IN THE
SUPREME COURT OF THE UNITED STATES

No. 19-8799

JAMES JOHNMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

Courts may not "prescrib[e] greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). That is what the Third Circuit did below in interpreting 18 U.S.C. § 3014, a part of the Justice for Victims of Trafficking Act (JVTA), to mandate an additional $5,000 special assessment per count of conviction (in addition to the special assessments already mandated under 18 U.S.C. § 3013). And that is what the government asks this Court to maintain in opposing the petition for certiorari.

This petition presents a circuit split between two United States courts of appeals on "the same important matter." This falls squarely within Supreme Court Rule 10(a), regardless of whether other courts of appeals have also weighed in. Resolving a circuit split on the same matter of federal law, and bringing uniformity to federal courts, is one of the primary purposes of certiorari jurisdiction. *See, e.g.*, *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

The question presented is narrow, and the split is well-defined. The Third Circuit Court of Appeals, based on Section 3014's use and placement of different grammatical articles, concluded that the JVTA required $5,000 be assessed per count of conviction. The Second Circuit Court of Appeals held that the JVTA straightforwardly imposed "an amount of $5,000" per offender, and directly recognized its split from the Third Circuit. This matter is important because the Third Circuit practice and other district courts that follow the per-count-of-conviction exceed the statutory maximum of $5,000, violating the constitutional hallmark against duplicative punishment. *See United States v. Wilson*, 420 U.S. 332, 339-43 (1975) (citing 4 W. Blackstone, Commentaries 335-36; 3 E. Coke, Institutes 212-13 (6th ed. 1680)).

And not only do courts continue to impose multiple $5,000 additional special assessments not authorized by law, district and appellate courts also continue to only impose one special assessment, resulting in lack of uniformity throughout the country. The government is correct that the offender in *United States v. Kelley* was only charged one additional $5,000 special assessment under the JVTA because of

the timing of his offenses. *See* B.I.O at 11 n.2 (discussing 861 F.3d 790 (8th Cir. 2017)). But the Eighth Circuit recently affirmed a sentence that imposed one additional $5,000 special assessment under 18 U.S.C. § 3014, a per-offender reading of the JVTA, where the offender was charged with five offenses that could have been assessed under the JVTA. *See United States v. Rhodes*, 828 Fed. Appx. 342 (8th Cir. Nov 4, 2020) (not precedential).

I. This case presents a fully litigated circuit split on an issue of statutory interpretation even though both cases were reviewed under a plain error standard

The government erroneously posits this case as about plain error and that "Petitioner's failure to even attempt to show reversible plain error in this Court is thus fatal to his claim." (B.I.O. at 9).

Whether Petitioner can show plain error is not required for this Court's review of an issue. This Court does not hesitate to grant certiorari when a legal issue is squarely presented, even absent a contemporaneous objection. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319 (2011). When that happens, the Court's routine practice is to decide the legal issue and remand for the court of appeals to determine whether relief is warranted under the plain-error standard. *Tapia*, 564 U.S. at 335 ("Consistent with our practice, *see, e.g.*, *United States v. Marcus*, 560 U.S. 258, 266 – 267, 130 S.Ct. 2159, 2166, 176 L.Ed.2d 1012 (2010), we leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed. *See* Fed. Rule Crim. Proc. 52(b); *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)."); *see, e.g.,, Fowler v. United*

States, 563 U.S. 668 (2011) (clarifying an evidentiary standard and remanding to the court of appeals to decide whether there was plain error).

Here, the conflicting courts below each engaged in a full statutory analysis before ultimately deciding the issue in the plain error context.

The Third Circuit determined it had found the "best" reading of the statute after it focused on the phrase "convicted of an offense" in the JVTA's command to "assess an amount of $5,000 on any non-exempt person or entity *convicted of an offense* under certain enumerated chapters of the criminal code." *United States v. Johnman*, 948 F.3d 612, 617 (3d Cir. 2020) (quoting 18 U.S.C. § 3014(a)). The Third Circuit employed linguistic canons, focusing on the placement and use of singular and indefinite articles. By contrast, the Second Circuit, in *United States v. Haverkamp*, found error in imposing multiple special assessments. It focused on the phrase "an amount of $5,000" and explained "as a matter of grammar and common understanding," an amount of $5,000 is assessed one time. 958 F.3d 145, 149 (2d Cir. 2020). The Third Circuit found the similarities with 18 U.S.C. § 3013 supported its holding, while the Second Circuit found the differences with 18 U.S.C. § 3013 supported its holding. *Compare* 948 F.3d at 619-20 *with* 958 F.3d at 149-50. The Third Circuit only considered the first prong of plain error and found no error in imposing multiple additional special assessments. 948 F.3d at 616. The Second Circuit, because this was a sentencing appeal, found plain error. 958 F.3d at 150.[1]

[1] And neither should this case serve as a referendum on the Second Circuit describing its plain error review of sentencing decisions as "relaxed." *Haverkamp*, 958 F.3d at 149. This Court follows a similar approach, explaining that "[a]

In sum, the split in whether the JVTA mandates a per-count or per-offender assessment is simple and well-defined even though the issue is "of very recent vintage." (*See* B.I.O. at 11). In such a straightforward case about text and grammar, this Court would not benefit by letting the analysis further percolate in other circuit courts of appeals. Moreover, shallow splits on important issues require this Court's attention. *See, e.g.*, *VF Jeanswear LP v. Equal Employment Opportunity Commission*, 140 S.Ct. 1202 (April 6, 2020) (Thomas, J., dissenting from denial of certiorari with "shallow" split between three circuit courts of appeals in which the case below permitted an interpretation to stand whereby an administrative agency could be wielding ultra vires power, beyond that authorized by Congress).

