No. 19-5979

IN THE SUPREME COURT OF THE UNITED STATES

RODRIGO PABLO LOZANO, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

RICHARD E. ZUCKERMAN
Principal Deputy Assistant
Attorney General

S. ROBERT LYONS
ALEXANDER P. ROBBINS
GREGORY S. KNAPP
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. 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 victim's loss.

2. Whether the district court plainly erred, during petitioner's trial for conspiracy to defraud the United States by obtaining payment of false claims, in violation of 18 U.S.C. 286, by instructing the jury that the element of knowledge of the submission of the false claims could be established by proof of deliberate avoidance.

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5979

RODRIGO PABLO LOZANO, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 438.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2019. A petition for rehearing was denied on June 14, 2019 (Pet. App. 4). The petition for a writ of certiorari was filed on September 12, 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 of conspiracy to defraud the United States by obtaining payment of false claims, in violation of 18 U.S.C. 286. Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 1-2. The court also ordered petitioner to pay $23,094,300 in restitution. Judgment 1. The court of appeals affirmed. Pet. App. 1-3.

1. Petitioner owned and operated an income tax preparation business, Lozano & Associates -- Ayuda (Ayuda), in Oxnard, California. Gov't C.A. Br. 1, 5. Petitioner had obtained from the Internal Revenue Service (IRS) a Preparer Identification Number and an Electronic Filing Identification Number, that authorized him to file tax returns electronically on behalf of clients. Id. at 5. Petitioner hired several employees to assist in processing client paperwork, but petitioner was the only person at Ayuda who filed tax returns. Id. at 6.

Although Ayuda prepared some legitimate tax returns for individual clients, most of Ayuda's business during 2011 and 2012 consisted of preparing fraudulent tax returns for "marketers," who brought in false tax documentation for multiple taxpayers. Gov't C.A. Br. 7-8. The false documentation included Forms W-2 that

reported the same amount of wages for multiple taxpayers, as well as identification documents that used the same photo for different people. Id. at 8-9. Ayuda employees complained to petitioner about the false documentation provided by the marketers, but petitioner told them not to worry about it. Id. at 9. Petitioner signed and submitted the false returns that had been prepared for the marketers. Id. at 9-10.

All of the fraudulent returns prepared for the marketers claimed tax refunds. Gov't C.A. Br. 8. During 2011 and 2012, petitioner submitted more than 12,000 fraudulent returns that claimed a total of $56.5 million in refunds. Id. at 14-15. The IRS paid out more than $23 million of those fraudulent refund claims. Id. at 23. Petitioner directed the IRS to pay the refunds by sending a check to his residence or business, or by depositing the funds into a bank account he controlled. Id. at 11-12. After receiving the refunds from the IRS, petitioner personally gave those funds in cash to the marketers who had provided the false taxpayer information. Id. at 12. Petitioner, for his part, received at least $1,000,000 in fees for preparing the fraudulent returns for the marketers. See D. Ct. Doc. 144, at 3 (Dec. 7, 2016); Presentence Investigation Report (PSR) ¶ 15.

2. A federal grand jury charged petitioner with conspiracy to defraud the United States by obtaining payment of false claims, in violation of 18 U.S.C. 286. Indictment 1-10. During trial,

petitioner testified in his own defense, portraying himself as a "big picture guy" who spent little time at Ayuda and left the day-to-day operations to his employees. Gov't C.A. Br. 16. Petitioner claimed that he trusted the clients to bring in proper tax documentation. Ibid.

Most of the jury instructions given by the district court were jointly proposed and agreed to by the parties. Gov't C.A. Br. 19. The jury was instructed that the elements of the Section 286 conspiracy offense were:

> First, * * * the defendant entered into a conspiracy to obtain payment or to aid in obtaining payment of one or more claims against an agency of the United States, specifically, the Internal Revenue Service.
>
> Second, the claims were false, fictitious, or fraudulent.
>
> And, third, the defendant knew that the claims were false, fictitious, or fraudulent.

