No. 19-5979

IN THE SUPREME COURT OF THE UNITED STATES

RODRIGO PABLO LOZANO,

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

REPLY BRIEF FOR PETITIONER

BENJAMIN L. COLEMAN
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

INTRODUCTION

Petitioner, Rodrigo Pablo Lozano, respectfully submits this reply to the Brief for the United States in Opposition ("BIO"). The government contends that this case is a poor vehicle to review the questions presented because they were inadequately preserved in the district court, BIO 8-9, 17-18, 25, but the Ninth Circuit did not accept these forfeiture arguments below and explicitly passed upon the questions without applying plain error review. App. 2-3. Thus, this case is a fine vehicle for review. *See United States v. Williams*, 504 U.S. 36, 41 (1992). As for the merits, the government claims that there is no conflict in the lower courts, but petitioner's contention is that review is appropriate because the Ninth Circuit's decision in this case conflicts with relevant decisions of *this Court*, and this petition presents important federal questions that have not been, but should be, settled by this Court. *See* S. Ct. R. 10(c). Indeed, like the Ninth Circuit and other lower courts, the government's position on the constitutional restitution question conflicts with the recent opinions in *United States v. Haymond*, 139 S. Ct. 2369 (2019) and *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 1642-45 (2017). The uniformity in the lower courts is all the more reason to grant review, as the circuits are disregarding this Court's precedent. *See Rehaif v. United States*, 139 S. Ct. 2191 (2019) (granting review and rejecting the unanimous view of the circuits).

ARGUMENT

I. This case is a fine vehicle to review whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to the imposition of criminal restitution because the Ninth Circuit explicitly passed upon the question, and the government's view is inconsistent with the recent opinions in *United States v. Haymond*, 139 S. Ct. 2369 (2019) and *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 1642-45 (2017).

The government does not dispute that the question presented regarding whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to restitution is important but contends that this case is a poor vehicle for review because petitioner did not adequately object in the district court. BIO 8, 17-18. Although the government concedes that petitioner objected to the loss and restitution calculations in the district court, it contends that he did not sufficiently raise an *Apprendi* claim. BIO 6, 17. The "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below[,]" and "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . . ." *Williams*, 504 U.S. at 41. Here, the Ninth Circuit explicitly passed upon the *Apprendi* question without applying plain error review. App. 3. Thus, while petitioner maintains that his objection to the restitution figure in the district court was adequate, even if it weren't, this case would still be a fine vehicle for review because the Ninth Circuit explicitly passed upon the question.

On the merits, the government continues to advance the same two rationales for exempting restitution from *Apprendi* that were debunked by Justice Gorsuch in *Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., dissenting from denial of *certiorari*). The government again contends that restitution (1) does not have a "statutory maximum" and (2) is a "restorative" remedy. BIO 11-12. Besides having been rejected by Justice Gorsuch in *Hester*, these two rationales are inconsistent with *Haymond* and *Kokesh*, two recent opinions that the government ignores.

With respect to the no "statutory maximum" rationale, the lead opinion in *Haymond* succinctly stated: "we have been down this road before." *Haymond*, 139 S. Ct. at 2379. In *Haymond*, this Court held that a mandatory minimum prison sentence imposed for a violation of supervised release violated *Apprendi*. In rejecting the government's arguments that the revocation sentence did not trigger an increase in a maximum sentence, this Court reasoned: "As this Court has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Id.* (citation omitted). This Court emphasized that "following the government down this road . . . lead[s] to the same destination" as in cases like *Alleyne v. United States*, 570

U.S. 99 (2013). *Haymond*, 139 S. Ct. at 2381. Justice Breyer concurred in *Haymond*, emphasizing the mandatory nature of the sentence at issue. *Id.* at 2396 (Breyer, J., concurring). Here, the government concedes that restitution was mandatory under the Mandatory Victims Restitution Act, BIO 10, and the reasoning in *Haymond* and *Alleyne* applies.

Meanwhile, the "restorative" remedy argument is inconsistent with *Kokesh*, another one of this Court's recent opinions that the government ignores. In *Kokesh*, this Court held that disgorgement was a "penalty" and rejected the government's similar argument that it was merely restorative or "remedial." *Kokesh*, 137 S. Ct. at 1644. This Court reached this conclusion because disgorgement, like criminal restitution, "is imposed by the courts as a consequence for violating . . . public laws." *Id.* at 1643. In the restitution context, like the disgorgement context, the "violation for which the remedy is sought is committed against the United States rather than an aggrieved individual – this is why, for example, a[n] enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Id.* Furthermore, restitution, like disgorgement, "is imposed for punitive purposes" and "is not compensatory." *Id.* at 1643-44. Both restitution and disgorgement "are paid to the district court, and it is 'within the court's discretion to determine how and to whom the money will be

distributed.'" *Id.* at 1644. Restitution, like disgorgement, "sometimes exceeds the profits gained as a result of the violation" and "is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit." *Id.*

In short, because restitution "orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty" and are not simply restorative. *Id.* at 1645. Indeed, Judge O'Scannlain has recently applied *Kokesh* to conclude that restitution is a penalty. *See Federal Trade Commission v. AMG Capital Management, LLC*, 910 F.3d 417, 433-35 (9th Cir. 2018) (O'Scannlain, J., concurring). Despite the fact that the petition cited both *Kokesh* and Judge O'Scannlain's opinion in *AMG Capital*, the government has ignored them.

