No. 20-860

In the Supreme Court of the United States

RYAN RANDALL GILBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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The Court should grant review in this case to prevent further erosion of its Sixth Amendment jurisprudence. The government does not dispute the importance of the question presented, which implicates the fundamental constitutional rights of the many thousands of defendants who are ordered to pay criminal restitution every year. In its brief in opposition, the government instead offers an extended discussion on the merits of the question presented. But the parties' contrasting arguments only underscore the need for this Court's review.

Although the government harps on the absence of a circuit conflict, that should not deter the Court from granting certiorari. Most of the courts of appeals addressed the question presented before the Court issued

its most relevant decisions applying the Sixth Amendment. But those courts have steadfastly adhered to their precedent in the face of the Court's decisions. At this point, only the Court can set the lower courts straight.

Two Justices have already stated that the Court should grant review on the question presented. See *Hester* v. *United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). This case presents the Court with an ideal opportunity to do so—and potentially one of its last. Now that all of the numbered circuits have addressed the question presented, a dwindling number of defendants have been seeking review on that question. See Br. in Opp. 11 n.2. And this case is an exceptionally good vehicle for consideration of the question presented, because the restitution order here is wholly divorced from the facts found by the jury. While the government tepidly suggests that this case is a poor vehicle because of an alleged preservation issue, the government forfeited any plain-error argument by failing to make it below, and petitioner preserved his objection in any event.

In short, there is no valid obstacle here to the Court's review of the question presented, and the Court will never get a better opportunity to resolve it. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With This Court's Sixth Amendment Jurisprudence

As petitioner has explained, the imposition of criminal restitution based on judge-found facts is incompatible with the Sixth Amendment, its history, and this Court's case law. See Pet. 13-20. In response, the government attempts to limit the Court's relevant decisions to their facts and ultimately relies on the same flawed reasoning as the courts of appeals have. The government's position

is indefensible, and it highlights the need for this Court's review.

1. The Sixth Amendment right to a jury trial applies "[i]n all criminal prosecutions." U.S. Const. Amend. VI. As petitioner has explained, at common law and in early American history, that right was understood to apply to restitution. See Pet. 14.

The government has no persuasive response to the text of the Sixth Amendment and its original meaning. The government contends only that, in England, the consequence of omitting facts from the indictment relevant to restitution was that assets not named in the indictment could be forfeited to the Crown. See Br. in Opp. 17. But in the English system, forfeiture of all property followed *automatically* from most felony convictions; it was not tethered to any factfinding. See K.J. Kesselring, *Felony Forfeiture in England c. 1170-1870*, 30 J. Legal Hist. 201, 202 (2009).

The English practice of forfeiture (which was largely abandoned in America) is thus irrelevant. Rather, the "salient question" is "what role the jury played in prosecutions for offenses that did peg" the award of restitution to "the determination of specified facts." *Southern Union Co.* v. *United States*, 567 U.S. 343, 354 (2012). And the government does not dispute that, at common law, a court could order restitution to a victim of larceny only if a jury found the value of the stolen property. See Pet. 14.

2. The government fails to offer any valid reason that the Sixth Amendment does not apply to criminal restitution. The government clings onto the two justifications adopted by the courts of appeals. As petitioner has already explained, neither withstands scrutiny.

First, unable credibly to argue that restitution is not a "penalty," the government contends that the "purpose" of restitution is insufficiently penal because restitution is "at

its essence, a restorative remedy that compensates victims." Br. in Opp. 13 (citation omitted). But the Mandatory Victims Restitution Act itself characterizes restitution as a "penalty" and sets out harsh consequences for failure to pay restitution, including the possibility of additional imprisonment. See Pet. 16-17. In any event, whatever the *purpose* of restitution under the MVRA, there can be no dispute that restitution is imposed as part of a "criminal prosecution[]" and conviction. U.S. Const. Amend. VI. The Sixth Amendment therefore applies.

Second, the government contends that the MVRA "establishes an indeterminate framework" to which *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), does not apply. Br. in Opp. 13. But the government simply ignores petitioner's argument that *Apprendi*'s "statutory maximum" formulation does not appropriately apply to criminal restitution, as opposed to terms of imprisonment or other types of penalties. See Pet. 17-18. Because the authorized amount of restitution under the MVRA is "calculated by reference to particular facts," such as "the victim's loss," the Sixth Amendment requires that such facts be found by a jury. *Southern Union*, 567 U.S. at 349-350. The government similarly ignores petitioner's argument that, to the extent *Apprendi*'s "statutory maximum" formulation applies, the statutory maximum for restitution is zero, because the court is required to find additional facts in order to impose any amount of restitution. See Pet. 18. Each of those points is fatal to the government's argument.

