No._____

In the
Supreme Court of the United States

SOLOMON JALLOH,
*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

# Petition for Writ of Certiorari

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# QUESTION PRESENTED

Whether under *Apprendi,* the maximum restitution that can be imposed without additional jury findings as to any amount of loss is zero, consistent with the common law tradition?

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## OPINION BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced as Appendix A.

## JURISDICTION

The court of appeals entered judgment on December 11, 2019. App. A. It denied a petition for rehearing on January 28, 2020. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> 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 . . . .

## STATEMENT OF THE CASE

A jury convicted Petitioner on several counts of wire fraud. Specifically, he was convicted on seven counts that arose from his interactions with an undercover agent who purported to be seeking an investment vehicle for $500,000 in assets. Prior to consummation of the deal and before any money or assets changed hands, the undercover agent withdrew from their agreement and Petitioner responded with a cease and desist notice. An eighth count of wire fraud was added by superseding indictment alleging a separate instance of wire fraud, specifically a

scheme involving an investment of $15,000. The jury convicted Petitioner on this count as well. But there were no specific findings by the jury as to loss amount.

Before sentencing, the government agreed with probation's calculations of loss and restitution, seeking over $2.1 million in restitution. Among other things, Mr. Jalloh objected to the loss amounts, and the district court ordered an evidentiary hearing at the time of sentencing. It then found by a preponderance a total loss of $2,129,600 and ordered Petitioner to repay that amount in restitution.

On appeal, the Ninth Circuit affirmed the restitution order relying on language from the Mandatory Victims Restitution Act requiring restitution to anyone "harmed by the defendant's criminal conduct in the course of the scheme," Appx. at 4 (quoting 18 U.S.C. § 3663A(a)(2)), and another Ninth Circuit decision in *United States v. May*, 706 F.3d 1209 (9th Cir. 2013), that held restitution lies for loss that "flows directly from the specific conduct that is the basis of the offense of conviction." Appx. at 4 (quoting *May*, 706 F.3d at 1214). Petitioner sought rehearing, which was denied. Appx. B. This petition follows.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's affirmance of a contested $2.1 million restitution order with nothing greater than a judge's preponderance finding is premised on a fundamental misunderstanding of the Supreme Court's evolving explication of *Apprendi*'s application to criminal penalties. The court of appeals has failed to appreciate that even before the

Supreme Court's decision in *Paroline*, the Ninth Circuit acknowledged the precariousness of its prior precedent with respect to restitution in light of this Court's even earlier decision in *Southern Union Co. v. United States*.[1]

*Southern Union* held that *Apprendi* protections apply to criminal fines.[2] And the Ninth Circuit in *United States v. Green,* 722 F.3d 1146 (9th Cir. 2013), has candidly acknowledged that "*Southern Union* provides reason to believe that *Apprendi* might apply to restitution."[3] *Green* even went so far as to suggest that *Southern Union* "chips away at the theory behind [the Ninth Circuit's previous] restitution cases,"[4] and that this Court's prior caselaw is not "well-harmonized with *Southern Union*."[5] Indeed, it even suggested that "[h]ad *Southern Union* come down before our cases, those cases might have come out differently."[6] *Green* nevertheless declined the invitation to hold that the Supreme Court's decision on criminal fines clearly overruled this Circuit's prior precedent on *Apprendi*'s application to restitution, but in what appears to have been an invitation for further en banc consideration, *Green* stated that "[s]uch rewriting of doctrine is the sole province of the court sitting en banc."[7]

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[1] 132 S. Ct. 2344 (2012).
[2] *Id.* at 2349.
[3] 722 F.3d at 1150.
[4] *Id.*
[5] *Id.* at 1151.
[6] *Id.*
[7] *Id.*

To the extent that *Green*'s invitation for further en banc review wasn't yet ripe while the ink was still drying on the *Southern Union* decision, the time has now come for the Court to grant such review on certiorari in the wake of the its subsequent decisions in *Paroline* and *Alleyne*. The Ninth Circuit's consistent rejection of the applicability of *Apprendi* to restitution findings not only fails in light of this Court's evolving jurisprudence on the issue but because *Green* itself acknowledged the shaky foundation of prior circuit precedent in light of *Southern Union*. That foundation has now been undercut even further, and the Court should grant certiorari to ensure consistency of Ninth Circuit precedent with the current stream of Supreme Court authority eroding that prior precedent. The Court, therefore, should grant *certiorari* to resolve this important question.