Ibid. (citation omitted). Regarding the first element, the agreed-upon jury instructions stated that "[o]ne becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance some purpose of the conspiracy." Id. at 19-20 (citation omitted; brackets in original).

The government also proposed a deliberate-avoidance jury instruction regarding petitioner's knowledge that many of the tax returns that he prepared were fraudulent, which stated that:

> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

> 1. was aware of a high probability that the tax returns he was filing, agreeing to file, or causing others to file were false, fictitious or fraudulent, and
>
> 2. he deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that the tax returns were not false, fictitious, or fraudulent, or if you find that the defendant was simply careless.

Gov't C.A. Br. 20 (citation omitted).

Petitioner objected that a deliberate-avoidance instruction was "unnecessary" in light of the evidence, but he did not object to the form of the instruction proposed by the government. Gov't C.A. Br. 20 (citation omitted). Nor did petitioner argue generally that a deliberate-avoidance instruction is inconsistent with the requirements of a conspiracy offense. The district court gave the proposed deliberate-avoidance instruction. Id. at 22. The jury found petitioner guilty. Judgment 1.

The Probation Office reported that the tax loss intended by petitioner's conduct, for purposes of calculating his recommended sentencing range under the Sentencing Guidelines, was $56,481,566. D. Ct. Doc. 159, at 3 (Apr. 4, 2017). That amount represented the total refunds claimed on 12,825 returns filed by petitioner that had been identified as fraudulent. Id. at 4-5. To identify which of the returns filed by petitioner were fraudulent, an IRS Investigative Analyst reviewed the returns for common characteristics of fraud, including the use of repeated mailing addresses, wage and withholding amounts, and employer identities.

For all 12,825 returns identified as fraudulent, the IRS confirmed that the wage amounts reported on the returns were invalid by checking the reported amounts against Social Security records. Id. at 5. The loss calculation excluded an additional 7,198 returns filed by petitioner during 2011 and 2012 that could not be verified as fraudulent. Id. at 7.

Based on an intended loss of $56.5 million, petitioner's advisory Sentencing Guidelines range would have been 168 to 210 months of imprisonment, but the statutory maximum for petitioner's offense was 120 months. Gov't C.A. Br. 23-24; see 18 U.S.C. 286. The district court sentenced petitioner to the statutory maximum term, finding, among other things, that petitioner displayed "a total lack of remorse" and was "one of the most arrogant defendants [the court had] ever faced in * * * 20 years on the bench." Gov't C.A. Br. 27-28 (citation omitted). The court also ordered petitioner to pay $23,094,300 in restitution to the IRS, which represented the portion of the $56.5 million in false refund claims that the IRS had actually paid. Id. at 23. Although petitioner objected generally to the amount of loss and restitution reported in the PSR, see, e.g., Pet. C.A. Br. 26, he did not argue before the district court that any facts supporting a restitution award must be found by a jury beyond a reasonable doubt.

3. Petitioner appealed. As relevant here, he argued that, under Apprendi v. New Jersey, 530 U.S. 466 (2000), the district

court's restitution order was invalid because it was not based on facts found by a jury beyond a reasonable doubt. Pet. C.A. Br. 26. Petitioner also argued that the court had erred by giving the deliberate-avoidance instruction, on the theory that it was inconsistent with the mens rea for the conspiracy offense with which he was charged. Id. at 9-13. The government's answering brief observed that petitioner had raised neither his Apprendi-based challenge to restitution nor his challenge to the deliberate-avoidance jury instruction in the district court, and maintained that each was subject to plain-error review. Gov't C.A. Br. 30-31, 58.

The court of appeals affirmed. Pet. App. 1-3. The court rejected petitioner's Apprendi argument, relying on its prior decision in United States v. Green, 722 F.3d 1146, 1150 (9th Cir.), cert. denied, 571 U.S. 1025 (2013), which determined that "restitution is not a question that is subject to the protections of Apprendi." Pet. App. 3. The court also upheld the district court's decision to give a deliberate-avoidance instruction at trial. Id. at 2. The court cited United States v. Ramos-Atondo, 732 F.3d 1113, 1120 (9th Cir. 2013), and United States v. Nicholson, 677 F.2d 706, 710-711 (9th Cir. 1982), both of which had approved the use of a deliberate-avoidance instruction in a case where the defendant was charged with a conspiracy offense. Pet. App. 2.