3. This Court's decisions in *Blakely* v. *Washington*, 542 U.S. 296 (2004); *Southern Union*, *supra*; and *Alleyne* v. *United States*, 570 U.S. 99 (2013), make clear that the Sixth Amendment's jury-trial right applies to restitution, just as it applies to terms of imprisonment and criminal

fines. The government's contrary arguments are incompatible with those decisions.

a. The government barely mentions *Blakely*. See Br. in Opp. 12. There, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303. Of course, a judge cannot impose *any* restitution without finding additional facts: to wit, the amount of the losses suffered by each victim as a direct and proximate result of the defendant's offense. See 18 U.S.C. 3663A(a)(2), (c)(1)(B), 3664(f)(1)(A). As one judge has explained, *Blakely* "dictates a conclusion that any dispute over the amount of restitution due and owing a victim of crime must be submitted to a jury and proved beyond a reasonable doubt." *United States* v. *Carruth*, 418 F.3d 900, 905 (8th Cir. 2005) (Bye, J., dissenting).

b. Critically, in *Southern Union*, this Court affirmed the principle that the Sixth Amendment does not "distinguish[] one form of punishment from another." 567 U.S. at 350. The government seeks to confine *Southern Union* to the particular statute at issue there, but the government's arguments defy logic. *First*, the government mentions in passing that restitution serves different purposes than criminal fines. See Br. in Opp. 16. True enough, but nothing in *Southern Union* suggests that its holding would not apply equally to a penalty—imposed as part of a criminal conviction—that also has a "compensatory and remedial purpose." *Ibid.* Quite to the contrary, the Court made clear that the Sixth Amendment applies "broadly" to all "criminal sentences, penalties, or punishments." 567 U.S. at 350 (internal quotation marks and citation omitted).

Second, the government contends that, "[u]nlike the statute at issue in *Southern Union*, which prescribed a

$50,000 maximum fine for each day of violation, the MVRA sets no maximum amount of restitution." Br. in Opp. 16. But the government's distinction does not hold water. Because the statute in *Southern Union* prescribed a fine for *each day* of the violation, the fine was indeterminate; it depended on the number of days on which the violation occurred.

The government relies on the Court's statement in *Southern Union* that there cannot be an *Apprendi* violation where "no maximum is prescribed." 567 U.S. at 353. But the government misapprehends the Court's use of the term "maximum." As the Court explained, the Sixth Amendment requires a jury to find facts that "determine [a] fine's maximum amount." *Id.* at 356. The Court thus understood "maximum" to refer to the maximum authorized fine that was pegged to the jury's "determination of specified facts" (*i.e.*, the number of days of the violation). *Id.* at 354; see *id.* at 346. The MVRA sets a maximum amount of restitution that is pegged to certain facts in the same sense: as the government recognizes, the MVRA "requires that restitution be ordered in the total amount of the victims' losses." Br. in Opp. 16.

c. The government likewise seeks to limit the reach of *Alleyne*, arguing that the MVRA does not set a "mandatory minimum amount" or a "prescribed range" of amounts that a defendant must pay. Br. in Opp. 19 (citation omitted). But the reasoning adopted by the *Alleyne* Court (not just the plurality) was significantly broader: the Court held that "because the legally prescribed range *is* the penalty affixed to the crime * * * it follows that a fact increasing either end of the range produces a new penalty" and thus must be submitted to the jury. 570 U.S. at 112. So too with criminal restitution: like a fact triggering a mandatory minimum, a fact triggering restitution "alters" the sentence "to which a criminal defendant

is exposed" and thereby produces a new penalty. *Ibid.* By narrowly focusing on the specific context of *Alleyne*, the government fails to explain why the Sixth Amendment should not apply "with equal force" in the context of restitution. *Ibid.*

4. The government correctly notes that numerous courts of appeals have determined that this Court's intervening decisions did not justify revisiting their previous holdings on the question presented. See Br. in Opp. 17-19. But the government completely ignores the hesitancy expressed by many of those courts and judges, including the recognition by one court that its precedent was not "well-harmonized" with *Southern Union*. See *United States* v. *Green*, 722 F.3d 1146, 1151 (9th Cir.), cert. denied, 571 U.S. 1025 (2013); Pet. 20. Because it is now clear that the courts of appeals will not overrule their prior precedents without the Court's intervention, the only remaining option is for the Court to grant review. The Court should do so in this case, and it should make clear that restitution based on judge-found facts is incompatible with the Sixth Amendment and the Court's precedent applying it.

B. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review In This Case

The government does not dispute that the question presented is exceptionally important or that it has enormous practical consequences for the many thousands of defendants who are ordered to pay criminal restitution every year. The government instead argues that this case is an unsuitable vehicle to decide the question presented. See Br. in Opp. 20-22. That argument lacks merit.