Under *Apprendi v. New Jersey*, "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."[8] In *Southern Union*, the Court held that the *Apprendi* rule applies to fines, noting 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."[9]

[8] 530 U.S. 466, 490 (2000).
[9] 132 S. Ct. at 2351 (citations omitted).

In *Green*, the Ninth Circuit recognized that "*Southern Union* provides reason to believe *Apprendi* might apply to restitution."[10] But it rejected the defendants' argument that the restitution orders in their case violated *Apprendi*, reasoning that *Southern Union* was not "clearly irreconcilable" with this Court's prior precedent holding that *Apprendi* doesn't apply to restitution.[11] The Court explained: "Even if it [*Southern Union*] chips away at the theory behind our restitution cases, it's not 'clearly irreconcilable' with our holdings that restitution is 'unaffected' by *Apprendi*."[12] Thus, the three-judge panel in *Green* did not believe that it could overrule this Circuit's prior precedent under the standard in *Miller v. Gammie*,[13] even though it acknowledged that Ninth Circuit caselaw was not "well-harmonized with *Southern Union*" and "[h]ad *Southern Union* come down before our cases, those cases might have come out differently."[14]

*Green* offered two potential reasons why *Southern Union* may not control in the restitution context. First, it explained that it isn't clear whether restitution is punishment, the Ninth Circuit had sometimes stated that it isn't punishment, sometimes stated that it is punishment, and even other times that it is a "hybrid."[15] Second, *Green* stated: "Restitution carries with it no statutory maximum; it's pegged to the amount of the victim's loss. A judge can't exceed the non-existent statutory maximum for

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[10] *Green*, 722 F.3d at 1150.
[11] *Id.* at 1150-51.
[12] *Id.* at 1150.
[13] 335 F.3d at 900.
[14] *Green*, 722 F.3d at 1151.
[15] *Green*, 722 F.3d at 1150.

restitution no matter what facts he finds, so *Apprendi*'s not implicated."[16] As set forth below, given the Supreme Court's recent precedent, these two reasons can no longer justify exempting restitution from the rule articulated in *Apprendi* and *Southern Union*, and therefore, the Court should now conclude that restitution is subject to the *Apprendi* rule.

### *A.* The two rationales suggested in *Green* have been undercut by *Paroline* and *Alleyne*.

The first basis offered in *Green* to distinguish *Southern Union* was that restitution may not be punishment.[17] After *Green*, the Supreme Court decided *Paroline*, which undercut whatever validity there ever was to that rationale.

In *Paroline*, the Court stated that restitution "implicates 'the prosecutorial powers of government,'" and "*serves punitive purposes*."[18] In reaching this conclusion, the Court cited *Pasquantino v. United States*, which explicitly stated that "[t]he purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for [the defendant's criminal] conduct."[19] The Court further analogized restitution to criminal fines and said that there is strong reason to believe that the Excessive Fines Clause of the Eighth Amendment applies to criminal restitution.[20] Thus, even if Ninth Circuit precedent has been inconsistent on whether restitution is punishment, Supreme Court precedent has

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[16] *Id.* at 1150.
[17] *See Green*, 722 F.3d at 1150.
[18] 134 S. Ct. at 1726 (emphasis added).
[19] 544 U.S. 349, 365 (2005).
[20] *See Paroline*, 134 S. Ct. at 1726.

now made it clear that restitution *is* punishment. In short, after *Paroline*, there is now little basis to the no-punishment rationale offered in *Green*.

The second basis offered in *Green* for potentially distinguishing *Southern Union* was that there is purportedly no statutory maximum for restitution.[21] This rationale was undercut in *Alleyne v. United States*,[22] which was decided a mere three weeks before *Green* and therefore understandably not mentioned in this Court's opinion.