ARGUMENT

Petitioner contends (Pet. 6-9) that Apprendi v. New Jersey, 530 U.S. 466 (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," id. at 490, applies to the calculation of restitution. The court of appeals correctly rejected that contention. As petitioner acknowledges (Pet. 6), 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 first question presented because petitioner forfeited his Apprendi 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 had been preserved.[1] The same result is warranted here.

---

[1] See, e.g., Budagova v. United States, 140 S. Ct. 161 (2019) (No. 18-8938); Ovsepian v. United States, 140 S. Ct. 157 (2019) (No. 18-7262); 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)

Petitioner separately contends (Pet. 10-11) that the deliberate-avoidance instruction in his case is inconsistent with the requirements of a conspiracy offense. That contention lacks merit, and petitioner identifies no conflict in the court of appeals on that issue. In any event, this case would be a poor vehicle to consider petitioner's challenge to the deliberate-avoidance instruction that was given at his trial because petitioner failed to raise that challenge before the district court. This Court has previously denied petitions for a writ of certiorari challenging the use of a deliberate-avoidance theory of mens rea in a conspiracy case.[2] The same result is warranted here.

1. a. The court of appeals correctly determined that Apprendi does not apply to restitution. Pet. App. 3; see United States v. Green, 722 F.3d 1146, 1151 (9th Cir.), cert. denied, 571 U.S. 1025 (2013). In Apprendi, this Court held that any fact other

---

(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, 575 U.S. 904 (2015) (No. 14-6980); Ligon v. United States, 574 U.S. 1182 (2015) (No. 14-7989); Holmich v. United States, 574 U.S. 1121 (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).

[2] See Datta v. United States, 571 U.S. 992 (2013) (No. 13-440); Halat v. United States, 530 U.S. 1229 (2000) (No. 99-1511).

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 United States v. Cotton, 535 U.S. 625, 627 (2002) (making clear 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) (observing that the MVRA "is an indeterminate system") (citing cases). In other words, pursuant to the restitution statutes, the jury's conviction "authoriz[es] restitution of a specific sum, namely the full amount of each victim's loss." United States v. Leahy, 438 F.3d 328, 337 (3d Cir.) (en banc) (internal quotation marks omitted), cert. denied, 549 U.S. 1071 (2006). And when a sentencing court determines that loss amount, 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." Ibid.

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) (citations 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, 574 U.S. 1078 (2015); Day, 700 F.3d at 732 (4th Cir.); 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 (2d Cir.); 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 (3d Cir.); 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 of appeals 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 Distribution Sys., Inc., 466 F.3d 585, 593 (7th Cir. 2006); see also Leahy, 438 F.3d at 337-338; Visinaiz, 428 F.3d at 1316; Carruth, 418 F.3d at 904;

b. Contrary to petitioner's suggestion (Pet. 6), 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 require applying Apprendi to restitution. 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 347-348. Southern Union considered only criminal fines, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct. Id. at 350. 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 the distinction between restitution under the MVRA and the type of sentences subject to Apprendi because, in observing 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, 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).

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 (9th Cir.); 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, 575 U.S. 904 (2015).

