concluded that the answer is no.[7]

Moreover, after the Court decided Southern Union Co., eight federal courts of appeals have assessed that opinion's impact on those earlier holdings. And each has held that the earlier, uniform circuit-level precedent has not been undermined. Courts have offered two reasons for that conclusion.

The Seventh and Eighth Circuits noted that they had earlier concluded that Apprendi principles do not apply to criminal restitution because it is civil in nature, rather than criminal punishment. Both courts determined that Southern Union Co. 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).

Separately, the Second, Fourth, Fifth, and Sixth Circuits distinguished Southern Union Co. by noting that an explicit statutory maximum capped fines

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[7] 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. 2006) (en banc); United States v. Nichols, 149 Fed. Appx. 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, 553 (6th Cir. 2005); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); United States v. Williams, 445 F.3d 1302, 1310 (11th Cir. 2006).

there, while restitution under the MVRA has no statutory cap. Consequently, under this reasoning, a court's imposing 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 earlier Fifth Circuit precedent to reject restitution challenge based on Southern Union Co. "because no statutory maximum applies to restitution"); United States v. Jarjis, 551 Fed Appx. 261 (6th Cir. 2014) (unpublished opinion) (same regarding Sixth Circuit precedent); 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").

Additionally, the Ninth and Tenth Circuits have relied on both the not-punishment and no-maximum rationales to conclude that Southern Union Co. does not apply to 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. Appx. 653, 664 (10th Cir. 2014) (unpublished opinion) (relying on conclusion that "Tenth Circuit

precedent is clear that restitution is a civil remedy designed to compensate victims – not a criminal penalty"); Green, 722 F.3d at 1150 (relying on both reasons).

Both reasons are lacking, however.

G. As a threshold concern, it is useful to note 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 a jury had to find the facts supporting that restitution. Quite simply, attention to historical practice has driven the Court's Apprendi line of cases. See supra at 17-18. Indeed, in Southern Union Co., 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).

H. Turning to the rationale that restitution does not amount to "criminal punishment," that is a weak basis for declining to apply Apprendi to imposing restitution under MVRA. The 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 government's behest. See 18 U.S.C. § 3663A(a)(1). That is, "[t]he victim has no

control over the amount of restitution awarded or the decision to award restitution." Kelly v. Robinson, 479 U.S. 52 (1986). Thus, for precisely those reasons, the Court has analogized restitution to criminal fines and suggested that the Excessive Fines Clause of the Eighth Amendment applies to criminal restitution. See United States v. Paroline, 134 S. Ct. 1710, 1726 (2014).

I. Equally incorrect 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 premise.

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. 567 U.S. at 353-56. For example, Southern Union Co. relied on Commonwealth v. Smith, 1 Mass. 245, 247 (Mass. 1804), a larceny case in which the court was authorized to order a fine of three times the amount of money stolen. But the court declined to do so regarding 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 that Southern Union Co. relied on, which all concerned 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 also United States v. Sharma, 703 F.3d 318, 322 (5th Cir. 2012) ("An award of restitution greater than a victim's actual loss exceeds the MVRA's statutory maximum"); Bussell, 414 F.3d at 1016 ("[T]he amount of restitution is limited to the victim's actual losses"); United States v. Broughton-Jones, 71 F.3d 1143, 1147 (4th Cir. 1995) (holding that an unauthorized restitution order "is no less than a sentence of imprisonment that exceeds the statutory maximum").

Third, the no-statutory-maximum distinction is akin to what the Court 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 – there, life imprisonment. The Court disagreed, stating that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent new 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. Indeed, the circumstances here 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, and relatedly, the no-statutory-maximum distinction is not consistent with the definition of "statutory maximum sentence" that Blakely set forth. There, 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 additional factual findings in Petitioner's case, it could not have ordered any restitution under the MVRA. Thus, by making those findings here, the district court necessarily increased the punishment available.

Indeed, Circuit Judge Kermit Bye of the Eighth Circuit, stated so cogently 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).

Moreover, Circuit Judge Theodore McKee of the Third Circuit made the same point in his dissent from the en banc opinion in Leahy:

> 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 had 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).

J. The discussion above makes clear that the principles that Apprendi and Southern Union Co. set forth apply equally to criminal restitution. But the federal courts of appeals do not view Southern Union Co. as a sufficiently strong

indicator of constitution law to overrule their contrary precedent. And the controlling Ninth Circuit case illustrates this:

> Our precedents are clear that Apprendi doesn't apply to restitution, but that doesn't mean or 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.

Thus, given the federal court of appeals' uniform unwillingness to revisit the issue following Southern Union Co., the Court should resolve it instead.

III. TWO OF THE COURT'S JUSTICES HAVE ALREADY STATED THAT THE COURT SHOULD REVIEW THIS QUESTION.

Dissenting from the Court's denial of certiorari in Hester v. United States – which presented a virtually identical question – Justice Gorsuch, joined by Justice Sotomayor, enumerated several reasons why it would be appropriate to consider whether restitution orders are subject to principles that Apprendi and its progeny promulgated.

A. First, Justice Gorsuch noted that the "increasing role" that restitution

"plays . . . in federal criminal sentencing today." Slip op. at 1 (Gorsuch, J., dissenting from denial of certiorari). And, he further observed, the effects of restitution orders, too, can be profound," including – for those unable to comply – "suspension of the right to vote, continued court supervision, or even reincarceration." Id. at 2.

B. Second, he observed that the Ninth Circuit's underlying "ruling" in Hester was "not only important, [but also] seems doubtful." Id. at 2. Indeed, Justice Gorsuch added, the Ninth Circuit in Green "itself has conceded that allowing judges, rather than juries, to decide the facts necessary to support restitution orders isn't 'well harmonized' with this Court's Sixth Amendment decisions." Id. (quoting Green, 722 F.3d at 1151). And Justice Gorsuch cited favorably the dissents by Judges McKee and Bye in, respectively, Leahy and Carruth that criticized their courts' failures to extend Southern Union Co. to restitution findings. See id.; supra at 26-27.

C. Third, Justice Gorsuch discussed Blakely's core holding (see supra at 14 n.6), using it to criticize the government's defense of the Ninth Circuit's reasoning in Hester. Among other things, he observed that "the statutory maximum for restitution is usually *zero*, because a court can't award any restitution without finding additional facts about the victim's loss. And just as a jury must find any

facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order." Id. at 3 (original emphasis). Further, Justice Gorsuch noted that restitution imposed in a criminal case is not truly a "civil remedy" because it is "imposed as part of a defendant's criminal conviction." Id. (internal quotation marks omitted).

D. Finally, Justice Gorsuch opined that the Sixth Amendment "was understood as preserving the 'historical role of the jury at common law.'" Id. at 3 (quoting Southern Union Co., 567 U.S. at 353). Along those lines, he noted, juries in England "as long ago as the time of Henry VIII" – and in the Several States during the Nineteenth Century – needed to make explicit predicate findings about victims' losses before courts could impose restitution. Id. at 3-4.

E. Simply put, Justice Gorsuch's dissent for denial of certiorari in Hester sent a powerful and persuasive signal regarding this question's viability. The Court should therefore settle it definitively by granting certiorari here.

CONCLUSION

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

Dated: April 17, 2019

Respectfully submitted,

s/David A. Schlesinger

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No._____

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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PROOF OF SERVICE

I, David A. Schlesinger, declare that on April 17, 2019, as required by Supreme Court Rule 29, I served Petitioner Elza Budagova's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition 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 motion and the petition 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:

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

Executed on April 17, 2019

s/David A. Schlesinger

DAVID A. SCHLESINGER
Declarant