No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ELIJAH LOREN ARTHUR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), 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." In *Southern Union Co. v. United States*, 567 U.S. 343 (2012), the Court extended the rule of *Apprendi* to the imposition of criminal fines. Nevertheless, the federal courts of appeals have persisted in holding that the rule of *Apprendi* does not apply to criminal restitution. The question presented is: Should the Court extend the rule of *Apprendi* to the award of criminal restitution?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner Elijah Loren Arthur respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 19, 2019.

OPINION BELOW

The court of appeals' order granting summary affirmance (App. A), and the district court's second amended judgment (App. B), are unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Arthur pursuant to 18 U.S.C. § 3231. The order of the United States Court of Appeals for the Ninth Circuit granting summary affirmance was entered on November 19, 2019. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution reads, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]

U.S. Const. amend. VI.

The Mandatory Victims Restitution Act, 18 U.S.C.A. § 3663A, reads in pertinent part, as follows:

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

*** * * ***

STATEMENT OF THE CASE

Elijah Loren Arthur is a 38-year-old former convenience store clerk and landscaper, and member of the Salt River Pima-Maricopa Indian Community (Salt River), a federally recognized tribe that occupies a reservation adjacent to Scottsdale, Arizona. On May 24, 2014, after spending much of the previous day consuming alcohol, marijuana, and methamphetamine, Mr. Arthur shot and killed Salt River police officer Jair Cabrera. Following a nine-day trial, a jury convicted Mr. Arthur on one count of first degree murder in violation of 18 U.S.C. §§ 1111, 1153, and 2, and one count of discharging a firearm during the commission of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(j), and 2.

In his presentence report, the probation officer recommended that the court include no restitution in the judgment, noting that Officer Cabrera's family had already won a $96 million judgment against Mr. Arthur in state court. At the sentencing hearing, however, the government announced that it had learned that morning from an attorney representing Officer Cabrera's father that Officer

Cabrera's family would be seeking restitution. Apologizing "for the late disclosure," the government asked the court to set a restitution hearing. The court agreed to do so, and entered a judgment that sentenced Mr. Arthur to life imprisonment on Count 1 followed by ten consecutive years on Count 2, and specified that restitution was "[t]o be determined." Mr. Arthur filed an appeal from that judgment.

While Mr. Arthur's first appeal was pending, the government filed a memorandum urging the court to award lost-income restitution pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A (MVRA). The government noted that in *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006), the Ninth Circuit had held that the MVRA authorizes an award of restitution for lost income, provided that the amount of lost income is "reasonably calculable." *Id*. at 1161. The government explained that it had retained Certified Public Accountant Tim Tribe to "perform an independent analysis of [Officer Cabrera's] lost future income for purposes of the restitution determination." In an April 20, 2016 report attached to the government's motion, Mr. Tribe provided three alternative estimates of Officer Cabrera's lost income. The first, assuming no salary growth and no overtime, yielded a lost income estimate of $780,923. The second, assuming 1.97% salary growth and 25.59% overtime pay, yielded a lost income estimate of $1,123,156. The third, assuming 2.37% salary growth and 25.59% overtime pay, yielded a lost income estimate of $1,153,843.

Mr. Arthur filed a response to the government's memorandum. Mr. Arthur described lost-income restitution as "not precluded under the MVRA," but disagreed

with the government's calculation of the amount. Mr. Arthur argued (among other things) that the lost income estimate erroneously failed to deduct Officer Cabrera's living expenses from his projected income.

The government then produced a June 7, 2016 supplemental report of Mr. Tribe. In his supplemental report, Mr. Tribe applied estimates of Officer Cabrera's expected future expenses to generate revised lost income projections. With the projected expenses deducted, Mr. Tribe's three alternative lost income estimates were revised to $313,931, $612,120, and $628,844.

The district court conducted a restitution hearing at which Mr. Tribe and Officer Cabrera's father Alfonso Cabrera testified. Mr. Tribe explained the basis for his lost income estimates. Mr. Cabrera testified that Officer Cabrera had supported him and his wife, paying their housing, utilities, clothing, and medical expenses. The government took no position as to whether the court should deduct Officer Cabrera's projected expenses from the restitution award, instead "leav[ing] it to the Court whether the Court deems that appropriate to apply." The government urged the court to base a restitution award on one of Mr. Tribe's more generous lost income projections. Mr. Arthur's counsel argued that the court should, if it chose to award restitution, choose the "most conservative, least speculative" of Mr. Tribe's estimates.

The next day the court entered an order directing Mr. Arthur to pay restitution to Officer Cabrera's estate. The court adopted Mr. Tribe's "most conservative" estimate of Officer Cabrera's lost income, totaling $780,923. The court

declined to deduct Officer Cabrera's projected expenses, explaining: "No consumption rate will be applied as the MVRA does not require it." The court did, however, deduct "additional funds received by [Officer Cabrera's] family in compensation for his death," bringing the total down to $565,923. The court acknowledged that Officer Cabrera's father had won a $95 million civil judgment against Mr. Arthur in state court, and noted that any payment received in satisfaction of that judgment would "offset" money owed on the criminal restitution award pursuant to 18 U.S.C. § 3664(j)(2)(B).