II. The Third Circuit, and the government here, erred in its statutory analysis

As the Second Circuit correctly analyzed, the statute is straightforward. The Third Circuit's linguistic deconstruction simply got it wrong. Moreover, the comparisons to the well-settled per-count assessment under 18 U.S.C. § 3013 do not answer what Congress intended thirty years later in enacting the JVTA. *See*

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resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Rosales-Mireles v. United States*, 585 U.S. ___, 138 S.Ct. 1897, 1908 (2018) (quoting *United States v. Williams*, 399 F. 3d 450, 456 (2d Cir. 2005). Similarly, in *Molina-Martinez v. United States*, this Court rejected that additional resentencing proceedings would seriously burden judicial resources, explaining that circuit courts had developed procedures for limited remand. 578 U. S. ___, 136 S.Ct. 1338, 1348-49 (2016). The cost of correction in the context of the $5,000 special assessment under 18 U.S.C. § 3014 is even smaller: the Court of Appeals can simply excise the excessive fine without remand.

Rutledge v United States, 517 U.S. 292 (1986) (stating without analyzing that Section 3013 mandates a per-count assessment). Although the additional special assessment in 18 U.S.C. § 3014 was placed after 18 U.S.C. § 3013, the government is wrong to describe Section 3014 as "supplement[ing]" Section 3013." (B.I.O. at 3, 5). The additional $5,000 special assessment in Section 3014 was part of the sweeping Justice for Victims of Trafficking Act, and the money collected through its assessment was specifically tied to a $30 million relief fund for victims and law enforcement. This is the relevant statutory context, not the creation of assessments under Section 3013 over thirty years before to support a general Crime Victims Fund.

III. This assessment affects more than 35,000 criminal defendants

Because 18 U.S.C. § 3014 is set to expire in September 2021, the government argues that a correct interpretation of this additional special assessment has "limited perspective importance," and thus asks this Court to deny certiorari. (B.I.O. at 8). This is wrong for two reasons.

First, Congress has already extended the tenure of Section 3014. The Act was originally set to expire on September 30, 2019. The Abolish Human Trafficking Act of 2017 extended the time to collect a $5,000 additional special assessment through 2021. *See* PL 115-392, 132 Stat 5250 (Dec. 21, 2018).

Second, even if the statute does ultimately expire in 2021, this case has substantial practical importance: the additional special assessment under 18 U.S.C. § 3014 affects thousands of defendants each year. Staff at Shared Hope

International, an anti- sex trafficking organization which supported the drafting and passage of the JVTA, explained that the $30 million fund for the JVTA was based on United States Sentencing Commission data from 2012. That data suggested "this additional special assessment would apply to more than 6,200 offenders per year—accounting for at least $31 million in obligated assessments. *Section-by-Section Analysis of the JVTA*, *available at* https://sharedhope.org/wp-content/uploads/2015/03/Justice-for-Victims-of-Trafficking-Act-2015_Section-by-Section_Reported-....pdf; *accord* Coalition Against Trafficking in Women, *Press Release: U.S. Congress Passes the Justice for Victims of Trafficking Act* (May 19, 2015) ("The JVTA creates a new funding stream to finance services for U.S. trafficking victims. Up to $30 million of the innovative funding mechanism will come from $5,000 fines on perpetrators of crimes ranging from human trafficking to child pornography."). These sources show that tens of thousands of offenders will face the $5,000 assessment, and also that the assessment was only intended to be $5,000 per offender.

Such a high assessment, be it $5,000 or some multiple thereof, makes a dramatic difference in an imprisoned person's conditions of confinement. While an inmate owes fines and assessments, the money he holds at the prison, either through what he earns working in the prison or what family members put into his account, are garnered. This restricts how much an inmate has to spend at the commissary to buy toiletries and healthy foods, to add money to his email and phone account, or even to send money home. The other effect is that the less an

inmate can support himself, the more he relies on his family. The decision to impose a per-conviction assessment makes a profound difference to an imprisoned person and his family.

IV. Conclusion

Linguistic canons are not meant to obscure straightforward language. While imposing multiple additional $5,000 special assessments serves the noble purpose of adding more money to a victim's funds, the Third Circuit strayed from its role as faithful agent in interpreting the statute as it did. On this important issue, the petition for writ of certiorari should be granted.

Respectfully submitted,

s/ Alison Brill

ALISON BRILL
Office of the Federal Public Defender

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