c. Petitioner is also incorrect in contending (Pet. 7) that the rationale adopted by the courts of appeals is undercut by this Court's holding in Alleyne v. United States, 570 U.S. 99 (2013). Alleyne held that Apprendi applies to facts that increase a mandatory minimum sentence, explaining that Apprendi's definition of "elements" that must be found by a jury beyond a reasonable doubt "necessarily includes not only facts that increase the ceiling, but also those that increase the floor," because both kinds of facts "alter the prescribed range of sentences to which a defendant is exposed." Id. at 108. The MVRA, however, does not mandate a minimum "floor" or even a "prescribed range" of restitution amounts that a defendant may be ordered to pay. Rather, the amount of restitution -- if any -- is authorized by the jury based on the loss caused to the victim by the defendant. Alleyne is thus inapplicable. Since Alleyne, every court of appeals to consider whether that decision requires that the Apprendi rule extend to restitution has determined that it does not. See, e.g., United States v. Ovsepian, 674 Fed. Appx. 712, 714 (9th Cir. 2017); Kieffer, 596 Fed. Appx. at 664 (10th Cir.); 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 (3d Cir.); United States v. Holmich, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 574 U.S. 1121 (2015).

Petitioner acknowledges (Pet. 6) that the lower courts are uniform in their recognition that the rule of Apprendi does not apply to restitution. And although some Members of this Court have favored review of the question presented, see Hester v. United States, 139 S. Ct. 509 (2019) (Gorsuch, J., dissenting from denial of certiorari), this Court has repeatedly denied certiorari on this issue, see p. 8 n.1, supra, and petitioner identifies nothing that would warrant a different course here.

d. Indeed, even if this Court were inclined to consider the question presented, this case would be an unsuitable vehicle for doing so because petitioner failed to raise his Apprendi argument in the district court.

Although petitioner objected to the amount of restitution ordered by the district court, he did not argue that, pursuant to Apprendi, a restitution order must be based on facts found by a jury beyond a reasonable doubt. Petitioner's Sixth Amendment argument is therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b); Puckett v. United States, 556 U.S. 129, 135 (2009). On plain-error review, petitioner would be entitled to relief only if he could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that

"affected [his] 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 petitioner's Apprendi argument, he 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 his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Petitioner has never argued that submitting the restitution issue to the jury would have resulted in a lower calculation of the amount of restitution owed. The government's loss calculation at petitioner's sentencing was conservative -- excluding any claims whose fraudulence could not be verified -- and was based on clear, specific evidence of loss. See pp. 5-6, supra. In particular, the final restitution amount was limited to the sum of the tax refunds that the IRS actually paid on a specific set of returns that were proved to be false. See ibid. Petitioner does not identify any error in the calculation or any reason to believe that application of Apprendi would change the result.

2. Petitioner's separate claim of error in the deliberate-avoidance instruction likewise does not warrant this Court's review.

a. The doctrine of deliberate avoidance, or willful blindness, is "well established in criminal law" as a means of demonstrating that the defendant acted "knowingly or willfully." Global-Tech Appliances, Inc. v. SEB S. A., 563 U.S. 754, 766 (2011). "The traditional rationale for this doctrine" is that defendants who "deliberately shield[ ] themselves from clear evidence of critical facts that are strongly suggested by the circumstances" are "just as culpable as those who have actual knowledge." Ibid. A deliberate-avoidance instruction does not diminish the government's burden to prove the mens rea of knowledge beyond a reasonable doubt; it is simply one means by which the government may make that showing. See, e.g., United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003), cert. denied, 541 U.S. 1044 (2004).

The courts of appeals uniformly have recognized that it is appropriate in a criminal case to give a deliberate-avoidance instruction where the evidence could support conviction on that basis. E.g., Svoboda, 347 F.3d at 477; United States v. Draves, 103 F.3d 1328, 1333 (7th Cir.), cert. denied, 521 U.S. 1127 (1997); United States v. Holloway, 731 F.2d 378, 381 (6th Cir. 1984) (per curiam); United States v. Jewell, 532 F.2d 697, 700-704 (9th Cir.)

("The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable."), cert. denied, 426 U.S. 951 (1976). The "basic requirements" of deliberate avoidance are that the defendant (1) "subjectively believe[s] that there is a high probability that a fact exists" and (2) "take[s] deliberate actions to avoid learning of that fact." Global-Tech, 563 U.S. at 769.