The court then entered an amended judgment adding the $565,923 in restitution. Mr. Arthur filed an appeal from the amended judgment, and moved to consolidate that appeal with his appeal from the original judgment. The Court granted the motion, and received consolidated briefing in the two appeals.

In that appeal, in addition to challenging his convictions, Mr. Arthur raised four challenges to the restitution penalty, arguing that: (1) the district court erred in refusing to deduct Officer Cabrera's projected living expenses, (2) the district court made a mathematical error in deducting other forms of compensation from the restitution award, (3) the MVRA does not authorize restitution for a decedent's lost income, and (4) the MVRA unconstitutionally authorizes a judge, rather than a jury, to impose and set the amount of restitution. Mr. Arthur acknowledged that arguments (3) and (4) were foreclosed by circuit precedent, and were being made for purposes of preservation. In its answering brief, the government conceded that Mr. Arthur's arguments (1) and (2) might have merit, and requested that the court of

appeals remand the case for the district court to reconsider the restitution award. The government agreed with Mr. Arthur that arguments (3) and (4) were foreclosed by precedent.

The court of appeals issued its amended memorandum decision in Mr. Arthur's first appeal on November 20, 2018. The court rejected Mr. Arthur's challenges to his convictions. But, noting the government's concession, the Court vacated the restitution award and remanded the judgment "for reconsideration of the restitution." (This Court denied Mr. Arthur's petition for certiorari seeking review of that judgment. *Arthur v. United States*, No. 18-8076.)

Following the remand, the government filed a new motion for restitution in the district court. This time, the government agreed that Officer Cabrera's projected expenses should be deducted from the lost income estimate, such that Mr. Tribe's expense-adjusted most conservative lost-income estimate of $313,931 should be adopted. The government argued that, because the MVRA did not allow other amounts that Officer Cabrera's family had received in compensation for his death to be deducted from the restitution award, no other adjustments should be made. Mr. Arthur filed a response in which he agreed that Officer Cabrera's projected expenses should be deducted from the lost income estimate, and "t[ook] no position" as to whether the court should deduct money Officer Cabrera's family had received in compensation for his death. In addition, as he had done in his first appeal, Mr. Arthur argued that (1) the MVRA does not authorize restitution for a decedent's lost income, and (2) the MVRA unconstitutionally authorizes a judge, rather than a jury,

to impose and set the amount of restitution. Mr. Arthur again acknowledged that these claims were precluded by circuit precedent, and that he was pressing them "for purposes of preservation." The government filed a brief reply in which it noted that "[b]ecause remand here was on an open record," Mr. Arthur was raising his challenges to the restitution award "to ensure they are preserved."

The district court held a motion hearing to address the question of restitution. App. C. The court asked the parties whether they agreed that the restitution award should be $313,931. *Id*. at 3. Mr. Arthur's counsel responded, "Yes, Your Honor, with the caveat that we are preserving some issues on a bigger scale regarding the applicability of restitution at all." *Id*. Mr. Arthur's counsel summarized his challenges to the lost-income award, again acknowledging that they were barred by circuit precedent. *Id*. at 3-4. Noting that Mr. Arthur "preserves certain arguments in opposition to binding precedent in the event that there is a change in the law while this case is still pending," the court adopted a restitution penalty of $313,931. *Id*. at 6. The next day the court entered its second amended judgment, including the $313,931 restitution penalty. App. B.

Mr. Arthur filed an appeal to the court of appeals, again pressing his arguments that (1) the MVRA does not authorize restitution for a decedent's lost income, and (2) the MVRA unconstitutionally authorizes a judge, rather than a jury, to impose and set the amount of restitution, while acknowledging that these claims were barred by circuit precedent. The government filed an unopposed motion for summary affirmance, noting that Mr. Arthur acknowledged that his claims were

barred by circuit precedent. The court of appeals entered an order on November 19, 2019, granting the government's motion. App. A.

REASON FOR GRANTING THE WRIT

Justice Gorsuch recently explained, in a dissent from the denial of certiorari that was joined by Justice Sotomayor in *Hester v. United States*, 139 S. Ct. 509 (2019), why the question presented in this petition warrants this Court's review.