In *Alleyne*, the government argued that *Apprendi* should not be applied to facts that bring a mandatory minimum sentence into play because those facts don't alter the statutory maximum penalty, which in that case (according to the government) permitted up to a life sentence. The Court rejected that argument, stating: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent 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."[23] After *Alleyne* decided that *Apprendi* applies to mandatory minimum penalties, the no-statutory-maximum rationale to distinguish restitution has no force.

It is also worth emphasizing that *Southern Union* relied on common law cases in which there was no explicit maximum penalty, and instead the fine was based on the

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[21] *See Green*, 722 F.3d at 1150-51.
[22] 133 S. Ct. 2151 (2013).
[23] *Alleyne*, 133 S. Ct. at 2162; *see Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("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").

victim's loss.[24] For example, *Southern Union* relied on *Commonwealth v. Smith*,[25] a larceny case in which the court was authorized to order a fine of three times the amount of money stolen, which the court declined to do with respect to property that was not listed or valued in the indictment. Thus, the no-maximum rationale would have applied equally to the statute in *Smith*. The same holds true for the other historical cases relied on in *Southern Union*, which all dealt with offenses for which the available fine was determined by the value of property stolen or damaged. But, even if the no-maximum cases relied upon in *Southern Union* could be ignored, it is now clear that the no-maximum rationale offered in *Green* no longer has any force after *Alleyne*.[26]

### B. The common law also demonstrates that *Apprendi* applies to restitution.

As demonstrated above, the Supreme Court's most recent precedent now makes it clear that there is no legitimate basis to distinguish restitution from fines for *Apprendi* purposes. For that reason alone, the Ninth Circuit could no longer be bound by its prior precedent.

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[24] *See Southern Union*, 132 S. Ct. at 2353-54.

[25] 1 Mass. 245, 247 (1804).

[26] *See, e.g., United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (an unauthorized restitution order "is no less illegal than a sentence of imprisonment that exceeds the statutory maximum"); ain *see also United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012) ("[a]n award of restitution greater than a victim's actual loss exceeds the MVRA's statutory maximum"); 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) (claiming that statutes authorizing restitution do "in fact, prescribe a statutory maximum" penalty – the amount of the victim's loss).

Furthermore, the Ninth Circuit's prior precedent addressing *Apprendi* in the context of restitution has not considered the historical record. Actually, the origin of the purported restitution exception to *Apprendi* in the Ninth Circuit is based on virtually no analysis whatsoever. The reasoning amounts to a three-word declaration that the restitution statutes are "unaffected by *Blakely*" with a supporting citation to a pre-*Apprendi* case stating that restitution is different from the Sentencing Guidelines.[27]

As it had done in every case in the *Apprendi* line, the Court in *Southern Union* based its holding in large part on its "examin[ation of] the historical record, because 'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.'"[28] The Court stated that "the salient question . . . is what role the jury played in prosecutions for offenses that [pegged] the amount of a fine to the determination of specified facts – often, the value of damaged or stolen property."[29] 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 andn proved to the jury."[30]

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[27] *United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004) (citing *United States v. Baker*, 25 F.3d 1452, 1456 (9th Cir. 1994)). Other cases have simply piggy-backed on *DeGeorge*. *See Green*, 722 F.3d at 1149 (citing the *DeGeorge* followers).

[28] *Southern Union*, 132 S. Ct. at 2353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009).

[29] *Southern Union*, 132 S. Ct. at 2353-54.

[30] *Id.*

The historical record is the same with respect to criminal restitution. Prior to 1529, there was no method for awarding criminal restitution, and anything seized from a criminal defendant became property of the Crown. 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.[31]

That recovery was limited to "goods listed in the indictment and found in the felon's possession."[32] "[T]he 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."[33] Thus, the historical record supports applying the *Apprendi/Southern Union* rule to restitution.

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[31] 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 Placitorum Coronae: the History of the Pleas of the Crown 541-43 (1736); Theodore F. T. Plucknett, A Concise History of the Common Law 451-52 (1929)).

[32] Barta, *supra*, at 473 (citing Hale, 1 Pleas of the Crown 541-43; Edward Hyde East, 2 A Treatise of the Pleas of the Crown §171, at 787- 89 (1806)).

[33] Barta, *supra*, at 476.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Date: June 25, 2020

Respectfully submitted,

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