No. 21-_____

IN THE
Supreme Court of the United States

KHALED ELBEBLAWY,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment to the United States Constitution requires a jury trial on the forfeiture, and whether the Sixth Amendment forbids a trial judge from assuming the traditional role of the jury in a criminal trial to find facts that lead to an increase in the fines or forfeiture upon a criminal defendant.

Whether the government's decision to use the pre-remand forfeiture amount for restitution, instead of the reduced amount found on remand by the district court, violates due process and allows the government to obtain an unconstitutional fine.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceedings.

RELATED PROCEEDINGS

The following proceedings are directly related to this Petition: *United States v. Elbeblawy*, 899 F.3d 925 (2018), *aff'd and remanded*, *United States v. Elbeblawy,* No. 16-16048 (11th Cir. August 7, 2018); *United States v. Elbeblawy*, No. 20-10769, 12021 WL 21757 (11th Cir. 2021) (unpublished opinion on remand).

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Khaled Elbeblawy ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion (App. A) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the Fifth and Sixth Amendment to the United States Constitution. The petition is timely filed. The Eleventh Circuit entered judgment on January 4, 2021.

The Eleventh Circuit Court of Appeals issued a written opinion on January 4, 2021, affirming petitioners' conviction and sentence. App. A. The mandate issued on February 5, 2021. This Court has jurisdiction to review the Eleventh Circuit's judgment under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution's Sixth Amendment provides: 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Constitution's Fifth Amendment provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

Petitioner Khaled Elbeblawy respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit remanded the forfeiture determination because it had been decided in violation of this Court's precedent with regard to the amount of forfeiture. However, the Eleventh Circuit decided that a trial by jury was not constitutionally required regarding the amount Petitioner was compelled to forfeit. Upon remand, therefore, the District Court failed to afford Petitioner a trial by jury on that determination.

Although the District Court on remand reduced the amount of Petitioner's compelled forfeiture, the Court did not amend the amount of restitution it demanded from Petitioner. In so doing, the District Court contravened the law that only a defendant's specific conduct can be considered when determining the amount a defendant may be compelled to pay in fines. The erroneous forfeiture amount that led to the remand was allowed to stand for the restitution. The changes to the restitution amount should have been made consistent with the forfeiture amount reduced by the District Court on remand, because the analysis for determining the amount Petitioner owed for restitution was inextricably intertwined with that concerning the forfeiture determination. To allow the restitution to remain

unchanged allows the government to obtain an unconstitutional fine against Petitioner.

COURSE OF PROCEEDINGS

Petitioner Khaled Elbeblawy was charged by superseding indictment with conspiring to commit health care fraud and wire fraud, as well as with conspiring to defraud the United States. Upon Elbeblawy's conviction, the District Court sentenced him to 240 months in prison and imposed a compelled forfeiture of assets without a corresponding jury verdict that the proceeds subject to forfeiture were actual proceeds the defendant received from criminal offenses. On appeal, the Eleventh Circuit affirmed *Elbeblawy*'s conviction in a published opinion but vacated the forfeiture judgment against him for having subjected him to liability for actions that were not proved to have been attributable to him specifically. *United States v. Elbeblawy*, 899 F.3d 925, 933 (11th Cir. 2018), ECF No. 183; No. 16-16048 (11th Cir. 2018).

The panel of the Eleventh Circuit rejected the Sixth amendment argument citing to the Supreme Court in *Libretti v. United States* 516 U.S. 29, 49 (1995) that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. The panel rejected Appellant's argument that *Libretti* was overruled by implication. See, *Elbeblawy,* 899 F.3d 925, 941 (11th Cir. 2018). The panel vacated the forfeiture order, however, and found the drug statute in *Honeycutt v. United States,* 137 S. Ct. 1626 (2017) and the statute at issue here, were similar and joint and several liability was improper:

> Finally, we agree with both parties that we must remand for a new forfeiture determination because the

> district court erred when it ruled that Elbeblawy was jointly and severally liable for the proceeds from the conspiracy. The Supreme Court held in *Honeycutt* that a defendant may not "be held jointly and severally liable for property that his co-conspirator derived from [certain drug] crime[s] but that the defendant himself did not acquire." 137 S. Ct. at 1630.

Elbeblawy, 899 F.3d at 941.

The Eleventh Circuit cited to the Fifth Circuit stating that neither the drug statute in *Honeycutt* nor the health statute in that case "provides for joint and several liability, and both statutes reach only property traceable to the commission of an offense." Id., citing *United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017).