Justice Gorsuch noted that, pursuant to this Court's watershed Sixth Amendment holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in a criminal case "the prosecutor must prove to a jury all of the facts legally necessary to support [a defendant's] term of incarceration." *Hester*, 139 S. Ct. at 509. And that rule is not "limited to prison time"; pursuant to this Court's holding in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), it applies as well to criminal fines. *Hester*, 139 S. Ct. at 509. But this Court has not yet extended the rule of *Apprendi* to criminal restitution – and as a result, even after *Southern Union*, the federal circuit courts have adhered to the view that *Apprendi* does not apply in this context. *United States v. Vega-Martínez*, ___ F.3d ___, 2020 WL 502538, at *6-*7 (1st Cir. Jan. 31, 2020); *United States v. Burns*, 800 F.3d 1258, 1261-62 (10th Cir. 2015); *United States v. Churn*, 800 F.3d 768, 780-83 (6th Cir. 2015); *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Bengis*, 783 F.3d 407, 411-13 (2d Cir. 2015); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *United States v. Green*, 722 F.3d 1146, 1149-51 (9th Cir. 2013); *United States v. Wolfe*, 701 F.3d 1206, 1215-18 (7th Cir. 2012); *United States v. Day*, 700

F.3d 713, 731-32 (4th Cir. 2012). The circuit consensus is sufficiently entrenched that it appears that this Court must intervene pursuant to Supreme Court Rule 10(c), which authorizes it to address an "important question of federal law that has not been, but should be, settled by this Court," rather than waiting for a circuit split that is very unlikely to materialize.

Justice Gorsuch's *Hester* dissent demonstrates that Rule 10(c) is applicable here. As he notes, "[r]estitution plays an increasing role in federal criminal sentencing today," particularly in light of federal statutes such as the MVRA – which was applied here – and the Victim and Witness Protection Act of 1982, 96 Stat. 1248. *Hester*, 139 S. Ct. at 509. From 2014 to 2016, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution," and in 2016 the total amount of unpaid criminal restitution exceeded $110 billion. *Id.* These restitution awards have a profound effect upon defendants, insofar as their failure to pay them may subject them to loss of voting rights, continued court supervision, and even reincarceration. *Id.*

Moreover, the surface consensus among the circuit courts masks an undercurrent of concern among circuit judges that withholding the rule of *Apprendi* from criminal restitution awards cannot be reconciled with the principles underlying *Apprendi* and its progeny. *Id.*; *see Green*, 722 F.3d at 1151 (noting that fact that circuit precedent declines to apply *Apprendi* to restitution "doesn't mean our caselaw's well-harmonized with *Southern Union*"); *United States v. Leahy*, 438 F.3d 328, 343-44 (3d Cir. 2006) (McKee, J., concurring in part and dissenting in

part) (positing that the view that "restitution is 'not really' additional punishment" cannot be reconciled with this Court's holding in *Blakely v. Washington*, 542 U.S. 296, 303 (2004), 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*"); *United States v. Carruth*, 418 F.3d 900, 905-06 (8th Cir. 2005) (Bye, J., dissenting) (asserting that the notion that *Apprendi* does not apply to restitution because restitution statutes do not prescribe a maximum amount "is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum").

As these judges – and Justice Gorsuch – have observed, the defense of the circuit courts' conclusions on the theory that "restitution is dictated only by the extent of the victim's loss and thus has no 'statutory maximum'" cannot be squared with this Court's holding, that the "statutory maximum" for *Apprendi* purposes is "the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." *Hester*, 139 S. Ct. at 509 (*citing Blakely*, 542 U.S. at 303). "In that sense," as Justice Gorsuch observed, "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." *Id*.

The alternative defense of the circuit courts' holdings, that "the Sixth Amendment doesn't apply to restitution orders because restitution isn't a criminal penalty, only a civil remedy that compensates victims for [their] economic losses," is

equally unconvincing. *Id*. (internal quotation marks omitted). The argument overlooks the fact that restitution "is imposed as part of a defendant's criminal conviction," and that both federal statutes and this Court's cases describe it as "a 'penalty' imposed on the defendant as part of his criminal sentence." *Id.* (internal quotation marks omitted; citing 18 U.S.C. §§ 3663(a)(1)(A), 3663A(a)(1), 3572(d)(1); *Paroline v. United States*, 572 U.S. 434, 456 (2014); and *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)).

The bottom line, as Justice Gorsuch observed, is that the arguments in support of withholding the rule of *Apprendi* from the award of criminal restitution are "difficult to reconcile with the Constitution's original meaning." *Hester*, 139 S. Ct. at 509. At the time of the Sixth Amendment's adoption American courts, following long-established English law, held that "the jury usually had to find the value of the stolen property before restitution to the victim could be ordered." *Id*. (*citing Schoonover v. State*, 17 Ohio St. 294 (1867); *Jones v. State*, 13 Ala. 153 (1848); *State v. Somerville*, 21 Me. 20 (1842); *Commonwealth v. Smith*, 1 Mass. 245 (1804); 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, 472-476 (2014)). Notwithstanding the circuit courts' (uneasy) consensus to the contrary, "it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption." *Id*.

It appears that, until this Court intervenes, that illogical disparity is likely to persist. And this case – in which the district court judge imposed $313,931.00 in restitution over Mr. Arthur's fully preserved Sixth Amendment objection – is an appropriate vehicle for that intervention to occur.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on February 14, 2020.

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