1. The government contends that petitioner's argument is reviewable only for plain error because he "waived his Sixth Amendment argument" during his sentencing

proceeding in the district court. Br. in Opp. 20. That argument is forfeited and wrong besides.

a. To begin with, the government raises its waiver argument for the first time before this Court. It is undisputed that petitioner made his Sixth Amendment argument in the court of appeals (despite binding circuit precedent on the issue). See Pet. C.A. Br. 50-51. Yet the government did not invoke the plain-error standard in responding to that argument. See Gov't C.A. Br. 77. Likewise, the court of appeals did not suggest that the argument had not been preserved; the court simply applied its prior precedent. See Pet. App. 24a. The government has therefore forfeited any waiver argument, and the plain-error standard is inapplicable. See, *e.g.*, *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *Calzone* v. *Summers*, 942 F.3d 415, 421-422 (8th Cir. 2019).

b. In any event, petitioner *did* preserve his Sixth Amendment objection at sentencing. In his response to the government's position regarding sentencing, petitioner "object[ed] generally to reliance on facts not found by a jury beyond a reasonable doubt as a basis for increasing his sentence." D. Ct. Dkt. 295, at 3 n.2. It doesn't get much clearer than that. The government speculates that petitioner's objection "was plainly directed at the term of imprisonment, not restitution." Br. in Opp. 10 n.1. But petitioner's objection was much broader: he objected "generally" to judge-found facts for increasing his "sentence"—and to state the obvious, petitioner's "sentence" included restitution.

Notably, in the very same brief, petitioner also renewed his argument that the court should limit the restitution award to exclude the amount of the bonus payment. See D. Ct. Dkt. 295, at 12 (arguing that the district court

should "limit restitution to those provable expenses Dakota Plains incurred as a result of participating in the criminal investigation and prosecution"); D. Ct. Dkt. 286, at 48 (making the same argument in an earlier brief). Petitioner's specific objection to the restitution amount—together with his unambiguous and overarching Sixth Amendment objection—were more than sufficient for preservation purposes. See *Holguin-Hernandez* v. *United States*, 140 S. Ct. 762, 764, 766-777 (2020).[1] The government thus fails to identify any valid impediment to this Court's review.[2]

2. This case is an especially compelling vehicle for review because of the complete disconnect between the restitution award imposed on petitioner and the facts found by the jury.

As petitioner has explained, the district court ordered restitution based on its own finding that the bonus provision was part of the fraudulent scheme. See Pet. 12. The government does not dispute that the bonus provision was unanimously approved by the Dakota Plains board; that the prosecution conceded that the bonus provision itself was not illegal; or, critically, that it never asked the jury to find that the bonus provision was part of petitioner's fraudulent scheme or to determine the extent of loss to Dakota Plains—the key findings made by the district court. See Pet. 9-12, 22. Nor does the government dispute

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[1] In light of those objections, petitioner's passing citation of the *statutory* preponderance-of-the-evidence standard is of no moment. See Br. in Opp. 20.

[2] At a minimum, the Court could decide the question presented and then remand for the court of appeals to determine whether the government preserved its waiver argument and whether that argument has merit, and, if the answer to both questions is yes, to apply the remaining plain-error factors. See, *e.g.*, *Tapia* v. *United States*, 564 U.S. 319, 335 (2011).

that the debt was ultimately restructured so that it was no longer based on the trading days in which the alleged manipulation occurred. See Pet. 8. In short, the government's request for over $15 million in restitution was entirely detached from the facts found by the jury; indeed, even the purported victim sought far less in restitution than the government did. See D. Ct. Dkt. 286, at 46.

The government contends that petitioner's argument "misunderstands what the trial evidence against petitioner established." Br. in Opp. 21. But what the government thinks the trial evidence established is beside the point. The most the government argues is that it "explained to the jury that * * * petitioner obtained [the bonus] provision as the means to profit from his stock-manipulation fraud." *Ibid.* But even if that were true, the critical question is what *the jury was asked to (and did) find*. The jury plainly did not make the relevant findings, and the government fails to cite any place where it even asked the jury to do so.

In a similar vein, the government contends that the jury "agreed with the government's evidence that petitioner *did* benefit at the expense of Dakota Plains, and the evidence showed that the extent of the losses that he caused was (conservatively) $15.1 million." Br. in Opp. 22. Those assertions, too, are baseless. As is obvious from the lack of any citation of the record, the jury never found anything of the sort, regardless of what the government believes the "evidence showed." In fact, the jury instructions made clear that "whether and to what extent the defendant benefitted from the alleged crime" was not an element of any crime, but was simply evidence as to "motive." D. Ct. Dkt. 214, at 22. And the jury was told "[i]t does not matter whether the alleged unlawful scheme was

successful or not, or that the defendant profited or received any benefits as a result of the alleged scheme." *Id.* at 18.

At bottom, the government does not contend that the jury found the facts supporting the award of restitution. The government instead argues only that the bonus provision *should* be considered part of petitioner's fraudulent scheme. But that argument should have been made to the jury. Instead, the government was allowed to suggest to the jury that the bar for finding manipulation was a low one (insofar as it did not depend on the legality of the bonus provision), then turn around and argue to the court at sentencing that petitioner's participation in the negotiation of the concededly legal bonus provision was part of his criminal scheme. That cannot stand. The government's about-face and the resulting restitution order not only violates the Sixth Amendment, but is manifestly unfair. The government's blatant effort to justify the award of restitution based on facts that were never found by the jury only underscores the urgent need for this Court's review.

* * * * *

It is now or never. If the Court ever wishes to address the question presented—a question of obvious importance—it should do so in this case. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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