The district court thereafter entered an amended forfeiture money judgment (Doc. 201), the specific amount which Appellant contested in the Eleventh Circuit. (Doc. 203). The district court's amended forfeiture money judgment was based upon fact-finding from the district court judge, not a jury. The second appeal presented the following issues: The district court incorrectly determined the forfeiture amount attributable to appellant; the Court incorrectly applied Supreme Court precedent and appellant reserved the issue for possible further review; the restitution amount should have been conformed to the forfeiture amount. The Eleventh Circuit thereafter denied Elbeblawy's challenge to the district court's amended forfeiture judgment, relying upon *Libretti v. United States,* 516 U.S. 29 (1995), as well as upon the Circuit's own precedent and also rejected the restitution argument saying "…defendant is not entitled to 'two bites at the appellate apple' and is deemed to have waived his right

to raise an argument that he failed to raise in his first appeal." *United States v. Elbeblawy*, No. 20-10759, 12021 WL 21757 (11th Cir. 2021) at *6.

STATEMENT OF FACTS

The FBI and the Department of Health and Human Services began to investigate three home healthcare agencies for Medicare fraud: Willsand Home Health Agency (Doc. 137:179), JEM Home Health (Doc. 137:82), and Healthy Choice Home Health Services (Doc. 137:184).

Eulises Escalona owned Willsand and hired Appellant Khaled Elbeblawy to work for Willsand in 2004. (Doc. 137:182). In 2007, Appellant and Escalona purchased JEM, each holding a 50% share of the company. (Doc. 137:183). In 2009, Elbeblawy became the sole owner of JEM. (Doc. 137:185). That year, Elbeblawy's wife purchased Healthy Choice. (Doc. 137:184-87). Escalona, who was the Willsand corporation's sole owner, and the only person authorized to sign for the business (Doc. 138:44, 124-25), testified that he paid kickbacks for patient referrals. (Doc. 138:18-19, 126-27). Escalona admitted to distorting medical records at Willsand, exaggerating medical symptoms and billings for services never rendered. (Doc. 138:19). Escalona testified that when he and Appellant purchased JEM together, they were co-equal owners of the corporation. (Doc. 138:83-86). At that point, Appellant spent most of his time at JEM. (Doc. 138:86). Escalona testified that about 90% of patients at Willsand and JEM were referred by agents receiving compensation for their referrals. (Doc. 138:106-107) and that he and Appellant shared equally in financing the kickback payments to referring parties. (Doc. 138:94).

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to address two important issues. First, whether the Eleventh Circuit, contrary to the Sixth Amendment, found that this Court's precedent did not require a jury to decide the facts leading to a finding concerning the amount a court may compel a defendant to pay as forfeiture. Second, certiorari is also proper to determine whether the Government can fail to adjust the amount a defendant owes as restitution when a finding of fact on remand shows that the trial court must reduce a defendant's liability as forfeiture. When the government uses the label "restitution" to justify an unsupported fine, such a theory does not comply with Supreme Court precedent, and violates a defendant's due process rights.

THE SIXTH AMENDMENT JURY ISSUE

To avoid violations of the Sixth Amendment's right to a trial by a jury of the defendant's peers, this Court should clarify the scope of a trial judge's power to act as finder of facts that may lead to an augmentation of a criminal defendant's punishment. Petitioner Elbeblawy asks that this Court review whether the Eleventh Circuit's current precedent, and its decision in this case, complies with this Court's most recent decisions in *Alleyne v. United States*, 570 U.S. 99 (2013) and *Southern Union Co. v. United States*, 567 U.S. 343 (2012).

This Court recently articulated a long-established principle of law, namely that "the Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum

potential sentence." *Southern Union Co. v. United States,* 567 U.S. 343, 346 (2012). This Court has acknowledged elsewhere that deep common law precedent reserves to juries the determination of facts that alter a defendant's potential sentence. *Cunningham v. California,* 549 U.S. 270, 281 (2007), *Oregon v. Ice*, 555 U.S. 160, 163 (2009). In *Southern Union,* this Court invoked that precedent, and then reasoned, "…we see no principled basis under *Apprendi* for treating criminal fines differently… *Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense'. That concern applies whether the sentence is a criminal fine or imprisonment or death." *Southern Union*, 567 U.S. at 349. This Court justified its holding by arguing that "criminal fines, like those other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses." *Id*. at 349.

It has been the long practice of the courts of the United States to demand that where a punishment depends upon a property's specific value, that value must be proved precisely. See: 1 T. Starkie, A Treatise on Criminal Pleading 187-88 (1814). To that end, this Court in *Southern Union* cited both William Blackstone, Commentaries on the Laws of England (1769) and its own precedent to support the claim that two principles attain in all criminal cases: first, that the truth of every accusation should be confirmed by the unanimous suffrage of a man's neighbors, and second, that the law may not accept an accusation that lacks a fact necessary to its punishment. *Southern Union*, 567 U.S. at 356.