The deliberate-avoidance instruction at petitioner's trial was consistent with those standards. The district court instructed the jurors that they could find the requisite knowledge of the falsity of the tax returns if petitioner (1) "was aware of a high probability" that the tax returns he filed, agreed to file, or induced others to file were false, and (2) "deliberately avoided learning the truth." Gov't C.A. Br. 20-21 (citation omitted). That instruction was legally correct, see Global-Tech, 563 U.S. at 769, and was supported by the evidence. In particular, while petitioner attempted at trial to portray himself as an offsite owner who trusted his employees to prepare accurate tax returns, the government presented evidence that petitioner heard complaints from the employees indicating a high probability that the marketers were providing fraudulent tax information. See pp. 2-4, supra. That evidence supported an inference that, at minimum, petitioner deliberately "shut his eyes" to the preparation of fraudulent tax returns at his office, which he assisted by signing many fraudulent

tax returns himself and reassuring the complaining employees that they should not worry. See p. 3, supra. Cf. United States v. Schnabel, 939 F.2d 197, 204 (4th Cir. 1991) (citing evidence of a "wide variety of fraudulent practices that took place" at the defendant's office to support a deliberate-avoidance instruction).

b. Petitioner contends (Pet. 10-11) that a deliberate-avoidance instruction is inconsistent with the mens rea requirements of his conspiracy offense. But he provides no meaningful support for that proposition. The Model Penal Code section on which he relies (Pet. 11) states that a defendant is guilty of conspiracy if he enters an agreement "with the purpose of promoting or facilitating" the commission of a crime. Model Penal Code § 5.03(1) (1985). The deliberate-avoidance jury instruction that petitioner now challenges was directed to whether petitioner, who had the purpose of promoting and facilitating the preparation and filing of tax returns on behalf of his "marketer" clients, knew the fact that made the scheme criminal -- namely, the falsity of the returns. As previously explained, a deliberate-avoidance instruction is an instruction about how knowledge can be proved, not an invitation to find guilt based on a lesser mental state. Accordingly, the courts of appeals have recognized that "intent to participate [in a conspiracy] may be shown by a finding that the defendant either knew, or consciously avoided knowing, the unlawful aims of the charged scheme and intended to advance

those unlawful ends." Svoboda, 347 F.3d at 480; see also United States v. Nguyen, 493 F.3d 613, 624-625 (5th Cir. 2007) ("Since the jury found the [defendants] deliberately ignorant, and thus, subjectively aware of the high probabilities of illegalities around them, evidence of their continued facilitation of those highly suspicious transactions may constitute 'specific intent' to further an illegal purpose for which they were deliberately ignorant.").

Petitioner argues (Pet. 10-11) that the decision below conflicts with Ocasio v. United States, 136 S. Ct. 1423 (2016), and United States v. Bailey, 444 U.S. 394 (1980). But neither Ocasio nor Bailey addressed the law of deliberate avoidance. In Ocasio, this Court held that a defendant may be convicted of conspiring to violate the Hobbs Act by extorting property from another person under color of official right, see 18 U.S.C. 371, 1951, even if the defendant's co-conspirator is the person being extorted. 136 S. Ct. at 1428-1429, 1436. Applying "longstanding principles of conspiracy law," id. at 1429, the Court recognized that the existence of a conspiracy to violate the Hobbs Act does not require "that each conspirator agreed personally to commit -- or was even capable of committing -- the substantive offense of Hobbs Act extortion." Id. at 1432. It is enough "that the conspirators agreed that the underlying crime be committed by a

member of the conspiracy who was capable of committing it." Ibid. Ocasio has no bearing on the question presented.