While this Court's recent precedent refutes the substance of the two-pronged argument for exempting restitution from *Apprendi*, the government also points out that petitions raising this issue have been denied in several cases, including *Hester*. BIO 8-9 n.1. Most of these petitions were filed before *Haymond* and *Kokesh*. It has been three years since *Kokesh*, more than a year since *Hester*, and nearly a year since *Haymond*, and the lower courts have not budged. It is now time to correct the view of the lower courts, which is inconsistent with multiple opinions of this Court. This case is also a better vehicle for review than *Hester*, as it arises from a jury trial rather than a guilty plea.

Finally, despite the government's argument, BIO 17-18, plain error review is not an obstacle because, as explained, the Ninth Circuit passed upon the question presented without applying plain error review. *See Williams*, 504 U.S. at 41. Under Ninth Circuit law, plain error review did not apply to this question, *see United States v. Green*, 722 F.3d 1146, 1148 n.2 (9th Cir. 2013), and petitioner's objection to the loss amount in the district court was sufficient to preserve the issue. *See, e.g.*, *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Even if plain error review applied, the error was plain under this Court's opinions in *Haymond* and *Kokesh*, regardless of the fact that they were decided after the district court proceedings. *See Henderson v. United States*, 568 U.S. 266 (2013). Petitioner disputes the government's contention that he cannot show prejudice under the plain error standard, BIO 18, as he challenged the amount of loss and contended that it was millions of dollars less than the restitution figure imposed by the district court. *Compare United States v. Cotton*, 535 U.S. 625, 632-33 (2002) (*Apprendi* error did not require reversal under plain error standard because the factual question was "uncontroverted"). In any event, the prejudice question does not weigh against review because the lower court never considered the issue, and therefore the appropriate course would be a remand for consideration of prejudice in the first instance. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015).

II. This case is a good vehicle to review whether a "deliberate avoidance" mental state is sufficient for a conspiracy offense, as the Ninth Circuit explicitly passed upon the question without applying plain error review.

The government similarly contends that this case is not a good vehicle to review whether a "deliberate avoidance" mental state is sufficient for a conspiracy offense because petitioner did not adequately object in the district court. BIO 9, 25. Once again, this procedural complaint is not persuasive because the Ninth Circuit explicitly passed upon the question presented without applying plain error review. *See Williams*, 504 U.S. at 41. The traditional rule as articulated in *Williams* applies in the jury instruction context. *See United States v. Wells*, 519 U.S. 482, 487-89 (1997). The government even concedes that petitioner *did* object to the deliberate avoidance jury instruction in the district court, BIO 5, further undermining its position, particularly when considering that the Ninth Circuit passed upon the question. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 n.10 (2005).

On the merits, the government does not meaningfully contradict petitioner's contention that a deliberate avoidance jury instruction is inconsistent with this Court's articulation of the conspiracy offense. The government does not dispute that the legal foundation for a "deliberate avoidance" mental state is the Model Penal Code ("MPC"). *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 767 (2011); *Turner v. United States*, 396 U.S. 398, 416-17 (1970); *Leary v.*

United States, 395 U.S. 6, 46-47 and n.93 (1969). Nor does the government dispute that the MPC defines "a hierarchy of culpable states of mind . . . . commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence[,]" *United States v. Bailey*, 444 U.S. 394, 404 (1980), and that deliberate avoidance can only be a substitute for the second MPC category, knowledge, not the first category, purpose.

This Court made it clear in *Bailey* that conspiracy falls under the "purposely" category, the highest level of mens rea set forth in the MPC, *see Bailey*, 444 U.S. at 404-05, and this Court recently approved of this description in *Ocasio v. United States*, 136 S. Ct. 1423, 1435 (2016). While the government cannot dispute this language in *Bailey* and *Ocasio*, it simply states that those opinions did not specifically address the "law of deliberate avoidance." BIO 22-23. The government is correct, as "deliberate avoidance" was not the specific issue in those two cases. Nevertheless, the language in *Ocasio* and particularly *Bailey* is clear – conspiracy requires a purposely mens rea under the MPC. Deliberate avoidance is insufficient under the MPC to establish this highest level of scienter. Thus, the decision below conflicts with this Court's articulation of the conspiracy offense and the MPC origin of deliberate avoidance, meriting review.

Finally, although the government maintains a lack of prejudice under the plain error standard, BIO 25-26, petitioner has already explained that plain error

review does not apply, *see Arthur Andersen LLP*, 544 U.S. at 707 n.10, and the government does not contend that reversal is inappropriate under the harmless beyond a reasonable doubt standard. *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). Even if the plain error standard were to apply, the error was plain under cases like *Bailey*, and any prejudice determination should be made by the Ninth Circuit in the first instance given that it did not address the question. *See, e.g.*, *McFadden*, 135 S. Ct. at 2307. In sum, the government's vehicle complaint as to the mens rea question is without basis.

CONCLUSION

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

Dated: January 27, 2020

Respectfully submitted,

BENJAMIN L. COLEMAN
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Petitioner