Justice Thomas further elaborated the legal principle that any fact that increases a defendant's liability is an element that must be submitted to the jury. *Alleyne v. United States*, 570 U.S. 99, 144 (2013). Justice Thomas, writing for the Court, undertook an historical analysis to show that the common law has long insisted that a jury must find any facts that aggravate a punishment. *Id.* at 111-13. Justice Thomas concluded, speaking for the Court, that "when a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense, and must be submitted to the jury." *Id.* at 114-15.

The Eleventh Circuit has misapplied Supreme Court precedent by needlessly narrowing the Circuit's decisions to their specific fact patterns, ignoring the justification and analysis that led to the ruling. The Eleventh Circuit mistakenly reads *Alleyne* as merely an extension of past precedent from *Apprendi v. New Jersey,* 530 U.S. 466 (2000) requiring a jury to find whatever facts a court relies upon to justify an augmentation of a maximum sentence.[1] Yet *Alleyne* did not only apply *Apprendi* to mandatory minimum; it reasserted the common law principle of criminal procedure that demands a man not face criminal penalty without having been adjudged guilty by a jury of his peers for every relevant fact leading to that penalty.

[1] For example, in *Morales v. United States* 2016 WL 6582736 (2016), the Eleventh Circuit incorrectly considered *Alleyne* inapplicable because "the enhancements applied to Petitioner only affected his sentencing guidelines range, not his statutory mandatory minimums and maximums." At *8. *See also, United States v. McKinley*, 732 F.3d 1291, 1296 (11th Cir. 2013) ("the [Supreme] Court held that 'any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury'"; *United States. v. Silva*, 574 U.S. 1142 (11th Cir. 2015) ("under *Alleyne*, facts that resulted in a higher mandatory minimum sentence are treated as additional elements of an offense that must be submitted to a jury and found beyond a reasonable doubt.") (unpublished per curiam); *United States v. Shaw*, 561 Fed. Appx. 860, 863 (11th Cir. 2014) ("recently, in *Alleyne*, the Supreme Court found that the distinction between facts increasing a defendant's mandatory maximum sentence and those increasing his mandatory minimum sentence was inconsistent with *Apprendi*.")

Petitioner brings his case before this Court in an effort to clarify the law that has a tremendous impact on criminal defendants and to return the lower courts to the proper interpretation of the Sixth Amendment. Certiorari is proper for this reason.

THE FIFTH AMENDMENT RESTITUTION ISSUE

Appellant had been ordered to pay restitution. Although a court on remand cannot alter the mandate or give any further relief or review but must enter an order in strict compliance with the mandate, *United States v. Stein*, 964 F.3d 1313, at 1322 (11th Cir. 2020), examination of the restitution order here would have been consistent with a remand of the forfeiture, and logically and constitutionally required. The District Court failed to undertake such an examination. The issue of restitution was inextricably intertwined with the issue remanded because, if a trial court on remand were able to review and adjust only the amount demanded of a defendant as forfeiture, then the Government can still collect a criminal fine which is excessive as a forfeiture, and simply label that fine "restitution". To do so violates *Honeycutt,* as the District Court did here.[2] The amount of forfeiture was a jury issue and it was error not to require that. But whatever the jury would have decided was the proper amount should have been the amount required to be levied and could not have been enhanced by calling it restitution. The government's backdoor attempt to avoid the

[2] Petitioner also argued that the restitution issue was reviewable under plain error. See, *United States v. Bane,* 948 F.3d 1290, 1296 (11th Cir. 2020). ("In the restitution context, we have reviewed for plain error where the district court exceeded its authority by imposing restitution beyond that allowed by the restitution statute."); see also, *United States v. Cobbs*, 967 F.2d 1555, 1557-58 (11th Cir. 1992).

district court's reduced amount not only violates the Sixth Amendment but also merits certiorari review for violating the Fifth Amendment.

The original judgment entered on September 2016 required restitution in the amount of $36,400,957.00 (Doc. 170), compared to a total loss of over $40 million for the forfeiture (Doc. 171). The revised amount for the forfeiture was $10,436,911.70. No mention is made in the amended judgment (Doc. 201) about a reduction of restitution. And no amended judgment was entered for the restitution. Thus, even the reduction made in the forfeiture, which Appellant argued on appealwas not an adequate determination under *Honeycutt*, was not considered with regard to the restitution. (Doc. 201). It was plain error not to review and adjust the restitution. In examining the restitution and adjusting it to comply with *Honeycutt*, the district court would not have been re-examining the mandate but rather would have been complying with it by not imposing on Appellant restitution amounts not attributable to him. On remand, without a jury, the district court reduced the forfeiture amounts but left the restitution without analysis. This issue merits certiorari because if the Government can avoid a reduced forfeiture finding by imposing an unconstitutional fine by way of restitution, punishing the defendant for what others did, then the Government can circumvent all of this Court's precedent by pretending to comply with constitutional requirements and using the backdoor to fine a defendant who otherwise would not be subject to that fine.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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