Bailey likewise does not support petitioner's argument, as that case did not involve a conspiracy offense. Instead, the Court in Bailey addressed the mens rea required for a conviction for escape from federal custody, in violation of 18 U.S.C. 751(a) (1970). 444 U.S. at 406-407. The Court discussed, by way of background, the criminal intent that is required for various classes of offenses, including "inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior." Id. at 405. The Court did not elaborate on this "heightened mental state," much less whether a defendant's purpose to promote the object of a conspiracy can be shown by evidence that the defendant sought to promote a scheme's objective while willfully blinding himself to the nature of those objectives. Bailey therefore does not draw into question the propriety of a deliberate-avoidance instruction in this case.

c. Petitioner fails to identify a conflict in the courts of appeals on the deliberate-avoidance issue. Several courts have approved deliberate-avoidance jury instructions in cases involving conspiracy charges. See Svoboda, 347 F.3d at 476-482; Nguyen, 493 F.3d at 619-621 (upholding a deliberate-avoidance instruction in a case involving conspiracy to commit money laundering); United

States v. Gromet, 801 F.2d 395, 1986 WL 17616, at *2 n.3 (4th Cir. 1986) (Tbl.) (per curiam) (finding a willful-blindness instruction is permissible "even in a case involving a conspiracy charge"); United States v. Ramos-Atondo, 732 F.3d 1113, 1120 (9th Cir. 2013) (rejecting the defendants' argument that "it is impossible to conspire to be deliberately ignorant"). And the cases from the Fifth and Seventh Circuits cited by petitioner (Pet. 11) are not to the contrary.

The Fifth Circuit's decision in United States v. Ganji, 880 F.3d 760 (2018), did not involve a deliberate-avoidance jury instruction. The court of appeals reviewed the sufficiency of the evidence supporting a conviction for conspiracy to commit health care fraud, id. at 767-777, and observed that one "cannot negligently enter into a conspiracy," id. at 776. That observation is consistent with the jury instructions given at petitioner's trial, which stated that he must have willfully participated in the plan with the intent to advance the object of the conspiracy, Gov't C.A. Br. 19-20, and that the jury could not find the requisite intent if "the defendant was simply careless," id. at 20 (citation omitted).

And in United States v. Macias, 786 F.3d 1060 (7th Cir. 2015), a drug conspiracy case, the Seventh Circuit found that it was error for the district court to have given a deliberate-avoidance instruction, but only because that instruction "had no basis in

evidence." Id. at 1063. The court of appeals did not suggest that deliberate-avoidance instructions are generally inapplicable in conspiracy cases. To the contrary, Macias cited with approval the court's prior decision in United States v. Diaz, 864 F.2d 544 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989), which recognized that "such an instruction is permissible with respect to a conspiracy charge." Id. at 549; see Macias, 786 F.3d at 1062.

d. In any event, this case would be a poor vehicle for considering petitioner's second question presented. Because petitioner did not argue in the district court that a deliberate-avoidance instruction is inconsistent with the legal requirements of his conspiracy offense, his challenge to the deliberate-avoidance jury instruction given by the district court is reviewable on appeal only for plain error. See Jones v. United States, 527 U.S. 373, 388 (1999) (applying plain-error review to instructional challenge that was not raised in the district court). And because petitioner's challenge to the district court's jury instructions finds no support in the case law, petitioner cannot demonstrate any error that is "clear or obvious." Marcus, 560 U.S. at 262 (citation omitted).

Nor can petitioner demonstrate an error that affected his "substantial rights" or seriously affected "the fairness, integrity or public reputation of judicial proceedings." Marcus, 560 U.S. at 262 (citation omitted). The government presented

compelling evidence that petitioner actually knew that the tax returns he filed were false, so any error in giving the instruction would be harmless. Cf. United States v. Wells, 262 F.3d 455, 466 (5th Cir. 2001) (explaining that an error in giving a deliberate-avoidance instruction is "harmless where there is substantial evidence of actual knowledge") (citation omitted). In particular, the evidence here showed that petitioner personally dealt with and paid the marketers who provided the fraudulent taxpayer information. Gov't C.A. Br. 7-9, 12. The evidence also showed that the IRS repeatedly notified petitioner about discrepancies on the returns petitioner had prepared for the marketers. Id. at 10-11. Petitioner was not unaware of the falsity of the returns for which he earned $1 million in fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

RICHARD E. ZUCKERMAN
Principal Deputy Assistant
Attorney General

S. ROBERT LYONS
ALEXANDER P. ROBBINS
GREGORY S. KNAPP
Attorneys

JANUARY 2020